

August 21, 2003

**NOTICE AO DRAFT COMMENT PROCEDURES**

The Commission has approved a revision in its advisory opinion procedures that permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2003-22 is available for public comments under this procedure. It was requested by counsel Kenneth A. Gross and Ki P. Hong on behalf of American Bankers Association ("ABA") and ABA BankPAC. The draft may be obtained from the Public Disclosure Division of the Commission.

Proposed Advisory Opinion 2003-22 will be on the Commission's agenda for its public meeting of Thursday August 28, 2003.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is at the close of business on August 27, 2003.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case by case basis in special circumstances.

4) All comments timely received will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Disclosure Division.

**CONTACTS**

Press inquiries: Ron Harris (202) 694-1220

Acting Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copy of draft AO 2003-22 contact Public Records Office-  
Public Disclosure Division (202) 694-1120, or 800-424-9530.

For questions about comment submission procedure contact  
Rosemary C. Smith, Acting Associate General Counsel, (202) 694-1650.

**ADDRESSES**

Submit single copy of written comments to:

Commission Secretary  
Federal Election Commission  
999 E Street NW  
Washington, DC 20463

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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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August 21, 2003

# AGENDA ITEM

For Meeting of: 08-28-03

## MEMORANDUM

**TO:** The Commission

**THROUGH:** James A. Pehrkon *JAP*  
Staff Director

**FROM:** Lawrence H. Norton  
General Counsel

James A. Kahl *JAK*  
Deputy General Counsel

Rosemary C. Smith *RCS*  
Acting Associate General Counsel

John C. Vergelli *JCV*  
Acting Assistant General Counsel

Albert J. Kiss *AJK*  
Staff Attorney

**Subject:** Draft AO 2003-22

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for August 28, 2003.

Attachment

1 **ADVISORY OPINION 2003-22**

2  
3  
4 **Kenneth A. Gross, Esq.**  
5 **Ki P. Hong, Esq.**  
6 **Skadden, Arps, Slate, Meagher & Flom LLP**  
7 **1440 New York Avenue, N.W.**  
8 **Washington, D.C. 20005-2111**  
9

**DRAFT**

10  
11 **Dear Messrs. Gross and Hong:**

12 **This responds to your letters dated June 23, 2003, July 10, 2003, and July 24, 2003,**  
13 **requesting an advisory opinion on behalf of the American Bankers Association ("ABA")**  
14 **concerning the application of the Federal Election Campaign Act of 1971 ("the Act"), and**  
15 **Commission regulations, to the collecting and forwarding of contribution checks for ABA's**  
16 **separate segregated fund ("SSF"), ABA BankPAC, by executives of ABA member**  
17 **corporations.**

18 ***Background***

19 **You state that the ABA is an incorporated trade association for the banking industry**  
20 **(composed of community, regional, and money-center banks and holding companies, as well**  
21 **as savings associations, trust companies, and savings banks), that it is an organization**  
22 **described in 26 U.S.C. 501(c)(6), and that it has corporations as members. The ABA solicits**  
23 **contributions to ABA BankPAC from executive and administrative personnel of its member**  
24 **corporations that have provided separate and specific approval for solicitations, in**  
25 **compliance with 11 CFR 114.8(c).**

26 **You state that the ABA wants its member corporations to assist the ABA's support**  
27 **of ABA BankPAC by collecting and forwarding contribution checks from executive and**  
28 **administrative personnel of member corporations to ABA BankPAC. You state that this**

1 may include, but is not necessarily limited to, the executives manually collecting and  
2 forwarding the contribution checks themselves; using the member corporation's inter-office  
3 mail system to help collect the checks; and providing envelopes and postage in which  
4 contributors can send their contributions to ABA BankPAC.

5 ***Question Presented***

6 May executives of member corporations collect and forward contribution checks to  
7 the ABA BankPAC?<sup>1</sup>

8 ***Legal Analysis and Conclusion***

9 Executives of member corporations may collect and forward contribution checks to  
10 the ABA BankPAC in the circumstances you describe.

11 The Act prohibits corporations from making any contribution or expenditure in  
12 connection with a Federal election, and corporations that are members of trade associations  
13 are subject to these prohibitions. 2 U.S.C. 441b(a); 11 CFR 114.8(b). The Commission  
14 presumes that the ABA qualifies as a trade association as defined at 11 CFR 114.8(a). The  
15 Act allows a trade association, or its SSF, to solicit contributions to that SSF from members  
16 of the trade association. A trade association or its SSF may solicit the stockholders and the  
17 executive and administrative personnel of member corporations (and their families), to the  
18 extent that such solicitation has been separately and specifically approved by the member  
19 corporation involved, and such member corporation does not approve any such solicitation  
20 by more than one trade association in any calendar year. 2 U.S.C. 441b(b)(4)(D). All

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<sup>1</sup> Although your letter dated June 23, 2003 states that the ABA "wants its member corporations to assist in such solicitations by having their executives solicit their fellow executive and administrative personnel at the company and then collecting and forwarding those contribution checks to ABA BankPAC," you subsequently limited your request in your letter dated July 24, 2003 to the question of whether executives of member corporations are permitted to collect and forward contribution checks.

