

AOR 2011-14

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June 8, 2011

P. Christopher Hughey, Esq.
Acting General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
2011 JUN 13 PM 3:16
OFFICE OF GENERAL
COUNSEL

Re: **Advisory Opinion Request—“Friends of Traditional Banking”**

Dear Mr. Hughey:

This letter is an Advisory Opinion Request filed on behalf of the Utah Bankers Association, a professional and trade association for Utah's commercial banks, savings banks and industrial loan corporations that is a state-based affiliate of the American Bankers Association.

Utah Bankers Association Action PAC, an existing federal PAC connected to the Utah Bankers Association and affiliated with the PACs of other state bankers associations, plans to sponsor a new project called Friends of Traditional Banking (“FOTB”).¹ FOTB will be a website and email list that will advise interested individuals to contribute their personal funds to particular federal candidates during each election cycle. FOTB will provide each recommended candidate's website and physical address, and individuals will send their own contributions to the candidate. FOTB itself will not make monetary contributions to candidates or solicit contributions for FOTB itself. FOTB will not reference state and local candidates in its efforts. FOTB will also not “bundle” contributions for subsequent delivery to candidates. All FOTB expenditures and disbursements will be reported according to Commission rules.²

The paragraphs below describe the planned operations and activities of FOTB as a special project of Utah Bankers Association Action PAC. The Commission's guidance is requested regarding the permissibility of these proposed operations and activities.

¹ See Fed. Election Comm'n Adv. Ops. 1991-03, 1997-16.

² FOTB-related expenditures and disbursements will be disclosed on Utah Bankers Association Action PAC's Form 3X. 11 C.F.R. § 104.4(b)(1). In addition to completing Form 3X for the applicable reporting period: (1) Schedule E of Form 3X will be filed within 48 hours if FOTB spends \$10,000 or more in a calendar year on express-advocacy communications “with respect to a given election,” including email and online solicitations for a candidate; and Schedule E of Form 3X will be filed within 24 hours if FOTB spends \$1,000 or more on express-advocacy communications, including email and online solicitations for a candidate, “with respect to a given election” within 20 days of that election. 2 U.S.C. § 434(g)(1), (2); 11 C.F.R. § 104.4(b)(2), (c).

I. Banking Council and Advisory Council Functions

FOTB will be led by a Traditional Banking Council and an Advisory Council that will include banking leaders from across the country. FOTB's Advisory Council will identify federal candidates who support policies favorable to traditional banking. FOTB's Banking Council will then select a small number of federal candidates from the Advisory Council's list to recommend via FOTB's website and emails. Members of both Councils will also ask individuals who are not Council members to visit FOTB's website and join FOTB's email list.

A. FOTB Banking Council and Advisory Council Membership

FOTB plans to invite staff members and presidents of state associations linked to the American Bankers Association to serve on FOTB's Banking Council and Advisory Council. The Commission has previously allowed an entity's personnel may participate in all its affiliates' administrative functions,³ even during work time.⁴ FOTB is "affiliated" with all American Bankers Association-related state association PACs due to its status as a Utah Bankers Association Action PAC project. Under these circumstances, may these state associations' personnel serve on FOTB's Councils, even during work time?

Additionally, FOTB plans to invite individuals who are not state association employees to serve on its Banking Council and Advisory Council, including unpaid state bankers association members. These Council members will serve in their personal, volunteer capacities. FOTB will inform them that they may not serve at their work superior's invitation, utilize subordinates' time to participate in FOTB, or use more than four hours of work time each month to volunteer for FOTB.⁵ In addition, any FOTB communication that lists Council members will indicate that corporate titles are for identification purposes only.⁶ Under these circumstances, will these individuals be considered as serving on FOTB's Councils in their volunteer personal capacities?

B. Council Members' Interactions with Federal Candidates

FOTB plans to sponsor communications that reach the general public, such as emails recommending financial support to particular federal candidates.⁷

FOTB emails will be created and distributed independently from federal candidates and party committees.⁸ Email communications are independent if they are not "made in cooperation,

³ 11 C.F.R. § 114.1(b). See also Fed. Election Comm'n Adv. Op. 1977-19 (defining the scope of "administrative" tasks by stating that certain costs were not "administrative" expenses because they were not "incurred in pursuit of voluntary contributions, the maintenance of those contributions, or the utilization of those contributions for political purposes.").

⁴ Fed. Election Comm'n Adv. Op. 1995-12 at 9. See also Fed. Election Comm'n Adv. Ops. 1997-13 at 4, 1999-15 at 6, 1983-19 at 3, 2006-33 at 3.

