



FEDERAL ELECTION COMMISSION
Washington, DC 20463

September 22, 2011

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2011-14

Kirk Jowers, Esq.
Matthew T. Sanderson, Esq.
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One Thomas Circle, NW, Suite 1100
Washington, DC 20005

Dear Messrs. Jowers and Sanderson:

We are responding to your advisory opinion request on behalf of Utah Bankers Association and its separate segregated fund (“SSF”), Utah Bankers Association Action PAC (“UBAAPAC”), concerning the application of the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to certain proposed activities relating to Friends of Traditional Banking (the “Project”), a planned project of UBAAPAC. The Project will solicit individuals in the general public via email and the Project’s website to make contributions directly to certain recommended Federal candidates.

The Commission concludes that costs of the Project’s solicitations via email and website will not be in-kind contributions to the recommended candidates because the solicitations will not be “coordinated communications.” The Commission further concludes that the proposed method of funding the Project’s administrative and communication costs would be permissible under the Act and Commission regulations. The Commission also concludes that individuals working in their personal capacities as volunteers may serve on the Project’s leadership councils and may forward the Project’s email solicitations to their personal friends and acquaintances, without the value of their services constituting a contribution to UBAAPAC. Finally, the Commission concludes that the Project need not add any disclaimers to its email or website solicitations beyond those proposed in the request, but will need to revise the proposed disclaimer language.

Background

The facts presented in this advisory opinion are based on your letter received on June 13, 2011, your emails received on June 27, 2011 and July 22, 2011, and political

committee reports filed with the Commission that are available on the Commission's website.

Utah Bankers Association is a professional and trade association for Utah's commercial banks, savings banks, and industrial loan corporations. It is an incorporated tax-exempt trade association described in section 501(c)(6) of the Internal Revenue Code. 26 U.S.C. 501(c)(6). Utah Bankers Association is a State affiliate of the American Bankers Association. The American Bankers Association's SSF has identified UBAAPAC as one of more than 40 affiliated political committees.¹ Similarly, UBAAPAC has identified American Bankers Association PAC as an affiliated committee.²

The Project will be a specially branded communication of UBAAPAC consisting of a public website and an email list that will reach the general public. The Project will not be a separate legal entity and will not have a separate bank account or separate office space from UBAAPAC. The Project's disbursements will be reported to the Commission on UBAAPAC's Form 3X.

The Project will solicit individual members of the public via email and the Project's website to make contributions from their personal funds to particular Federal candidates during each election cycle. The Project will also encourage email recipients to forward its emails to other individuals and to refer other individuals to its website. The Project will provide the website and mailing address of the recommended Federal candidates so that any interested individuals receiving the Project's communications can send their contributions directly to the candidates. The Project will not accept or forward earmarked contributions to a candidate or a candidate's authorized committee. Nor will the Project solicit contributions to itself or to UBAAPAC, or make any monetary contributions to candidates.

UBAAPAC will assemble two groups to lead the Project: the Advisory Council and the Traditional Banking Council (collectively referred to as the "Councils"). The Advisory Council will identify Federal candidates who support policies favorable to traditional banking. The Traditional Banking Council will then select a small number of candidates from the Advisory Council's list to be included in the Project's communications.

UBAAPAC plans to invite employees of other State bankers associations related to the American Bankers Association to serve on the Councils. These individuals will serve on the Councils as part of their regular employment responsibilities with the State bankers associations and will be compensated accordingly by the State bankers associations. For purposes of this advisory opinion, the requestors have asked the

¹ See Statement of Organization of the American Bankers Association PAC (March 24, 2009), available at <http://query.nictusa.com/pdf/222/29991789222/29991789222.pdf#navpanes=0>.

² See Statement of Organization of the Utah Bankers Association Action PAC (July 23, 2003), available at <http://query.nictusa.com/cgi-bin/fecimg/?C00374371>.

Commission to assume that the State bankers associations are affiliated with Utah Bankers Association and are incorporated.

The Councils' membership will also include individuals who are not employed by State bankers associations, but who may themselves be members of State bankers associations. These individuals will not serve on the Councils as part of their employment responsibilities and will not be compensated for their services. The Project will inform these individuals that they may not serve on the Councils at the invitation of their supervisors at work, use their work subordinates' time to participate in the Project, or use more than four hours of work time per month to volunteer for the Project. Any communication of the Project that lists these Councils' members will also state that their corporate titles are for identification purposes only.

