

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT



FEDERAL ELECTION COMMISSION
Washington, DC 20463

2002 OCT -1 P 1:46

October 1, 2002

AGENDA ITEM

For Meeting of: ~~10-8-02~~

10-10-02

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Staff Director

FROM: Lawrence H. Norton *LH Norton*
General Counsel *(by JAVC)*

Rosemary C. Smith *RCS*
Acting Associate General Counsel

John C. Vergelli *JCV*
Acting Assistant General Counsel

Jonathan M. Levin *JL*
Senior Attorney

Subject: Draft AO 2002-11

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for October 8, 2002.

Attachment

2
3 Jan Witold Baran
4 Carol A. Laham
5 Wiley, Rein & Fielding
6 1776 K Street, N.W.
7 Washington, D.C. 20006

DRAFT

8
9 Dear Mr. Baran:

10 This responds to your letters dated May 9, June 5, June 28, and August 19, 2002,
11 on behalf of the Mortgage Bankers Association of America ("MBAA") and the Mortgage
12 Bankers Association of America Political Action Committee ("MBAA PAC"),
13 concerning the application of the Federal Election Campaign Act of 1971, as amended
14 ("the Act"), and Commission regulations to the relationship of MBAA PAC to the Texas
15 Mortgage Bankers Association PAC ("TMBA PAC").

16 ***Question Presented***

17 Specifically, you ask whether MBAA PAC is affiliated with TMBA PAC. The
18 question implicates the Commission's rules on trade associations, federations of trade
19 associations, and affiliation. In order to answer the question, it is necessary to analyze
20 the relationship of MBAA and TMBA. This entails a discussion of the nature and
21 structure of the two associations, and structural or other connections between the
22 associations. An analysis of MBAA's relationship with TMBA for purposes of affiliation
23 within a federation must also address MBAA's relationship with the State associations in
24 general. TMBA will be used as the representative example of the State associations
25 where information is not provided for the State associations in general.

26 ***Applicable Law***

27 Commission regulations define a trade association as:

28 [G]enerally a membership organization of persons engaging in a similar or
29 related line of commerce, organized to promote and improve business
30 conditions in that line of commerce and not to engage in a regular business
31 of a kind ordinarily carried on for profit, and no part of the net earnings of
32 which inures to the benefit of any member.

33
34 11 CFR 114.8(a).

35 Commission regulations define a federation of trade associations as "an
36 organization representing trade associations involved in the same or allied line of

1 commerce." 11 CFR 114.8(g)(1). Commission regulations explain the federation's role
2 for purposes of the Act as follows:

3
4 (1) ... Such a federation may, subject to the following limitations, solicit
5 the members of the federation's regional, State or local affiliates or
6 members, provided that all of the political committees established,
7 financed, maintained or controlled by the federation and its regional, State,
8 or local affiliates or members are considered one political committee for
9 the purposes of the [contribution] limitations in §§110.1 and 110.2. The
10 factors set forth at §100.5(g)(4) shall be used to determine whether an
11 entity is a regional, State or local affiliate of a federation of trade
12 associations.

13 (i) The federation and its member associations may engage in a joint
14 solicitation; or

15 (ii) The member association may delegate its solicitation rights to the
16 federation.

17 (2) A federation is subject to the provisions of this section when soliciting
18 the stockholders and executive or administrative personnel of the
19 corporate members of its member associations.¹
20

21 11 CFR 114.8(g)(1) and (2).

