

September 20, 2007

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

Two alternative DRAFTS of ADVISORY OPINION 2007-14 are available for public comments under this procedure. It was requested by Jan W. Baran, Esq., and Carol A. Laham, Esq., on behalf of Associated Builders and Contractors, the National Federation of Independent Business, and the National Restaurant Association.

Two alternative Drafts of Advisory Opinion 2007-14 are scheduled to be on the Commission's agenda for its public meeting of Monday, September 24, 2007.

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 12:00pm noon (Eastern Time) on September 21, 2007.

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 timely received comments 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 Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2007-14, contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission's website at www.fec.gov.

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

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

FEDERAL ELECTION
COMMISSION
SECRETARIAT

2007 SEP 20 A 11:43

September 20, 2007

MEMORANDUM

AGENDA ITEM
For Meeting of: 9-24-07

SUBMITTED LATE

TO: The Commission

FROM: Thomasenia P. Duncan *TPD*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Amy L. Rothstein *ALR*
Assistant General Counsel

Esa L. Sferra *ELS*
Senior Attorney

Stacey J. Shin *SJS*
Attorney

Subject: Draft AO 2007-14

Attached are two alternative proposed drafts of the subject advisory opinion. We request that these drafts be placed on the agenda for September 24, 2007.

Attachment

1 **ADVISORY OPINION 2007-14**

2 **Jan W. Baran, Esq.**
3 **Wiley Rein LLP**
4 **1776 K Street, NW**
5 **Washington, DC 20006**

DRAFT A

6 **Dear Mr. Baran:**

7 **We are responding to your advisory opinion request on behalf of the Associated**
8 **Builders and Contractors, the National Federation of Independent Business, and the**
9 **National Restaurant Association (collectively, the “Trade Associations”) concerning the**
10 **application of the Federal Election Campaign Act of 1971, as amended (the “Act”), and**
11 **Commission regulations. Your request concerns a series of jointly sponsored live**
12 **telephone conferences featuring presidential candidates, which will be made available**
13 **simultaneously to the three Trade Associations’ restricted classes.**

14 **The Commission concludes that the Trade Associations may not sponsor the**
15 **telephone conferences as proposed because jointly sponsored telephone conferences for**
16 **the Trade Associations’ three separate restricted classes would constitute corporate-**
17 **funded candidate appearances beyond each trade association’s own restricted class and**
18 **employees.**

19 ***Background***

20 **The facts presented in this advisory opinion are based on your letter received on**
21 **July 18, 2007, your telephone conversation with Commission staff on July 31, 2007, and**
22 **your email received on August 2, 2007.**

23 **The Trade Associations are non-profit corporations organized as trade**
24 **associations under Section 501(c)(6) of the Internal Revenue Code. The Trade**
25 **Associations comprise incorporated members whose representatives are small business**

1 owners. There may be some overlap in membership among the Trade Associations, but
2 not in large numbers.

3 The Trade Associations plan to host a series of live telephone conferences
4 focusing on small business issues. The telephone conferences would be open to the
5 “restricted class,” as defined under the Act and Commission regulations, of each of the
6 three Trade Associations. The three restricted classes would have access to the telephone
7 conferences either by dialing into the telephone conference and providing a password or
8 by receiving a telephone call connecting them to the telephone conference. Access to the
9 telephone conferences will also be granted to members of the news media.

10 Each telephone conference will feature one presidential candidate. The Trade
11 Associations will invite several Democratic and Republican presidential candidates in
12 accordance with current polls, beginning with the most popular candidates. The Trade
13 Associations will contact the candidates’ campaigns to schedule each candidate’s
14 appearance, but do not contemplate coordinating with the candidates in advance of the
15 conferences on any subject other than scheduling. The Trade Associations will offer each
16 candidate a similar opportunity to participate in the conferences in terms of time and
17 format.

18 The Trade Associations will not limit the content of any candidate’s discussion
19 during the telephone conferences in any manner. The candidates will be free to solicit
20 contributions and to solicit campaign volunteers by asking conference participants to visit
21 a website or call a telephone number. Candidates will also answer questions posed by
22 members of the audience. The Trade Associations have decided not to endorse any of the

1 candidates, to expressly advocate the election or defeat of any of the candidates in
2 connection with the conferences, or to collect any contributions.