The Project intends to conduct its activities independently of Federal candidates and political party committees. To maintain this independence, the Project will implement a formal Policy on Interactions with Federal Candidates and Political Party Representatives (the "Policy"). See Request, Exhibit A.

The Project will encourage members of the Councils to forward periodically the Project's emails to their friends and acquaintances, using the members' personal contact lists. Corporate-maintained vendor and contact lists will not be used for these personal email messages. The Project plans to cover the costs of forwarding these emails for each Council member who works at a State bankers association by making an annual advance payment of fifty dollars to that member's association.

UBAAPAC will pay for the Project's website and email expenses (including staff time spent creating email and website content, Internet vendor costs, and server time). To cover these costs, UBAAPAC may use funds transferred from UBAAPAC's affiliated political committees. The Utah Bankers Association will pay directly the Project's administrative costs, including legal and phone costs, and will accept payments from affiliated incorporated State bankers associations to help defray the Project's administrative costs. The Project will not solicit contributions to fund its activities.

Finally, the Project's website and emails will contain a disclaimer stating, 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." The website and emails will also state that the Project is not soliciting funds for itself or any affiliated entity and will not collect or "bundle" and forward contributions to candidates.

Questions Presented

1. Will the Project's website and email communications to the general public soliciting contributions to certain Federal candidates result in in-kind contributions to those Federal candidates?

2. *Is the requestors' proposed method of funding the Project's administrative and communication costs permissible?*

3. *May employees of incorporated State bankers associations that are affiliated with Utah Bankers Association serve on the Councils as part of their regular employment responsibilities, without the value of their services constituting a contribution to UBAAPAC?*

4. *Would individuals who are not employees of the State bankers associations and who serve on the Councils under the conditions described in the request be considered to serve in their personal capacities as volunteers?*

5. *May Council members forward the Project's email solicitations to their personal friends and acquaintances at the suggestion of the Project as described in the request without making a contribution to UBAAPAC?*

6. *If the Project asks recipients of its email solicitations to forward the emails to others and to refer others to its website, must it add any disclaimers to its email communications and website beyond those proposed in the request?*

Legal Analysis and Conclusions

Question 1. Will the Project's website and email communications to the general public soliciting contributions to certain Federal candidates result in in-kind contributions to those Federal candidates?

No, the Project's website and email communications to the general public soliciting contributions to certain Federal candidates will not result in in-kind contributions to those Federal candidates, because the communications will not be "coordinated communications" under the Act and Commission regulations.

Corporations, including incorporated trade associations, are prohibited from making contributions, including in-kind contributions, to candidates or their authorized committees. 2 U.S.C. 441b(a); 11 CFR 114.2(a), (b), (f), and 114.8(b). The costs incurred by UBAAPAC in making communications to the general public that solicit contributions to Federal candidates will be in-kind contributions from UBAAPAC to the candidates if the communications are "coordinated communications." 2 U.S.C. 441a(a)(7)(B)(i); 11 CFR 109.21(b).³ Commission regulations provide a three-prong test to determine if a communication is a coordinated communication. 11 CFR 109.21(a). First, the communication must be paid for, in whole or in part, by a person other than the Federal candidate, the candidate's authorized committee or the political party committee (the payment prong). 11 CFR 109.21(a)(1). Second, the communication must satisfy one of the five content standards (the content prong). 11 CFR 109.21(a)(2) and (c). Third,

³ Similarly, any other expenditures, if coordinated, would be in-kind contributions to the candidates with whom they are coordinated. 11 C.F.R. 109.20(b).

the communication must satisfy one of the five conduct standards (the conduct prong). 11 CFR 109.21(a)(3) and (d). A payment for a communication satisfying all three prongs of the test is made for the purpose of influencing a Federal election, and therefore is an in-kind contribution.

