FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission
Staff Director
Acting General Counsel
FEC Press Office
FEC Public Disclosure

FROM: Office of the Commission Secretary

DATE: August 23, 2011

SUBJECT: Late Comment on Draft AO 2011-14
(Utah Bankers Association and Utah Bankers Association Action PAC)

Transmitted herewith is a late submitted comment from Utah Bankers Association and Utah Bankers Association Action PAC by Kirk L. Jowers and Matthew T. Sanderson regarding the above-captioned matter.

Attachment

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August 22, 2011

VIA FACSIMILE

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

Re: Supplemental Comment on Commission Drafts for Pending Advisory Opinion Request 2011-14

Dear Mr. Hughey:

We thank the Commission for considering Pending Advisory Opinion Request 2011-14. We agree with nearly all the analysis presented in the draft opinions, but file this supplemental comment on behalf of the Utah Bankers Association ("UBA") and the Utah Bankers Association Action PAC ("UBAA PAC") to summarize previous remarks about the status of UBA's affiliated state bankers associations and to discuss corporate "facilitation" issues raised in the drafts.

A. UBA's Affiliated State Bankers Associations are Not "Connected Organizations" and Need Not Be Included in UBAA PAC's Name

Our previous written comment and remarks at the Commission's August 4th Open Meeting separately addressed at length the status of UBA's affiliated state bankers associations. We briefly summarize our position on this issue here to aid the Commission's deliberations.

A principal flaw of the drafts is they assume all "affiliates" that offer PAC support are automatically "connected organizations." This assumption is mistaken because, as mentioned, the Commission has specifically provided for the existence of affiliated-but-not-connected entities that share a common organizational umbrella in the trade association context.

Another error is that the drafts presume that all "connected organizations" must be included in a PAC's name. This is incorrect because, again, a subsidiary-type organization is permitted to exclude from its PAC's name any reference to "peer" entities that are part of the same organizational structure.

The Commission's regulations and precedents therefore do not, as the drafts suggest, require UBA's affiliated state associations to be both "connected organizations" and referenced

in UBAA PAC's name. Instead, in keeping with past Commission decisions, the Commission should hold that UBA's affiliated associations are not "connected" and/or UBA may exclude affiliated state associations from UBAA PAC's name.

B. Corporate Titles Used Only for Identification Purposes Will Not Cause Unlawful Facilitation

Commission rules prohibit corporations from "facilitating the making of contributions to candidates or political committees."[1] "Facilitation" occurs when a corporation uses its "resources or facilities to engage in fundraising activities in connection with any federal election."[2] In a 2007 Advisory Opinion, the Commission found that corporations would engage in unlawful facilitation if they lent their corporate names and logos to the Reyes Committee for use on fundraising-event advertising to "encourage contributions to the ... Committee."[3] The Commission reasoned:

> By allowing the committee to use the corporation's resources – in effect, by lending the corporation's resources to the committee – the corporation is using its resources to facilitate contributions to the Reyes Committee. By approving or accepting the use of the corporation's resources, the employee ratifies this use as an agent of the corporation. Such corporate facilitation is prohibited...[4]

Commission Draft A in Pending Advisory Opinion Request 2011-14 cites the Reyes Committee Opinion for the proposition that UBAA PAC's "use of ... volunteers' corporate titles, even for identification purposes" could result in facilitation.[5] We disagree and believe the Commission should find that facilitation would not occur for four main reasons.

First, important facts distinguish the Reyes Committee's situation from the circumstances here in Pending Advisory Opinion Request 2011-14. In the Reyes Committee Opinion, corporate names would have facilitated contributions because they were to appear on advertising at a fundraising event specifically to acknowledge and "encourage" contributions. Here, however, UBAA PAC plans to use corporate names only to identify individual Council participants, not to recognize individuals as contributors or offer corporate advertising opportunities in exchange for executives' contributions. Corporate facilitation would not occur because corporate names will not facilitate the actual process of making or collecting of contributions.

