



FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 9, 1994

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1994-10

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

Dear Mr. Bauer:

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

You state that in coming election cycles, the Bank plans to make loans to qualified candidates for Federal office and their committees.^{1/} In negotiating these loans, the Bank is considering waiving certain fees and costs customarily negotiated with borrowers establishing accounts with the Bank. You describe these charges as including those for incoming and outgoing wire transfers; stop payment orders; daily account transfers; service charges on deposit accounts; legal fees for the review of loan documentation and closing services; and preparation of special bank statements to conform to customer dating requirements.^{2/}

You state that in the ordinary course of managing deposit relationships with customers, either at the request of the customer or, more often, at the Bank's initiative, these charges can be waived. You state that the Bank does not have any special policy that governs waivers granted to political committees as opposed to other customers. Furthermore, a decision to grant a waiver is not based on the terms of any loan negotiated with a customer. Rather, the decision to grant a waiver is based on the Bank's business judgment on the profitability of the customer relationship and the profitability of the account itself. To the extent it provides a historical framework to determine profitability, the length of time that an account has been maintained is a factor. However, you explain that if a new account is substantial, the Bank is able to estimate profitability based upon the expected level of deposit balances versus the expected level of fees and charges likely to be

incurred. To show that the Bank grants these fee waivers in the normal course of business, your request contains five specific examples of situations where fee waivers were granted to customers.

The Bank wishes to know whether granting such waivers to clients who are political committees will cause the Bank to violate the Act by making contributions prohibited by 2 U.S.C. 441b.

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

In the past, the Commission has concluded that the receipt of complimentary items or the purchase of goods or services at a discount does not result in a contribution if the discounted or complimentary goods were available to others on equal terms or as part of a pre-existing business relationship. See Advisory Opinions 1992-24, 1989-14 and 1987-24.^{5/}

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. If the waiver of the charges discussed in your request--the charges for legal fees, deposit fees, and other similar service charges as set forth on the Bank's published fee schedule--is part of the Bank's practice in the normal course of business regarding its commercial customers and is normal industry practice, then it would be permissible to offer the same consideration for its political customers in similar circumstances.^{5/}

The Commission expresses no opinion regarding the applicability of banking laws in the situation you have described, nor as to any tax ramifications of the proposed 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.

For the Commission,

(signed)

Trevor Potter
Chairman

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

ENDNOTES

1/ You state that the Bank intends to make these loans in accordance with generally applicable banking laws and the requirements of the Act, in particular, the provisions of 2 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/ 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.

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

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).

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