

AGENDA DOCUMENT #94-51



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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AGENDA ITEM
For Meeting of: MAY 19 1994

SUBMITTED LATE

May 12, 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
Staff Attorney

SUBJECT: Draft AO 1994-10

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for May 19, 1994.

Attachment

1
2 CERTIFIED MAIL
3 RETURN RECEIPT REQUESTED

4 ADVISORY OPINION 1994-10

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

DRAFT

9 Dear Mr. Bauer:

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

1
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.

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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/}

The information contained in your request indicates that the Bank will likewise offer fee waivers within the context of a pre-existing business relationship and using the same considerations it uses with all its clients. However, the Commission notes that the examples you provide, which delineate the specific situations where the bank has waived fees for customers in the past, pertain almost exclusively to

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

In all three opinions it was determined that a corporation was treating its political clients no differently than its other patrons and was acting within the context of a business relationship. However, where a political committee 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).

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).

1
2 the waiver of deposit account charges.^{5/} Therefore, the
3 Commission expresses no opinion at this time regarding the
4 waiver of legal fees for the review of loan documentation and
5 loan closing services because the Bank's policy and practice
6 were not adequately confirmed in the request. The Commission
7 does conclude that, in agreement with prior advisory
8 opinions, the waiver of deposit fees and other similar
9 service charges, as set forth on the Bank's published fee
10 schedule, may be granted to political committees as part of
11 loan negotiations and would not be a contribution by the Bank
12 to the political committees.

13
14 The Commission expresses no opinion regarding the
15 applicability of banking laws in the situation you have
16 described, nor as to any tax ramifications of the proposed
17 transaction, because these issues are not within its
18 jurisdiction.

19 This response constitutes an advisory opinion concerning
20 application of the Act, or regulations prescribed by the

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23
24 ^{5/} Only one of the five examples is tangentially related to
25 the waiver of legal fees for loans. In that example where a
26 real estate firm holding major accounts in the bank had had
27 its deposit related charges waived, the Bank also waived the
28 appraisal expenses on a loan made to one of the principals of
29 the firm. This example is not relevant. Here the loan fee
30 waivers are only proposed with respect to political committee
31 loans from the bank and not as part of a larger series of
32 transactions of which the loan agreement plays apparently
33 only a minor role.

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)