22 The factors set forth at 11 CFR 100.5(g)(4) (and repeated at 11 CFR 110.3(a)(3))
23 are used to determine whether political committees and/or sponsoring entities are
24 affiliated under the Act. If political committees are affiliated, a single limit will apply to
25 the aggregate of contributions made by them and to the aggregate of contributions
26 received by them. 2 U.S.C. 441a(a)(5); 11 CFR 110.3(a)(1); *see also* 2 U.S.C.
27 441a(a)(1)-(2). Moreover, as indicated in section 114.8(g), a federation's ability to solicit
28 the restricted class of the corporate members of a State trade association is dependent
29 upon whether the federation's PAC and the PAC of the State association are considered
30 to be one political committee under the Act. Where entities are not *per se* affiliated,
31 under 11 CFR 100.5(g)(3) and 110.3(a)(2),² Commission regulations provide for an

¹ Generally, these provisions provide that the restricted class personnel of a member corporation of a trade association may be solicited for contributions to a trade association's SSF only if the member corporation separately and specifically approves the receipt of such solicitations for the calendar year and does not grant such approval to any other trade association for the same calendar year. 11 CFR 114.8(c) and (d). An approval granted to a State trade association that is an affiliate of a federation will constitute an approval for solicitation by the federation for its SSF. *See* 11 CFR 114.8(g)(2); *see also* Advisory Opinions 1995-17 and 1995-12.

² According to Commission regulations, committees established by a membership organization including trade or professional associations and/or related State and local entities of the organization are *per se* affiliated. As indicated below, MBAA does not appear to have a typical multi-tier federated structure or

1 examination of various factors in the context of an overall relationship to determine
2 whether one organization is an affiliate of another and, hence, whether their respective
3 SSFs are affiliated with each other. 11 CFR 100.5(g)(4)(i) and (ii)(A)-(J), and
4 110.3(a)(3)(i) and (ii)(A)-(J).

5 The factors relevant to this inquiry are whether a sponsoring organization or
6 committee: (B) has the authority or ability to direct or participate in the governance of
7 another sponsoring organization or committee through provisions of constitutions,
8 by-laws, contracts or other rules, or through formal or informal practices or procedures;
9 (C) has the authority or ability to hire, appoint, demote or otherwise control the officers,
10 or other decisionmaking employees or members of another sponsoring organization or
11 committee; (D) has a common or overlapping membership with another organization or
12 committee which indicates a formal or ongoing relationship between the organizations or
13 committees; (E) has common or overlapping officers or employees with another
14 sponsoring organization or committee which indicates a formal or ongoing relationship
15 between the organizations or committees; (G) provides funds or goods in a significant
16 amount or on an ongoing basis to another sponsoring organization or committee; (H)
17 causes or arranges for funds in a significant amount or on an ongoing basis to be provided
18 to another sponsoring organization or committee; (I) had an active or significant role in
19 the formation of another sponsoring organization or committee; and (J) has a pattern of
20 contributions or contributors similar to that of another sponsoring organization or
21 committee which indicates a formal or ongoing relationship. 11 CFR 100.5(g)(4)(ii) and
22 11 CFR 110.3(a)(3)(ii)(B), (C), (E), (G), (H), (I), and (J). The list of ten circumstantial
23 factors set out at 11 CFR 110.3(a)(3)(ii) is not an exclusive list, and other factors may be
24 considered. See Advisory Opinions 2001-18, 2000-28, and 1995-36.

25 ***Factual Background***

26 ***MBAA***

27 MBAA is an incorporated not-for-profit trade association representing the real
28 estate finance industry. MBAAPAC is MBAA's separate segregated fund ("SSF") and
29 has been registered with the Commission since 1975. MBAA is recognized as an

have sufficient structural aspects of the type that would fall within 11 CFR 110.3(a)(2)(iv). Cf. 11 CFR 100.8(b)(4)(iv)(E) and 114.1(e)(5).

1 organization exempt from Federal income tax under 26 U.S.C. 501(c)(6). It is composed
2 primarily of its 1431 "Regular Members" which are "[b]usiness organizations and
3 financial institutions that are regularly in the business of originating, servicing, or
4 investing in mortgage loans or other types of real estate finance." MBAA Bylaws,
5 Article III, §3.12. MBAA also has 743 "Associate Members." They are defined as
6 "[b]usiness organizations, financial institutions and individuals that regularly provide
7 service or products for business organizations or financial institutions eligible to be
8 regular members." *Id.* at 3.13. State mortgage bankers associations do not qualify as
9 regular or associate members, but are eligible for "membership" in MBAA pursuant to
10 Article X of the Bylaws, as "Adjunct Organizations." Adjunct Organizations include
11 State Associations, International Organizations, and "Other Organizations." Until
12 recently, this category was named "Affiliated Organizations." A State association is
13 defined as "[a] not for profit association, which has interests similar in nature to those of
14 [MBAA] and which represents firms or individuals engaged in real estate finance and
15 serves an exclusively statewide or regional membership base." MBAA Bylaws, 10.10(a).
16 There are 46 State association members. Local associations are not eligible for
17 membership in MBAA.³ Currently, there are also 274 members in other categories such
18 as honorary, special, or small mortgage broker membership.

