



FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 21, 1999

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1999-35

Jan Witold Baran
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Baran:

This refers to your letter dated November 8, 1999, with enclosures, on behalf of Associated Builders and Contractors, Inc. ("ABC"), the Associated Builders and Contractors Political Action Committee ("ABC PAC"), and ABC North Texas and its Chapter nonfederal PAC, which requests an opinion concerning application of the Federal Election Campaign Act of 1971 ("the Act"), as amended, and Commission regulations to the use of an Automatic Clearing House ("ACH") for the receipt of contributions to each respective PAC through their joint solicitation program.

FACTS

You state that ABC is a national, not-for-profit incorporated trade association whose membership is composed primarily of corporate contractors or builders. (Copies of ABC's articles of incorporation and bylaws are part of the request.) ABC has been recognized as an organization exempt from Federal income tax under §501(c)(6) of the Internal Revenue Code. Specifically, ABC has affiliated with its local chapters and state-level chapters in most states. ABC has affiliated with the ABC North Texas chapter which is also a not-for-profit corporation. ABC PAC is the separate segregated fund established and administered by ABC.

You further explain that as a trade association, ABC solicits voluntary contributions from executives of the member companies, provided that ABC has received

prior written approval from its member companies, under 11 CFR 114.8(d), to solicit those personnel. In Advisory Opinion 1979-75, you state, the Commission recognized the ability of ABC PAC and the ABC Chapter PACs, such as ABC PAC North Texas, to engage in joint fundraising. As was true in 1979, the joint solicitations are conducted under a written agreement between ABC PAC and the Chapter PAC identifying the amount of each jointly solicited contribution to be distributed to each PAC. All contributions are deposited into an escrow account, and then distributed as appropriate to ABC PAC, and the chapter PAC, and appropriate reporting is made. You state that the current request would not change these facts.

ABC PAC now seeks to utilize an ACH program that would allow ABC PAC to receive an electronic funds transfer from an individual's personal checking account, on a monthly basis, which would be deposited in an ABC PAC escrow account created solely for the receipt of ACH contributions. The transfers would be pre-authorized by each contributor and take the place of a single check contribution made by the contributor through the joint fundraising program.

You explain that ACH is a cash management service provided by Bank One, Texas, to meet the needs of its clients. ACH provides the ability to substitute electronic entries for paper generated transactions. The service is designed to be flexible and adaptable to meet the needs of particular clients. ACH is an electronic vehicle for exchanging paperless debit and credit entries and related information among financial institutions, corporations and individuals. The ACH system, provided by Bank One, follows the National Automated Clearing House Association Rules in structuring its processes and business. In this case the ACH would be used to collect pre-authorized contributions from the restricted classes. In order to participate in the ACH program, ABC will be charged \$35 per month and 14 cents per transaction. This administrative expense will be paid for by either ABC or ABC North Texas.

The program would operate as follows. After obtaining prior approvals as required pursuant to 11 CFR 114.8, ABC PAC and the chapter PAC would jointly solicit the restricted class for contributions. Individuals would be informed about their ability to make contributions through the ACH process, rather than by a single check, if they so choose. To participate using the ACH, individuals will be required to fill out and sign a single, combined form containing the required information for any contribution and the necessary bank account information to allow funds to be transferred from a personal bank account to the special ABC PAC escrow account set up to receive these funds. ABC PAC would file an amendment to its statement of organization with the Federal Election Commission ("FEC") regarding the opening of this escrow account (if at a new depository), and no other funds would be deposited into the ACH escrow account. Pursuant to 11 CFR 114.8(d)(4), the Associated Builders & Contractors will obtain prior approval forms with respect to each calendar year, as well as permission forms authorizing withdrawals. Furthermore, contributors would be notified of their ability to revoke their authorization at any time.¹

¹ You state that ABC will also meet all banking requirements in order to participate in the ACH system.

Minimum contributions of \$10 per month will be required to use ACH. If an individual's contribution does not exceed \$50 per month, the account would be cleared every two or three weeks. A total of 40% of the funds would be transferred to ABC PAC, and the remaining 60% would be transferred to the ABC PAC North Texas individual contribution account, as permitted by State and local law, and as authorized by the contributor. If there is a monthly individual contribution of more than \$50, the transfer from the escrow account to ABC PAC, and ABC PAC North Texas, would be made within ten days after receipt to comply with the applicable Commission regulations. A copy of each permission (or contributor authorization) form would accompany the funds going to ABC PAC.

