

MAY 25 10 41 AM '94



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

May 25, 1994

AGENDA ITEM
For Meeting of: JUN 2 1994

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

SUBJECT: Advisory Opinion Request 1994-10

Attached is the revised blue draft opinion for Advisory Opinion Request 1994-10.

On May 18, 1994, the Commission received from counsel for the requester, a timely comment on the original blue draft opinion prepared by the Office of the General Counsel to be discussed in the May 19, 1994, public session. This office withdrew the original blue draft to permit a full examination of the new information presented in the comment. That review having been completed and the revisions made, this office requests that the revised blue draft be placed on the June 2, 1994 agenda for discussion.

95060732399

2 CERTIFIED MAIL
3 RETURN RECEIPT REQUESTED

DRAFT

4 **ADVISORY OPINION 1994-10**

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

9 **Dear Mr. Bauer:**

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

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

25 1/ You state that the Bank intends to make these loans in
26 accordance with generally applicable banking laws and the
27 requirements of the Act, in particular, the provisions of 2
28 U.S.C. §431(8)(B)(vii); 11 CFR 100.7(b)(11) and 100.8(b)(12).
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.

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

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

25 The Bank wishes to know whether granting such waivers to

26
27
28

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

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

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

18 In the past, the Commission has concluded that the
19 receipt of complimentary items or the purchase of goods or
20 services at a discount does not result in a contribution if
21 the discounted or complimentary goods were available to
22 others on equal terms or as part of a pre-existing business
23 relationship. See Advisory Opinions 1992-24, 1989-14 and
24
25
26

27 ^{3/} The prohibition on national bank contributions also
28 applies in state and local elections. Your inquiry is
limited to fee waivers in connection with Bank accounts
established by Federal candidates and their committees.

1987-24.4/

2
3 The information contained in your request indicates that
4 the Bank will likewise offer fee waivers within the context
5 of a pre-existing business relationship and using the same
6 considerations it uses with all its clients. If it could be
7 shown that the waiver of legal fees was part of the Bank's
8 past practice regarding its commercial customers, then it
9 would be permissible to offer the same consideration for its
10

11 4/ In the circumstances of the above opinions, the
12 Commission determined that no prohibited contribution
13 resulted from the receipt of discounted or free goods or
14 services. For example, in Advisory Opinion 1992-24, the
15 Commission determined that a Senate campaign could purchase
16 books in bulk from a publisher at a discounted price. In
17 Advisory Opinion 1989-14, the Commission permitted a
18 restaurant to offer catering and reception services to a
19 campaign committee at reduced rates. Finally, in Advisory
20 Opinion 1987-24, the Commission determined that a hotel
21 corporation could provide services such as flowers, food,
22 free rooms and other "complimentary items" to a political
23 committee.

24 In all three opinions it was determined that a
25 corporation was treating its political clients no differently
26 than its other patrons and was acting within the context of a
27 business relationship. However, where a political committee
28 was accorded preferential treatment different from other
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).

24 The standard articulated in these opinions is similar to
25 the definition of ordinary course of business as set forth in
26 Commission regulations governing the extension of credit to
27 political committees by commercial vendors. 11 CFR 116.3(c).
28 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).

1 political customers. However, the Commission notes that the
2
3 examples you provide, which delineate the specific situations
4
5 where the bank has waived fees for customers in the past,
6
7 pertain almost exclusively to the waiver of deposit account
8
9 charges.^{5/} Therefore, the Commission expresses no opinion at
10
11 this time regarding the waiver of legal fees for the review
12
13 of loan documentation and loan closing services because the
14
15 Bank's policy and practice were not adequately confirmed in
16
17 the request. The Commission does conclude that, in agreement
18
19 with prior advisory opinions, the waiver of deposit fees and
20
21 other similar service charges, as set forth on the Bank's
22
23 published fee schedule, may be granted to political
24
25 committees as part of loan negotiations and would not be a
26
27 contribution by the Bank to the political committees.

28
29 The Commission expresses no opinion regarding the
30
31 applicability of banking laws in the situation you have
32
33 described, nor as to any tax ramifications of the proposed

34
35 ^{5/} In your April 13, 1994 submission, only one of the five
36
37 examples is tangentially related to the waiver of legal fees
38
39 for loans. In that example where a real estate firm holding
40
41 major accounts in the bank had had its deposit related
42
43 charges waived, the Bank also waived the appraisal expenses
44
45 on a loan made to one of the principals of the firm. This
46
47 example is not relevant. Here the loan fee waivers are only
48
49 proposed with respect to political committee loans from the
50
51 bank and not as part of a larger series of transactions of
52
53 which the loan agreement plays apparently only a minor role.

54
55 Your May 17, 1994 submission presented only one
56
57 additional example which dealt with the waiver of legal fees
58
59 for a commercial borrower. This still constitutes
60
61 insufficient documentation. The response also mentions the
62
63 waiver of loan documentation fees for "a political
64
65 organization." The Commission takes no position in this
66
67 opinion regarding the permissibility of this past action.

transaction, because these issues are not within its jurisdiction.

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

Sincerely,

Trevor Potter
Chairman

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

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28