⁵ 11 C.F.R. § 114.9(a)(1)(iii). See also 11 C.F.R. § 114.2(f)(2)(i)(A).

⁶ See Fed. Election Comm'n Adv. Op. 2007-10.

⁷ 11 C.F.R. § 114.5(i).

consultation or concert with, or at the request or suggestion of, a candidate.”⁹ FOTB will preserve its independence by requiring all Council members to disclose any formal positions they hold in candidate campaigns *before* participating in any Council discussions. FOTB will also exclude from Council membership any individual who holds a formal campaign position. FOTB will also require Council members to abstain from voting to recommend any candidate from whom they have received an FOTB-related request or suggestion, or with whom they have engaged in discussion regarding the candidate’s campaign plans projects, activities or needs.¹⁰ These and other practices will be memorialized in a formal Policy on Interactions with Federal Candidates and Political Party Representatives, which will be distributed to all Council members.¹¹ If these procedures are implemented and followed, will FOTB’s communications be independent from candidates, such that an in-kind contribution will not result?

C. Council Members’ Communications Regarding FOTB

FOTB will also suggest that Banking Council and Advisory Council members periodically forward FOTB emails to personal friends and acquaintances. As mentioned, these FOTB emails will be sent to any member of the general public.¹² Council members will only use contact lists maintained by them personally (i.e. “personal Rolodexes”). Corporate-maintained vendor and contact lists will not be utilized for these personal email messages. Finally, for each Banking Council and Advisory Council member who serves on a state bankers association staff, FOTB would make a \$50 annual advance payment to that member’s association to cover possible costs associated with forwarding FOTB emails. Are Council members’ communications consistent with federal campaign finance laws under these conditions?

II. Other Matters

A. Funding FOTB’s Communications and Administrative Activities

As mentioned, Utah Bankers Association Action PAC will pay for FOTB’s website and email expenses. The PAC plans to receive occasional transfers from its “affiliated” committees and, in turn, use those funds to defray FOTB’s communication costs (e.g., staff time in drafting email and web content, Internet vendor costs, server time).¹³ Administrative costs (e.g., legal and phone costs) associated with FOTB will be paid directly by the Utah Bankers Association.

⁸ Commission precedent indicates that FOTB’s solicitation may maintain its “independence” even if a candidate accepts the contributions yielded from the solicitation. Fed. Election Comm’n Adv. Op. 2003-23 at 5. *See also* Fed. Election Comm’n Adv. Op. 2006-30.

⁹ 11 C.F.R. § 109.20(a). The “coordinated communications” test does not apply to FOTB’s Internet communications. 11 C.F.R. § 100.26 (omitting Internet communications, other than paid ads on another’s site, from the “public communication” definition); 11 C.F.R. § 109.21(c) (stating that “coordinated communications” only involve “public communications”).

¹⁰ 11 C.F.R. § 109.20(a).

¹¹ Attached hereto as Exhibit A.

¹² 11 C.F.R. § 114.5(i).

¹³ 11 C.F.R. § 110.3(c)(1).

The Association plans to accept payments from its affiliated state associations for FOTB-related administrative costs.¹⁴ FOTB does not plan to solicit any other contributions to fund its activities. Is FOTB's funding plan permissible under federal campaign finance rules?

B. Content of FOTB Website and Email Communications

Again, FOTB will create and disseminate communications that will, among other things, recommend federal candidates to receive financial support. When writing these communications, FOTB will abide by the following guidelines:

- FOTB's website and emails will contain appropriate legal disclaimers;¹⁵
- FOTB will insert a statement clarifying that FOTB is not soliciting funds for itself or for any affiliated entity;¹⁶ and
- FOTB will not suggest that contributors send funds to FOTB for subsequent "bundling" and delivery to candidates.¹⁷

FOTB will suggest that recipients forward FOTB emails and refer others to FOTB's website, as individuals who receive these general-public communications will not be restricted in discussing the group's messages and activities. Is FOTB required to add any other disclaimer statements to its messages under these circumstances?

III. CONCLUSION

The Utah Bankers Association respectfully requests the Commission's timely consideration of this Advisory Opinion Request.

Sincerely,



Kirk Jowers
Matthew T. Sanderson
Caplin & Drysdale, Chtd.

¹⁴ Fed. Election Comm'n Adv. Op. 1997-13 at 4.

¹⁵ 11 C.F.R. § 110.11(a)(1).

¹⁶ See 11 C.F.R. § 114.5(i).

¹⁷ 11 C.F.R. § 110.6.