19 MBAA's web site indicates that, other than honorary members, the members in
20 each of these categories pay annual dues to MBAA in specific amounts pre-determined
21 by the organization. According to the MBAA bylaws, only the regular members have
22 voting power; this power includes the right to elect the chairman, vice chairman, and
23 chairman-elect of the MBAA MBAA Bylaws, §2.10 and Article V.

24 The MBAA bylaws provide for a Board of Directors, which manages the affairs
25 of the association. MBAA Charter, §10.01. The Board consists of 20 voting members,
26 broken down as follows: One director must be the immediate former Chairperson of
27 MBAA; six directors must be officers of regular members engaged in the residential
28 single family finance business; three directors must be officers of regular members
29 engaged in the commercial real estate or multifamily finance business; one director must

³ You state that MBAA believes that there are approximately 200 local mortgage bankers associations in the U.S. but that it is aware of only 70. In addition, MBAA is not aware of whether members in the local associations automatically have membership in State Associations because it has no control over this.

1 be an employee of an associate member; one director must be a current or former elected
2 or staff officer of a State or local mortgage bankers association; five directors must be
3 officers of regular members serving at-large; and three directors must be the elected
4 officers of the MBAA. MBAA Bylaws, §4.13. The Board members are selected by the
5 Nominating Committee, or by either the Residential Board of Governors or the
6 Commercial Real Estate/Multifamily Finance Board of Governors, depending on the
7 board slot. (See below for a discussion of the Boards of Governors.) You state that,
8 currently, only one individual on the Board of Directors has a direct relationship to a
9 State or local mortgage bankers association.⁴

10 The Chairperson of MBAA may also designate standing committees of MBAA on
11 an annual basis. Members of the standing committees must come only from the
12 membership of MBAA or the Board of Directors. MBAA Bylaws, §8.10. MBAA also
13 has two Boards of Governors: a Commercial Real Estate/Multifamily Finance Board and
14 a Residential Board. MBAA Bylaws, §6.10. These boards have the duties and authority
15 that the Board of Directors delegates to them. MBAA Bylaws, §6.13. The MBAA
16 bylaws do not identify any relationship between the State associations and these two
17 Boards of Governors. The bylaws of the Residential Board of Governors do not refer at
18 all to the State associations and limit its membership to specific numbers of regular
19 members. The bylaws of the Commercial Real Estate/Multifamily Finance Board
20 provide for five supporting members out of 30 total members, and these five members
21 include associate vendor members and "affiliate" members, which is the former name for
22 the category that includes the State associations. However, you indicate that
23 representatives of the State associations are not eligible to sit on either Board of
24 Governors.

25 Finally, in its discussion of MBAA committees, the MBAA bylaws (at §8.50)
26 refer to a State and Local MBA Advisory Council ("Advisory Council" or "Council"),
27 which is an organization under the authority of MBAA and is not separately incorporated.
28 See Advisory Council Bylaws, §1.10. According to the Advisory Council bylaws, its
29 mission is:

⁴ This individual is the Executive Director of the Mortgage Bankers Association of New Jersey.

1 (a) To facilitate and promote grass roots participation in the
2 relationship between federal, state and local governments and the real
3 estate finance industry;

4 (b) To facilitate the delivery by MBAA of member services to
5 state and local mortgage bankers associations and mortgage lenders
6 associations;

7 (c) To make policy recommendations to the Board of Directors of
8 MBAA affecting association-related state and local issues.