1 contributions must be strictly voluntary and without coercion. *See* 2 U.S.C. 441b(b)(3) and  
2 11 CFR 114.5(a).

3 In general, corporations, their officers, directors, and other representatives acting as  
4 agents of corporations, are prohibited from “facilitating” the making of contributions to  
5 candidates or political committees other than the *corporation’s own* SSF. 11 CFR  
6 114.2(f)(1).<sup>2</sup> “Facilitation” means using corporate or labor organization resources or  
7 facilities to engage in fundraising activities in connection with a Federal election, such as  
8 activities that go beyond the limited exemptions set forth in 11 CFR part 100, subparts C and  
9 E, or 11 CFR 114.9(a) through (c) and 114.13.<sup>3</sup> 11 CFR 114.2(f)(1). An example of  
10 facilitating the making of contributions is “[p]roviding materials for the purpose of  
11 transmitting or delivering contributions, such as stamps, envelopes addressed to a candidate  
12 or political committee other than the corporation’s SSF, or other similar items that would  
13 assist in transmitting or delivering contributions . . .” 11 CFR 114.2(f)(2)(ii). For  
14 purposes of 11 CFR Part 114, “method of facilitating the making of contributions” means  
15 the “manner in which the contributions are received *or collected* such as, but not limited to,  
16 payroll deduction or checkoff systems, other periodic payment plans, or return envelopes  
17 enclosed in a solicitation request.” 11 CFR 114.1(f) (*emphasis added*). As such, collecting  
18 and forwarding contribution checks, other than to a corporation’s own SSF, generally is both  
19 a “method of facilitating the making of contributions” under 11 CFR 114.1(f) and is  
20 “facilitation” subject to the prohibition in 11 CFR 114.2(f)(1).

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<sup>2</sup> Although 11 CFR 114.2(f)(1) was adopted in 1995, facilitation has been prohibited at least since 1977. *See generally* Federal Election Commission Regulations, Explanation and Justification, House Document No. 95-44, at 51 (1977).

<sup>3</sup> None of these limited exemptions apply under the facts presented.

1           11 CFR 114.8, however, recognizes that certain activity in regards to a trade  
2 association, which would be impermissible facilitation under section 114.2(f), is permissible  
3 under section 114.8. In particular, 11 CFR 114.8(e)(3) provides that “[t]here is no limitation  
4 on the method of soliciting voluntary contributions or the method of facilitating the making  
5 of voluntary contributions which a trade association may use” and then states only one  
6 condition: that “[t]he member corporation may not use a payroll deduction or checkoff  
7 system for executive and administrative personnel contributing to the separate segregated  
8 fund of the trade association.” 11 CFR 114.8(e)(3) thus appears to contemplate that  
9 executives of member corporations may collect and forward contribution checks for a trade  
10 association’s SSF.

11           Similarly, 11 CFR 114.8(d)(1) provides that a member corporation “must knowingly  
12 and specifically approve any solicitation for a trade association, whether the solicitation is  
13 done by the trade association, its separate segregated fund, *or the corporation or any of its*  
14 *personnel*, for contributions to the trade association’s [SSF]” (emphasis added). This  
15 provision also contemplates some limited facilitation by executives of member corporations.

16           Thus, the Commission concludes that the activity you ask about, in relation to a trade  
17 association, is excluded from the prohibition in 11 CFR 114.2(f)(1). Therefore, executives  
18 of the ABA’s member corporations may collect and forward contribution checks to ABA  
19 BankPAC where those corporations and the SSF have complied with 11 CFR 114.5(a) and  
20 114.8(b), (c) and (d).

21           This response constitutes an advisory opinion concerning the application of the Act  
22 and Commission regulations to the specific transaction or activity set forth in your request.  
23       *See 2 U.S.C. 437f.* The Commission emphasizes that, if there is a change in any of the facts

1 or assumptions presented, and such facts or assumptions are material to a conclusion  
2 presented in this opinion, then the requestor may not rely on that conclusion as support for  
3 its proposed activity.

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Sincerely,

Ellen L. Weintraub  
Chair