3 The Trade Associations will split the costs of the conferences and are open to cost
4 splitting arrangements other than dividing the costs equally among themselves. The
5 Trade Associations may be able to track restricted class participation and to split costs
6 based on the number of restricted class members of each Trade Association who
7 participates in the conferences.

8 ***Question Presented***

9 *May the Trade Associations jointly sponsor a series of telephone conferences*
10 *featuring presidential candidates for the Trade Associations' restricted classes?*

11 ***Legal Analysis and Conclusions***

12 No, they may not do so because the jointly sponsored telephone conferences for
13 the Trade Associations' three separate restricted classes would constitute corporate-
14 funded candidate appearances to those who are not in each trade association's own
15 restricted class and who are not its employees.

16 The Act prohibits contributions and expenditures by a corporation in connection
17 with a Federal election. *See* 2 U.S.C. 441b(a); 11 CFR 114.2(b). The terms
18 "contribution" and "expenditure" are defined to include "any direct or indirect payment,
19 distribution, loan, advance, deposit, or gift of money, or any services, or anything of
20 value . . . to any candidate, campaign committee, or political party or organization" in
21 connection with any Federal election. 2 U.S.C. 441b(b)(2); 11 CFR 114.1(a)(1); *see also*
22 2 U.S.C. 431(8)(A)(i) and (9)(A)(i); 11 CFR 100.52(a) and 100.111(a). The phrase

1 “anything of value” includes goods or services provided without charge, or at less than
2 the usual and normal charge. 11 CFR 100.52(d)(1) and 100.111(e)(1).

3 An incorporated trade association may sponsor candidate campaign appearances
4 only if: (1) the audience is limited to the trade association’s restricted class¹ and those
5 employees of the corporation outside the restricted class who are necessary to administer
6 the meeting; or (2) the audience is limited to the trade association’s employees and their
7 families. See 2 U.S.C. 441b(b)(2)(A); 11 CFR 114.3(c)(2) and 11 CFR 114.4(b)(1).

8 Other guests of the corporation who are being honored or speaking or participating in the
9 event, and representatives of the news media, may also attend. *Id.*

10 Under your proposal, each trade association would use its general treasury funds
11 to sponsor candidate communications containing express advocacy to an audience that
12 includes individuals who are outside of that trade association’s restricted class and who
13 are not employees of that trade association. Accordingly, the Commission concludes that
14 the proposed telephone conferences do not fall within the scope of the exemptions from
15 the definitions of contribution and expenditure for corporate-sponsored candidate
16 campaign appearances.

17 Nor would the proposed candidate appearances qualify as permissible corporate-
18 sponsored communications to the general public. The Commission has permitted a

¹ An incorporated trade association’s restricted class for communication purposes is its members and executive or administrative personnel, and their families. 11 CFR 114.1(j). A trade association’s members include its noncorporate members and, in the case of corporate members, the individual corporate representatives with whom the trade association normally conducts the association’s activities. 11 CFR 114.8(h). Under Commission regulations, an incorporated trade association’s executive and administrative personnel are defined as individuals employed by the trade association who are paid on a salary rather than hourly basis and who have policymaking, managerial, professional, or supervisory responsibilities. 11 CFR 114.1(c). This definition consists of individuals who run the trade association’s business such as officers, other executives, and division and section managers; and individuals following the recognized professions, such as lawyers and engineers. Other classes of employees are excluded. *Id.*

1 corporation to use its general treasury funds to finance a candidate appearance before the
2 general public, but only if: (1) the candidate is also a current officeholder and is requested
3 to appear in his or her capacity as an officeholder; and (2) the discussion at the meeting is
4 limited to issues of concern to the sponsoring organization or its industry and avoids
5 soliciting contributions or expressly advocating the election or defeat of any candidate.²

6 Under your proposal, by contrast, the Trade Associations would invite candidates
7 to speak based solely on their status as presidential candidates. The Trade Associations
8 plan to invite these candidates in accordance with the current polls, beginning with the
9 most popular candidates. Furthermore, the Trade Associations will not limit the content
10 of any candidate's discussion during the telephone conferences. The candidates will be
11 free to engage in express advocacy and to solicit contributions and campaign volunteers.