9 Advisory Council Bylaws, Article II, §2.10. The Council consists of nine members,
10 including two representatives from each of the four operating Regions identified by the
11 U.S. Department of Housing and Urban Development. Of these two representatives from
12 each region, one is a volunteer member of a State or local association within the region,
13 and one is a paid executive of a state or local association within the region. The ninth
14 member and chairman is the State or local association member that is a member of the
15 MBAA Board of Directors. Advisory Council Bylaws, §§3.10 and 5.20.⁵ Each State and
16 local association within the region is entitled to nominate a candidate for the two
17 positions from its region, and each State association is entitled to one vote for each of the
18 two positions. Advisory Council Bylaws, §3.40(c) and (d). "Voting is by state for
19 practical reasons, and it is anticipated that state associations will consult with and respect
20 the preferences of the local associations in the state when the state association votes."
21 Advisory Council Bylaws, §3.40(d). Elections are conducted by MBAA under the
22 direction of the State/Local Representative on the Board of Directors. Advisory Council
23 Bylaws, §3.40. The Council is to meet four times per year, at least twice in person, and
24 two meetings may be conducted by electronic means. Advisory Council Bylaws, §4.10.
25 The MBAA bylaws state that "[i]n addition to individuals from the membership,
26 executive officers of state and local mortgage bankers associations shall be eligible to
27 serve as members of the State and Local MBA Advisory Council." MBAA Bylaws,
28 §8.50.

29

⁵ The State and Local Council shall recommend a list of nominees to the MBAA nominating committee for the State and Local Representative position on the MBAA Board of Directors. Council Bylaws, §5.30. The MBAA nominating committee makes the selection.

1 *TMBA*

2
3 TMBA's purpose is "to promote the proper, professional, educational, political,
4 and ethical conduct of persons engaged in the mortgage banking and real estate finance
5 business in the State of Texas" through meetings, discussion, and the circulation of
6 literature. TMBA Bylaws, Article II. The TMBA bylaws make no mention of MBAA.⁶
7 TMBA PAC registered with the Commission on August 17, 2001, and is the only Federal
8 PAC sponsored by an adjunct organization member of MBAA.

9 TMBA has a total of 92 Regular Members and 67 Associate Members. Regular
10 members encompass residential or commercial bankers and are comprised of financial
11 institutions that originate or service loans, that have been in continuing business for the
12 previous two years, and that meet other specified disjunctive criteria pertaining to their
13 services. TMBA Bylaws, Article IV, §1(a). Associate members are comprised of all
14 mortgage banking service providers, including mortgage brokers, title companies,
15 mortgage and other insurance companies, law firms, or any other provider servicing the
16 mortgage industry. There are two other membership categories; they are Affiliate
17 Members, which are out-of-state companies with limited operations in Texas that do not
18 want to become Regular or Associate members, and Honorary Life Members selected by
19 the TMBA Board of Directors. *Id.*, at § 1(b)-(d). The first three membership categories
20 pay annual dues to TMBA. Each representative of a regular member and each
21 representative of an associate member who is also a TMBA director have voting rights at
22 the TMBA business meetings. TMBA's affairs are controlled and managed by its Board
23 of Directors which consists of 30 members who are either regular (at least 21 directors)
24 or associate members, the three elected officers, and past TMBA presidents.

25 *Relationship Between MBAA and TMBA*

26 You assert that MBAA is not a federation of trade associations. You state that it
27 does not represent any other trade association and does not recognize the State
28 associations as "components" of MBAA. Any State association wishing to become
29 attached to MBAA must apply in order to become an adjunct organization. Regular and
30 associate members of MBAA are not members of State (or local) associations simply by

⁶ You have contacted the TMBA as to any official TMBA documents referring to MBAA and you are not aware of any.