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[1] 11 C.F.R. § 114.2(f)(1).

[2] 11 C.F.R. § 114.2(f)(1).

[3] Fed. Election Comm'n Adv. Op. 2007-10 at 2 (Reyes).

[4] Fed. Election Comm'n Adv. Op. 2007-10 at 2-3 (Reyes).

[5] Pending Advisory Opinion Request 2011-14, Draft A at n. 8.

Second, a facilitation finding in Pending Advisory Opinion Request 2011-14 would conflict with the Commission's practice of allowing businesses to acquiesce in the use of their marks by non-connected committees. The Commission has, on multiple occasions, permitted individuals associated with businesses to establish non-connected committees.[6] Notably, the Commission did not find the businesses facilitated or made contributions when the non-connected committees referenced the businesses in the committees' names. Similarly, UBAA PAC intends to use business names only in general project operations, to identify individual Council participants. Given the Commission's practice of allowing businesses to acquiesce in the use of their marks by non-connected committees, consistency dictates that no facilitation would occur because of UBAA PAC's use.

Third, a facilitation finding in Pending Advisory Opinion Request 2011-14 would conflict with the Commission's approach to a comparable prohibition—the ban on federal candidates soliciting so-called "soft money." Federal candidates are allowed, despite the soft-money solicitation ban,[7] to appear on non-federal fundraising invitations because the Commission gives effect to express language that disclaims candidate involvement.[8] Here, UBAA PAC plans to often post similarly express language near corporate names noting that the names are "for identification purposes only." If a federal candidate's name can appear on a non-federal fundraising invite because of express disclaimer language without violation, a "for identification purposes only" disclaimer should allow a corporate name to appear without resulting in facilitation. The Commission should therefore give effect to this UBAA PAC's express language, where it appears, and find that no facilitation would occur.

Fourth and finally, the Commission should more closely examine certain trademark law considerations. Facilitation requires a corporation to take some sort of affirmative act. The Reyes Committee Opinion found, for example, that facilitation would occur when a corporation "lent," "approved," or "accepted" the Reyes Committee's use of its mark. The decision was seemingly based on an assumption that the "use" (i.e. fundraising-event advertising) required the mark-holder's affirmative permission or assent to avoid trademark infringement. We note, however, that under trademark law, the mark-holder need not offer affirmative permission for every type of "use." For example, trademark law allows use of another's trademark to identify one's self, even without obtaining permission.[9] As part of the Friends of Traditional Banking

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[6] Fed. Election Comm'n Adv. Op. 2001-07 (NMC PAC); Fed. Election Comm'n Adv. Op. 2005-20 (Pillsbury Winthrop Shaw Pittman).

[7] 11 C.F.R. § 300.62.

[8] 11 C.F.R. § 300.64(c)(3)(iv).

[9] *See, e.g.*, Volkswagenwerk Aktiengesellshaft v Church, 411 F.2d 350, 352 (9th Cir. 1969) (holding that an automobile repair shop's use of the mark "Volkswagen" was not an infringing use because "advertising [the repair of Volkswagens, it] would be difficult, if not impossible, for [Church] to avoid altogether the use of the word 'Volkswagen' or its abbreviation 'VW,' which are the normal terms which, to the public at large, signify appellant's cars."); Rin Tin Tin, Inc. v. First Look Studios, Inc., 671 F. Supp. 2d 893, 900 (S.D. Tex. 2009) (holding that a movie studio's use of "Rin Tin Tin" mark to identify documentary was not an infringing use).

project, UBAA PAC will use corporate titles only as an extension of a participating individual's name. Corporate titles will serve as a mere identifier. UBAA PAC's "use" therefore would likely not require any mark-holder's affirmative permission. We ask the Commission to weigh the relevance of this trademark law consideration in rendering its facilitation finding.

Please contact us if you have any questions regarding the Advisory Opinion Request or this supplemental comment.

Sincerely,

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

cc: Office of the Commission Secretary