12 The situation presented here differs from that considered by the Commission in
13 Advisory Opinion 1984-13 (National Association of Manufacturers). In that advisory
14 opinion, the Commission concluded that the National Association of Manufacturers
15 ("NAM"), a corporation, and the Dallas Study Group ("DSG"), an unincorporated entity,
16 could jointly sponsor candidate appearances before NAM's restricted class. Even though
17 the sponsors had agreed not to endorse or expressly advocate the election or defeat of any
18 candidates, and had also agreed to ask all candidates to refrain from soliciting

² See Advisory Opinion 1996-11 (National Right to Life Conventions, Inc.) (permitting a corporate-sponsored speech given by candidates regarding legislative efforts); Advisory Opinion 1984-13 n. 3 (National Association of Manufacturers) (distinguishing requestor's candidate appearance from a "town meeting") and Advisory Opinion 1980-22 (American Iron and Steel Institute) (permitting a corporate-sponsored "issue forum"). See also *Explanation and Justification: Corporate and Labor Organization Activity; Express Advocacy and Coordination With Candidates; Final Rule*, 60 FR 64260, 64266 (Dec. 14, 1995) ("In addition, these amendments do not adversely affect the ability of corporations or labor organizations to invite . . . the general public to attend a speech given by an officeholder or other prominent individual who is also a federal candidate, if the speech is not campaign-related and the individual is not appearing in his or her capacity as a candidate for Federal office.").

1 contributions or assistance for their campaigns in connection with their appearances, the
2 Commission nonetheless found that the candidate appearances would be campaign
3 related or involve partisan communications. Accordingly, the Commission concluded
4 that the two entities could jointly sponsor the appearances, but only if the audience was
5 limited to NAM's restricted class and other persons permitted under 11 CFR 114.3(c)(2).³
6 The joint sponsorship by NAM and DSG did not change the scope of the permissible
7 audience. As the Commission stated, "If the audience is so limited, the exception for
8 such corporate expenditures in 11 CFR 114.3(c)(2) would apply whether the candidate
9 appearances are sponsored solely by NAM or jointly by NAM and DSG. This exception
10 would not apply, however, if the audience included persons beyond this group."

11 Advisory Opinion 1984-13.

12 Similarly, here, the fact that the three Trade Associations wish to jointly sponsor
13 candidate appearances does not change the scope of the permissible audience. Under
14 your proposal, each trade association would sponsor candidate appearances to an
15 audience that includes the other trade associations' restricted classes. As the Commission
16 noted in Advisory Opinion 1984-13, "Corporate sponsorship of partisan candidate
17 appearances before an audience made up of persons outside the group described in the
18 regulation [11 CFR 114.3(c)(2)] would, in effect, result in corporate expenditures for
19 partisan communications to the general public." *Id.* The result would be the same here,
20 as well. Accordingly, the Trade Associations may not jointly sponsor the proposed
21 candidate appearances by telephone conference.

³ As noted above, other persons permitted to attend candidate appearances under 11 CFR 114.3(c)(2) are employees outside the restricted class who are necessary to administer the meeting; other guests of the corporation who are being honored, speaking, or participating in the event; and representatives of the news media. See 11 CFR 114.3(c)(2).

1 **ADVISORY OPINION 2007-14**

2 **Jan W. Baran, Esq.**
3 **Wiley Rein LLP**
4 **1776 K Street, NW**
5 **Washington, DC 20006**

DRAFT B

6 **Dear Mr. Baran:**

7 **We are responding to your advisory opinion request on behalf of the Associated**
8 **Builders and Contractors, the National Federation of Independent Business, and the**
9 **National Restaurant Association (collectively, the “Trade Associations”) concerning the**
10 **application of the Federal Election Campaign Act of 1971, as amended (the “Act”), and**
11 **Commission regulations. Your request concerns a series of jointly sponsored live**
12 **telephone conferences featuring presidential candidates, which will be made available**
13 **simultaneously to the three Trade Associations’ restricted classes.**