The Commission concludes that the Project's communications will not be "coordinated communications" because they will not meet the content prong in 11 CFR 109.21(c).⁴ To meet the content prong, a communication must be either a "public communication" as defined in 2 U.S.C. 431(22) and 11 CFR 100.26, or an "electioneering communication" as defined in 2 U.S.C. 434(f)(3) and 11 CFR 100.29. Because the Project's communications will appear only on the Project's own website and by email, the communications will not be either public communications or electioneering communications. *See* 11 CFR 100.26 (an Internet communication that is not placed for a fee on another person's website is not a public communication); 11 CFR 100.29 (electioneering communications are limited to broadcast, cable, or satellite communications). Because the content prong is not satisfied, the Project's communications via email and on its own website will not be coordinated communications under 11 CFR 109.21. Accordingly, the costs of these communications will not be in-kind contributions to those candidates by UBAAPAC.

Question 2. Is the requestors' proposed method of funding the Project's administrative and communication costs permissible?

Yes, the requestors' proposed method of funding the administrative and communication costs of the Project is permissible.

Although the Act and Commission regulations prohibit a corporation from making contributions in connection with any Federal election, the definition of "contribution" does not include expenses paid by a corporation for "the establishment, administration, and solicitation of contributions to" the corporation's SSF. 2 U.S.C. 441b(a) and (b)(2)(C); 11 CFR 114.2(a). These establishment, administration and solicitation costs are "the cost of office space, phones, salaries, utilities, supplies, legal and accounting fees, fundraising and other expenses incurred in setting up and running a separate segregated fund established by a corporation." 11 CFR 114.1(b). Under the requestors' proposal, UBAAPAC would finance the Project's communications costs, including the Project's website and email expenses, and defray these costs through payments from UBAAPAC's affiliated political committees.⁵ Affiliated political committees share contribution limits and may transfer funds freely among themselves. 2 U.S.C. 441a(a)(5); 11 CFR 100.5(g)(2), 102.6(a)(1), 110.3(a)(1), and 110.3(c)(1). Because the Project is not a separately established legal entity but is, rather, a specially

⁴ Because the communications would not satisfy the content prong of the coordinated communication test, the Commission need not and has not examined the other two prongs of the test.

⁵ For the purposes of this advisory opinion, the Commission assumes without deciding that the political committees are affiliated with UBAAPAC under 11 CFR 100.5(g) and 110.3(a).

named undertaking of UBAAPAC that is funded by UBAAPAC, and UBAAPAC may accept unlimited transfers of funds from its affiliated political committees, the Commission concludes that UBAAPAC may receive unlimited transfers of funds from its affiliated political committees to help defray the Project's costs.

The Utah Bankers Association also proposes to pay directly the Project's administrative costs and to accept payments from its affiliated State bankers associations⁶ to help defray these costs. As the connected organization of UBAAPAC, Utah Bankers Association may use its general treasury funds to pay the Project's administrative costs without those payments being contributions to UBAAPAC. 2 U.S.C. 431(7) and 441b(b)(2)(C); 11 CFR 114.1(b) and 100.6(a).

The Commission considered, but could not approve a response by the required four affirmative votes on, the consequences of Utah Bankers Association's acceptance of payments from its affiliated State bankers associations to help pay the Project's administrative costs.

Question 3. May employees of incorporated State bankers associations that are affiliated with Utah Bankers Association serve on the Councils as part of their regular employment responsibilities, without the value of their services constituting a contribution to UBAAPAC?

The Commission could not approve a response by the required four affirmative votes on the circumstances under which affiliated State bankers associations may provide support to UBAAPAC by compensating their employees for serving on the Councils.

Question 4. Would individuals who are not employees of the State bankers associations and who serve on the Councils under the conditions described in the request be considered to serve in their personal capacities as volunteers?

Yes, individuals who are not employees of the State bankers associations and who serve on the Councils under the conditions described in the request would be considered to serve in their personal capacities as volunteers, provided that they do not receive any payment or other form of compensation for their service on the Councils. As such, the value of their service on the Councils would not be a contribution to UBAAPAC.