1 virtue of their membership in MBAA, and members of State (or local) associations are
2 not automatically members of MBAA. See MBAA Bylaws, §10.60. There are no
3 consolidated dues statements between MBAA and any State association, nor can a
4 member join both MBAA and a State association in the same application. MBAA has no
5 control or input into State association dues statements or receipts. You state that, instead,
6 membership in MBAA is independent of membership in State or local associations, and
7 that State associations are “freestanding associations that are eligible for membership in
8 the MBAA based on the fact that they are already in existence as state associations.” The
9 State associations are under no obligation to adopt the MBAA Bylaws, nor has MBAA
10 provided prototype bylaws to any State association. The MBAA does not provide
11 instructions to the State associations as to their organization, policies, or operations.

12 The State/Local MBA Advisory Council may be the most prominent feature of
13 the relationship between MBAA and the State associations. Moreover, as indicated
14 above, Council by-laws allow for an executive of a non-member organization to sit on the
15 Council. However, you state that the MBAA does not represent or coordinate with State
16 and local associations in lobbying efforts. Although section 2.10(a) of the Advisory
17 Council bylaws states that part of the Council’s mission is to facilitate and promote grass
18 roots participation in the relationship between Federal, State, and local governments in
19 the real estate finance industry, you state that MBAA does not represent the State
20 associations with respect to the State associations’ Federal or non-Federal lobbying nor
21 do they coordinate with the State associations’ own lobbying to the extent they engage in
22 such lobbying. You state that MBAA reaches out to all types of its members, whether
23 they are in the residential finance business, the commercial real estate/multifamily
24 finance business, or are a State Association, to assist MBAA in its Federal lobbying as to
25 issues concerning MBAA, not the State associations. It does this by requesting that the
26 members call or write to Members of Congress. The State Associations are not bound to
27 assist MBAA in those efforts and often do not because of disagreements with MBAA’s
28 positions.

29 The Advisory Council Bylaws, at section 2.10(b) and (c), also refer to the
30 facilitation of member services to the State and local associations and to the making of
31 policy recommendations affecting MBAA-related State and local issues. You emphasize

1 that "member services" means services to the State associations as members of MBAA
2 and not to the members of State or local associations, that the recommendations are with
3 respect to issues pertaining to MBAA and not to the State associations, and that the focus
4 is for MBAA to service all of its members effectively. The Advisory Council and
5 MBAA staff also conduct periodic regional meetings with State associations to discuss
6 MBAA issues and programs affecting them as MBAA members. You emphasize that
7 these meetings are similar to MBAA quarterly meetings with its residential finance
8 members and its commercial/multifamily finance members.

9 You discuss the lack of governance relationships and overlaps between MBAA
10 and TMBA, which the Commission assumes is typical with respect to the remainder of
11 the member State associations. Specifically, you state that MBAA has no authority or
12 ability to hire, appoint, demote or otherwise control the officers or other decisionmaking
13 employees of TMBA or vice versa. You also state that the directors, governors, officers,
14 or employees of MBAA do not overlap with the directors, officers, or employees of
15 TMBA. As indicated above, only one out of the twenty members of the MBAA Board of
16 Directors is a representative of State associations, i.e., the representative of the Council
17 (who is not from Texas). There does not appear to be a significant degree of membership
18 overlap between MBAA and TMBA. Of TMBA's 92 regular members and 67 associate
19 members, 33 (22 regular and 11 associate) are members of MBAA, constituting a 21
20 percent overlap. Moreover, there are 197 MBAA regular members with Texas addresses.
21 The 33 TMBA members constitute only 17 percent of MBAA's regular membership in
22 Texas.⁷ The MBAA believes that these numbers typically reflect the level of overlapping
23 membership between each State Association and MBAA.

24 You state that there is no "provision of goods or services from the MBAA to
25 TMBA or vice versa." There are some arrangements, however, whereby MBAA
26 arranges for the use of funds in connection with the State associations. The only
27 contractual arrangement is an education program known as the Campus MBA Affiliate
28 program whereby 16 of the 46 State associations (including TMBA) promote Campus
29 MBA in exchange for a percentage of the profits generated from Campus MBA sales in

⁷ You state that, if the MBAA associate members with Texas addresses are included, the 33 TMBA members would constitute less than a ten percent overlap.