14 **The Commission concludes that the Trade Associations may sponsor the**
15 **telephone conferences as proposed, provided that the Trade Associations split the costs of**
16 **the conferences on a pro rata basis determined by restricted class participation (assuming**
17 **it is possible to track such participation), or by other reasonable method (if it is not**
18 **possible to track participation) to ensure that each trade association does not subsidize the**
19 **costs of candidate appearances to a restricted class other than its own.**

20 ***Background***

21 **The facts presented in this advisory opinion are based on your letter received on**
22 **July 18, 2007, your telephone conversation with Commission staff on July 31, 2007, and**
23 **your email received on August 2, 2007.**

24 **The Trade Associations are non-profit corporations organized as trade**
25 **associations under Section 501(c)(6) of the Internal Revenue Code. The Trade**

1 Associations comprise incorporated members whose representatives are small business
2 owners. There may be some overlap in membership among the Trade Associations, but
3 not in large numbers.

4 The Trade Associations plan to host a series of live telephone conferences
5 focusing on small business issues. The telephone conferences would be open to the
6 “restricted class,” as defined under the Act and Commission regulations, of each of the
7 three Trade Associations. The three restricted classes would have access to the telephone
8 conferences either by dialing into the telephone conference and providing a password or
9 by receiving a telephone call connecting them to the telephone conference. Access to the
10 telephone conferences will also be granted to members of the news media.

11 Each telephone conference will feature one presidential candidate. The Trade
12 Associations will invite several Democratic and Republican presidential candidates in
13 accordance with current polls, beginning with the most popular candidates. The Trade
14 Associations will contact the candidates’ campaigns to schedule each candidate’s
15 appearance, but do not contemplate coordinating with the candidates in advance of the
16 conferences on any subject other than scheduling. The Trade Associations will offer each
17 candidate a similar opportunity to participate in the conferences in terms of time and
18 format.

19 The Trade Associations will not limit the content of any candidate’s discussion
20 during the telephone conferences in any manner. The candidates will be free to solicit
21 contributions and to solicit campaign volunteers by asking conference participants to visit
22 a website or call a telephone number. Candidates will also answer questions posed by
23 members of the audience. The Trade Associations have decided not to endorse any of the

1 candidates, to expressly advocate the election or defeat of any of the candidates in
2 connection with the conferences, or to collect any contributions.

3 The Trade Associations will split the costs of the conferences and are open to cost
4 splitting arrangements other than dividing the costs equally among themselves. The
5 Trade Associations may be able to track restricted class participation and to split costs
6 based on the number of restricted class members of each trade association who
7 participates in the conferences.

8 ***Question Presented***

9 *May the Trade Associations jointly sponsor a series of telephone conferences*
10 *featuring presidential candidates for the Trade Associations' restricted classes?*

11 ***Legal Analysis and Conclusions***

12 Yes, they may do so, provided that the Trade Associations split the costs of the
13 conferences on a pro rata basis determined by restricted class participation (assuming it is
14 possible to track such participation), or by other reasonable method (if it is not possible to
15 track participation) to ensure that each trade association does not subsidize the costs of
16 candidate appearances to a restricted class other than its own.

17 The Act prohibits contributions and expenditures by a corporation in connection
18 with a Federal election. See 2 U.S.C. 441b(a); 11 CFR 114.2(b). The terms
19 "contribution" and "expenditure" are defined to include "any direct or indirect payment,
20 distribution, loan, advance, deposit, or gift of money, or any services, or anything of
21 value . . . to any candidate, campaign committee, or political party or organization" in
22 connection with any Federal election. 2 U.S.C. 441b(b)(2); 11 CFR 114.1(a)(1); see also
23 2 U.S.C. 431(8)(A)(i) and (9)(A)(i); 11 CFR 100.52(a) and 100.111(a). The phrase

1 “anything of value” includes goods or services provided without charge, or at less than
2 the usual and normal charge. 11 CFR 100.52(d)(1) and 100.111(e)(1).