The term "contribution" does not include "the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee." 2 U.S.C. 431(8)(B)(i); 11 CFR 100.74. Thus, "a person's time and services, if donated, without payment or compensation, to or on behalf of a [political] committee will not constitute a 'contribution' under the Act." Advisory Opinion 1980-88 (Citizens for Election of Harry Davis as President Committee); *see also* Advisory Opinions 2007-08 (King) (the value of uncompensated volunteer services provided by an individual in

⁶ For the purposes of this advisory opinion, the Commission assumes without deciding that the State bankers associations are affiliated with Utah Bankers Association under 11 CFR 100.5(g) and 110.3(a).

arranging for entertainers to appear at Federal candidate and political party committee fundraisers, and the value of uncompensated services provided by entertainers at the fundraisers, are not contributions) and 1982-04 (Apodaca) (uncompensated volunteer services provided by carpenters, plumbers, electricians, carpet-layers, and other tradesmen in renovating political committee building were not contributions).

Here, the requestors propose that the Project will inform the individuals whom it invites to serve on the Councils that they may not serve at the invitation of their superiors or use their work subordinates' time to participate in the Project. In addition, the requestors propose that the Project would inform the individuals that they may not use more than four hours of work time each month to volunteer for the Project. Although this limitation is not required by Commission regulations,⁷ the Commission has previously determined that such a limitation is adequate to ensure that the individuals are not compensated by their employers for serving on the Councils. Under these conditions, the Commission concludes that the individuals would be serving on the Councils in their personal capacities as volunteers, such that the value of their service on the Councils would not be a contribution to UBAAPAC.⁸

Question 5. May Council members forward the Project's email solicitations to their personal friends and acquaintances at the suggestion of the Project as described in the request without making a contribution to UBAAPAC?

Yes, Council members may forward the Project's email solicitations to their personal friends and acquaintances at the suggestion of the Project as described in the request without making a contribution to UBAAPAC.

Under the requestors' proposal, the Project will suggest that members of the Councils forward the Project's email solicitations to their personal friends and acquaintances. Although Council members will use only the contact lists that they personally maintain, they will likely forward at least some of these solicitations via their corporate employers' computers.

⁷ Commission regulations establish a four hour per month safe harbor for *the use of corporate facilities* by corporate employees and stockholders for their individual volunteer activities in connection with a Federal election. 11 CFR 114.9. Under the safe harbor, the use of corporate facilities for no more than one hour per week or four hours per month for individual volunteer activities in connection with a Federal election will not result in a corporate contribution, so long as the individuals reimburse the corporation for any increase in its overhead or operating expenses. 11 CFR 114.9(a)(2). Corporate employees and stockholders who make more than the "occasional, isolated, or incidental use of corporate facilities" for their individual volunteer activities in connection with a Federal election, however, must reimburse the corporation for the fair rental value of its facilities to avoid a corporate contribution. 11 CFR 114.9(a)(3).

⁸ Requestors state that any Project communications that list the members of the Councils would include the members' corporate titles for identification purposes only. Although the use of the members' corporate titles would not affect their status as volunteers, the Commission could not approve a response by the required four affirmative votes on whether the use of the volunteers' corporate titles, even for identification purposes, may result in the making of a prohibited corporate contribution.

The Commission concludes that individuals who serve on the Councils in their personal capacities as volunteers would not make a contribution to UBAAPAC by forwarding the Project's solicitation emails as proposed. The term "contribution" does not include the use by individuals of equipment or services for uncompensated Internet activities, regardless of who owns the equipment and services. 11 CFR 100.94. Internet activities include sending and forwarding emails. 11 CFR 100.94(b). Thus, so long as the Councils' members forward the emails as uncompensated volunteers, the value of their services would not be a contribution to UBAAPAC.

Nor would the proposed use by volunteer Council members of their corporate employers' computer equipment and services to forward the Project's solicitation emails to their personal friends and acquaintances result in a contribution by their corporate employers to UBAAPAC. The Commission has established a safe harbor for the use of corporate computer equipment and Internet facilities. Under this safe harbor, corporations may allow their employees to use corporate computer and Internet facilities to engage in voluntary individual Internet activities, as defined in 11 CFR 100.94, without a corporate contribution resulting, provided that the activity does not prevent the employee from completing the normal amount of work for which the employee is paid or is expected to perform, does not increase the corporation's overhead or operating costs, and is not coerced. 11 CFR 114.9(a)(2)(ii); *see also* Explanation and Justification for Final Rules on Internet Communications, 71 FR 18589, 18611 (Apr. 12, 2006). Under these conditions, no corporate contribution would result.