FRIENDS OF TRADITIONAL BANKING

POLICY ON INTERACTIONS WITH FEDERAL CANDIDATES AND POLITICAL PARTY REPRESENTATIVES

Friends of Traditional Banking ("FOTB"), a website and email list that will advise individuals to contribute their personal funds to particular federal candidates, intends to conduct its activities independently from federal candidates and political party representatives. All decisions regarding FOTB's activities are made by the organization's Banking Council and Advisory Council.

This Policy on Interactions with Federal Candidates and Political Party Representatives lists below particular practices meant to maintain FOTB's independence from these persons. This Policy will be distributed to all FOTB Banking Council and Advisory Council members.

- FOTB requires Banking Council and Advisory Council members to disclose immediately any new formal position held in a federal candidate's campaign committee or in a political party committee.
- FOTB will exclude from Banking Council and Advisory Council membership any individual who holds a formal position in a federal candidate's campaign committee or in a political party committee.
- FOTB will not respond to or follow any request or suggestion of a federal candidate or political party representative concerning any FOTB communication.
- FOTB and all Banking Council and Advisory Council members will not seek the assent of a federal candidate or political party representative to any FOTB communication.
- FOTB will not allow a federal candidate or political party representative to have material involvement or participate in substantial discussions with respect to the creation, production, and distribution of any FOTB communication.
- FOTB will not utilize non-public information about a federal candidate's or political party committee's campaign plans, projects, activities, or needs to create, produce, or distribute any FOTB communication.
- FOTB will not retain or employ any staff member, vendor, or independent contractor who has provided campaign services to a federal candidate or political party committee referenced in an FOTB communication.
- FOTB's activities will not otherwise be made in cooperation, consultation, or concert with or at the request or suggestion of, any federal candidate or political party representative.

Questions or concerns about the implementation of this policy, including concerns about potential infractions, should be addressed to _____.

RECEIVED
FEDERAL ELECTION
COMMISSION

2011 JUN 18
OFFICE OF FEDERAL
ELECTION COMMISSION
PM 4:53



"Matthew Sanderson"
<msanders@capdale.com>
>

06/27/2011 12:15 PM

To <NStipanovic@fec.gov>
cc <ARothstein@fec.gov>, <YBrown.ctr@fec.gov>, "Kirk Jowers" <kjowers@capdale.com>
bcc

Subject RE: Utah Bankers Association Advisory Opinion Request

This is all correct. I should note on #3 below that the current intention is for the Councils' involvement in content formulation to be limited to selecting federal candidates to include in communications. Thank you.

Matt
(202) 862-5046 (direct)
msanders@capdale.com

From: NStipanovic@fec.gov [mailto:NStipanovic@fec.gov]
Sent: Monday, June 27, 2011 12:10 PM
To: Matthew Sanderson
Cc: ARothstein@fec.gov; YBrown.ctr@fec.gov
Subject: Utah Bankers Association Advisory Opinion Request

RECEIVED
FEDERAL ELECTION
COMMISSION
2011 JUN 27 PM 1:29
OFFICE OF GENERAL
COUNSEL

Dear Mr. Sandersoo:

In our telephone conversation last Thursday, June 23rd, you provided us with additional information regarding Utah Bankers Association's request for an advisory opinion. We have set out below our understanding of certain points that you made during the conversation. Please review the statements below and either confirm their accuracy or correct any misperceptions.

1. Friends of Traditional Banking (FOTB) is a specially branded communication of the Utah Bankers Association Action PAC (UBAPAC). FOTB will not have a separate legal personality from UBAPAC, nor will it have a separate bank account or operate out of a separate physical space.
2. The disclaimer for FOTB communications will state (in a printed box) that the communications are "Paid for by Friends of Traditional Banking, a project of Utah Bankers Association Action PAC. Not authorized by any candidate or candidate's committee. www.FriendsOfTraditionalBanking.com."
3. UBAPAC will assemble the Banking Council and the Advisory Council to formulate the communications, which will consist of a website and an email list. The two Councils will determine the content of the communications.
4. Utah Bankers Association is an incorporated trade association with tax-exempt status under Section 501(c)(6) of the Internal Revenue Code.

Please respond via email. Your response may be treated as a supplement to Utah Bankers Association's advisory opinion request and, as such, may be posted on the Commission's website.

Thank you very much for your cooperation.

Neven F. Stipanovic
Attorney, Policy Division
Office of General Counsel
U.S. Federal Election Commission
Tel: 202-694-1650

To ensure compliance with requirements imposed by the IRS, we inform you that, unless specifically indicated otherwise, any tax advice contained in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code, or (ii) promoting, marketing, or recommending to another party any tax-related matter addressed herein.

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