3 Under an exception to the prohibition on corporate contributions and expenditures
4 in connection with a Federal election, an incorporated trade association may sponsor
5 candidate campaign appearances, but only if: (1) the audience is limited to the trade
6 association’s restricted class¹ and those employees of the corporation outside the
7 restricted class who are necessary to administer the meeting; or (2) the audience is limited
8 to the trade association’s employees and their families. See 2 U.S.C. 441b(b)(2)(A); 11
9 CFR 114.3(c)(2) and 11 CFR 114.4(b)(1). Other guests of the corporation who are being
10 honored or speaking or participating in the event, and representatives of the news media,
11 may also attend. *Id.*

12 Under your proposal, each trade association would use its general treasury funds
13 to sponsor candidate appearances to its own restricted class. Because the Trade
14 Associations would sponsor the same candidate to address their restricted classes
15 simultaneously during the telephone conferences, each trade association must pay only
16 the portion of the costs of the conferences incurred because of its restricted class’s
17 participation, assuming it is possible to track such participation. You indicate that the
18 Trade Associations *may* also be able to track restricted class participation and to split the

¹ An incorporated trade association’s restricted class for communication purposes is its members and executive or administrative personnel, and their families. 11 CFR 114.1(j). A trade association’s members include its noncorporate members and, in the case of corporate members, the individual corporate representatives with whom the trade association normally conducts the association’s activities. 11 CFR 114.8(h). Under Commission regulations, an incorporated trade association’s executive and administrative personnel are defined as individuals employed by the trade association who are paid on a salary rather than hourly basis and who have policymaking, managerial, professional, or supervisory responsibilities. 11 CFR 114.1(c). This definition consists of individuals who run the trade association’s business such as officers, other executives, and division and section managers; and individuals following the recognized professions, such as lawyers and engineers. Other classes of employees are excluded. *Id.*

1 costs based on the number of restricted class members of each Trade Association that
2 participates in the conferences. If the Trade Associations split the costs of the
3 conferences proportionally, as described in the preceding sentence, the Commission
4 concludes that the proposed conferences come within the exemptions from the definitions
5 of “contribution” and “expenditure” for corporate-sponsored candidate campaign
6 appearances to the restricted class.²

7 The situation presented here is similar to that considered by the Commission in
8 Advisory Opinion 1984-13 (National Association of Manufacturers). In that advisory
9 opinion, the Commission concluded that the National Association of Manufacturers
10 (“NAM”), a corporation, could host candidates as speakers at a conference for its
11 restricted class and jointly sponsor the conference with another entity, the Dallas Study
12 Group (“DSG”), an unincorporated, nonmembership entity. The Commission concluded
13 that because NAM was funding candidate appearances to its restricted class only, the
14 event fell within the scope of the exemptions from the definitions of “contribution” and
15 “expenditure” for corporate-sponsored candidate campaign appearances to the restricted
16 class, regardless of DSG’s joint sponsorship.

17 Here, each trade association plans to host candidates as speakers at telephone
18 conferences for its restricted class, and also plans to sponsor the events jointly with the
19 two other Trade Associations. So long as the Trade Associations split the costs of the
20 conferences on a pro rata basis according to the participation of each trade association’s
21 restricted class, or by other reasonable method, *see supra* footnote 2, thereby ensuring no

² If it is not possible to precisely track restricted class participation and to split costs based on the number of restricted class members of each Trade Association that participates in the conferences, costs may be split by some other reasonable method calculated to closely approximate pro rata participation.

1 trade association is subsidizing the costs of candidate appearances to a restricted class
2 other than its own, then, like NAM's event, the proposed telephone conferences would
3 come within the exception for corporate-sponsored candidate campaign appearances to
4 the restricted class, regardless of the other Trade Associations' joint sponsorship.

5 This response constitutes an advisory opinion concerning the application of the
6 Act and Commission regulations to the specific transaction or activity set forth in your
7 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
8 of the facts or assumptions presented and such facts or assumptions are material to a
9 conclusion presented in this advisory opinion, then the requester may not rely on that
10 conclusion as support for its proposed activity. All cited advisory opinions are available
11 on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

12 Sincerely,
13
14

15
16 Robert D. Lenhard
17 Chairman