State association employees who serve on the Councils may also forward the Project's solicitation emails to their personal friends and acquaintances as proposed in the request. Under the requestors' proposal, UBAAPAC will make an advance annual payment of fifty dollars to each Council member's State association to cover possible costs associated with the member's forwarding of Project email solicitations. Assuming that fifty dollars is the fair market value of the Council member's services, the Commission concludes that no facilitation would result. 11 CFR 114.2(f)(2)(i)(A).

Question 6. If the Project asks recipients of its email solicitations to forward the emails to others and to refer others to its website, must it add any disclaimers to its email communications and website beyond those proposed in the request?

The proposed disclaimer language must be revised to comply with the Act and Commission regulations, as explained below; however, the Project need not add any further disclaimers to its email communications and website beyond those proposed in the request, even if it asks recipients of its email solicitations to forward the emails and to refer others to its website.

Any "public communication," as defined in 11 CFR 100.26, made by a political committee, electronic mail of more than 500 substantially similar communications when sent by a political committee, and all Internet websites of political committees available to the general public must include a disclaimer identifying who paid for and, where applicable, who authorized the communication. 11 CFR 110.11(a); *see also* 2 U.S.C.

441d(a), 431(22). If the communication is not authorized by a candidate, an authorized committee of a candidate, or an agent of either, the disclaimer must “clearly state the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication, and that the communication is not authorized by any candidate or candidate’s committee.” 11 CFR 110.11(b)(3); *see also* 2 U.S.C. 441d(a)(3). The disclaimer “must be presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate notice of the identity of the person or political committee that paid for . . . the communication.”⁹ 11 CFR 110.11(c)(1). Disclaimers on printed communications must also be of sufficient type size to be clearly readable, have a reasonable degree of color contrast between text and background, and be contained in a box set apart from the rest of the communication. 2 U.S.C. 441d(c); 11 CFR 110.11(c)(2)(i)-(iii).

In this case, both the Project’s emails and its website will contain disclaimers. The disclaimer in each case will be in a printed box and will state 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.”

Although UBAAPAC is the entity that will pay for the Project’s email and website communications, the proposed disclaimer identifies the Project, rather than UBAAPAC, as the payor, and does not provide UBAAPAC’s permanent street address, telephone number or website address. Because a disclaimer must clearly state the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication, the disclaimer must be revised to show UBAAPAC as the payor and include UBAAPAC’s permanent street address, telephone number or website address. The requestors may retain a reference to the Project in the revised disclaimer should they wish to do so, as long as the identity of the payor is clear. For example, a disclaimer stating that “This communication was made by Friends of Traditional Banking, a project of Utah Bankers Association PAC, and was paid for by Utah Bankers Association Action PAC. Not authorized by any candidate or candidate’s committee,” would satisfy the Act and Commission regulations if it also provided UBAAPAC’s permanent street address, telephone number, or website address, either alone or in addition to such information about the Project.

Although the Act, Commission regulations, and prior advisory opinions do not directly address the question of whether a political committee must include additional disclaimers in its email communications in contemplation of their being forwarded by the intended recipients, the Commission’s decision in Advisory Opinion 1999-37 (X-PAC) indicates that no such obligation exists. In Advisory Opinion 1999-37 (X-PAC), the Commission concluded that X-PAC would not have to collect information from recipients who forwarded its email independent expenditures, stating that the Act and

⁹ Because the Project’s communications will solicit only contributions to be sent directly by contributors to candidates and their authorized committees, they are not subject to 11 CFR 104.7(b)(1)(i) (requiring political committees to make their “best efforts” to gather certain information about contributors); *see also* 11 CFR 102.5(a)(2) (requiring additional statements regarding contributions).

Commission regulations “do not require that a political committee or individual making independent expenditures collect information from others who might replicate or utilize that committee’s or person’s political message even if they do so at the committee’s (or individual’s) behest.” Advisory Opinion 1999-37 (X-PAC). Consistent with this approach, the Commission concludes that the Project need not add disclaimers beyond those proposed in the request to its email solicitations in anticipation of their being forwarded by the intended recipients to other individuals.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestors may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. The cited advisory opinions are available on the Commission’s Web site at www.fec.gov, or directly from the Commission’s Advisory Opinion searchable database at <http://www.fec.gov/searchao>.

On behalf of the Commission,

(signed)
Cynthia L. Bauerly
Chair