You ask whether ABC PAC North Texas and ABC PAC may utilize and pay to use the ACH payment system for collecting contributions.²

ACT AND COMMISSION REGULATIONS

Under 2 U.S.C. §441b, corporations are expressly prohibited from making any contributions or expenditures in connection with any Federal election. However, under the Act and Commission regulations, a corporation, including an incorporated trade association, may use general treasury funds, including dues monies or membership fees, for the establishment, administration, and solicitation of contributions to its separate segregated fund, and such support would not result in a contribution to that fund. 2 U.S.C. §441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii), 114.1(b) and 114.5(b). An organization such as an incorporated trade association, which is not itself a political committee, but which directly or indirectly establishes, administers, or financially supports a political committee, is a "connected organization" of that committee. 2 U.S.C. §431(7); 11 CFR 100.6(a).

The connected organization and its SSF are subject to restrictions as to the category of persons who may be solicited for contributions to the committee. 2 U.S.C. §441b(b)(4)(A) and (D); 11 CFR 114.5(g)(1) and 114.8(c). Specifically, an incorporated trade association may solicit its executive and administrative personnel, the families of such personnel, and its unincorporated members. 11 CFR 114.7(a). In addition, it may solicit the stockholders and executive and administrative personnel, and the families of such stockholders and personnel, of the member corporations that separately and specifically approve such solicitation and that have not approved solicitation by any other trade association for the same calendar year. 11 CFR 114.8(c).

² This request does not ask the Commission to determine whether the members of ABC and its affiliated State members are "members" under the Act and Commission regulations. Therefore, this opinion will assume for purposes of this request that the corporate members of ABC and its State affiliates, whose restricted classes are proposed to be solicited on behalf of ABC PAC, would meet the requirements for membership as set out in the Commission's recently revised regulations defining membership at 11 CFR 114.1(e). See 64 *Fed. Reg.* 41270 (July 30, 1999). The effective date of these regulations was November 2, 1999. See 64 *Fed. Reg.* 59113 (November 2, 1999).

The Commission's regulations provide that there is no limitation on the method of soliciting voluntary contributions or the method of facilitating the making of voluntary contributions which a trade association may use. 11 CFR 114.8(e)(3). However, these regulations also specifically provide that a member corporation of a trade association "may not use a payroll deduction or checkoff system for executive or administrative personnel contributing to the separate segregated fund of the trade association." 11 CFR 114.8(e)(3).

APPLICATION TO PROPOSAL

As your request notes, the Commission previously determined in Advisory Opinion 1979-75 that ABC-PAC, and ABC Chapter PAC's, such as ABC PAC North Texas, could engage in the joint solicitation of contributions for both Federal and non-federal election purposes. Furthermore, as noted above, there is generally no limitation on the method of soliciting voluntary contributions or the method of facilitating the making of voluntary contributions which a trade association may use. The issue you present is whether the proposed ACH program is permissible given 11 CFR 114.8(e)(3) which prohibits a member corporation of a trade association from using a payroll deduction or checkoff system for executive or administrative personnel contributing to the separate segregated fund of the trade association. The Commission concludes that section 114.8(e)(3) does not bar the proposed ACH program, since the funds contributed are not deducted through a payroll deduction system administered by the employer of the contributing individual. Instead, voluntary contributions would be deducted from an executive employee's personal checking account at a bank.³ Therefore, the Commission concludes that the use of the ACH payment system for collecting contributions for ABC PAC is permitted by the Act and Commission regulations.⁴

The Commission emphasizes that the described PAC checking account deduction program may only be utilized by personnel who qualify as members of the "restricted class" of ABC and its State affiliates. 11 CFR 114.1(c),(h) and (j) and 114.8(c). In addition, all contributions made through the checking account deduction process must comply with Commission regulations that require them to be voluntary. See 11 CFR 114.1(i), 114.5(a) and 114.8(e)(4).

The Commission expresses no opinion regarding the application of State law to the proposed use of the ACH system to collect contributions to any ABC affiliated, non-Federal committee, because these issues are not within its jurisdiction. The Commission

³ As your request notes, where employee payroll deductions were not at issue, the Commission has permitted various forms of contribution made by pre-authorized account deductions. See Advisory Opinions 1998-19 (use of credit union member's credit union account), 1997-9 (use of trader's margin account), 1989-26 (use of contributor's personal bank account).

⁴ The Commission notes that the ACH program is only available to PAC contributors who give \$10 or more per month. However, this limitation seems linked to the administrative costs of the program and does not prevent contributors from using other means to make contributions of a lesser amount. The Commission does not, therefore, view this limitation as a means to enforce a guideline for a contribution, an action that would be prohibited under 11 CFR 114.5(a)(2).

notes, however, that State law is not pre-empted by the Act or Commission regulations with respect to its possible application to the use of the ACH system to collect contributions for any non-Federal committee. See 2 U.S.C. §453 and 11 CFR 108.7.

This response constitutes an advisory opinion concerning the 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,

(signed)

Scott E. Thomas
Chairman

Enclosures (AOs 1998-19, 1997-9, 1989-26 and 1979-75)