1 the State (regardless of whether the purchaser is a member of either MBAA or the State
2 association). You indicate that the expenses associated with these arrangements
3 constitute only an insignificant part of the revenues or budget of MBAA and the State
4 associations. The program constitutes approximately 2.5% to 3% of TMBA's income,
5 and, in view of the fact that this is supposed to be a profit-making opportunity, the
6 MBAA assumes that TMBA spends less than that percentage of its annual expenses on
7 the program. MBAA anticipates that these percentages are similar to those for other
8 State associations. As for MBAA, only three percent of its budget relates to the Campus
9 MBA program with the State associations and only one-tenth of that amount is
10 distributed to the State associations.⁸

11 You also note that MBAA endorsed funding of Habitat for Humanity ("Habitat")
12 grants benefiting nine State Associations and exceeding a total of \$100,000 in the year
13 2000. This figure was reduced to \$50,000 for each of 2001 and 2002. You explain that
14 MBAA encourages any member, including a State association, that wishes to aid Habitat
15 in building a home to apply for a grant from MBAA, which will be donated by MBAA to
16 Habitat. You state that this is not a means by which MBAA enhances the State
17 associations' budgets but a means for getting MBAA members involved in an MBAA-
18 supported program and to enhance MBAA's reputation and the reputation of its members
19 in their communities. You explained by phone that the figures described above do not
20 comprise a significant portion of MBAA's budget and would not constitute a significant
21 portion of the State Associations' budgets if the funds went to those associations.

22 You state that, to the knowledge of MBAA's current staff, neither MBAA nor any
23 person acting on behalf of MBAA participated in the establishment or formation of any
24 State (or local) mortgage bankers association. You also state that neither MBAA nor
25 MBAA PAC played a role in the formation of TMBA Federal PAC, that there are no
26 overlapping personnel between the PACs, that the PACs have not had a past relationship,
27 and that "there will be no coordination, direction or control between the PACs with

⁸ You also note that Campus MBA entails dozens of agreements with various member and non-member companies and real estate publishers, and MBAA views the agreements with the State associations as relatively insignificant in the overall program.

1 respect to the raising or spending of funds.”⁹ You also state that MBAA is aware that
2 some of the State associations (including TMBA) have non-Federal PACs but you state
3 that MBAA and its PAC did not have a role in the formation of these PACs, do not
4 operate or control those PACs, and have no overlapping personnel with them. You state
5 that MBAA PAC and the non-Federal PACs do not discuss their respective activities
6 (including the receipt and disbursements of contributions or donations). Consistent with
7 your general representations as to the lack of discussion between MBAA PAC and the
8 State association PACs, the Commission assumes that MBAA PAC does not consult with
9 the State Association executives as to its activities.

10 *Legal Analysis*

11 *Organizations as Trade Associations*

12 Both MBAA and TMBA appear to qualify as trade associations under
13 Commission regulations. 11 CFR 114.8(a). They are both not-for-profit corporations
14 composed of entities engaged in the business of mortgage banking and real estate finance,
15 and the purpose of each organization is to promote and improve business conditions in
16 that line of commerce. Both organizations appear to satisfy the criteria for membership
17 organizations under the Act. See 11 CFR 100.8(b)(4)(iv)(A) and 114.1(e)(1).¹⁰

18 *MBAA as a Federation of Trade Associations*

19 In a number of advisory opinions, the Commission has addressed issues
20 pertaining to federations of trade associations. Typically, such federations are national
21 associations with component State organizations that are officially recognized as such

⁹ The Federal PAC of TMBA is newly formed. Its reports as of the 2002 July quarterly disclose the receipt of only four itemized (and no unitemized) contributions and the disbursement of only one contribution. The FEC website discloses no overlapping contributors or recipients between TMBA's Federal PAC and MBAA PAC for the 2001-2002 election cycle; one of the 2001 contributors to TMBA's Federal PAC is disclosed as a contributor to MBAA PAC in 2000.

¹⁰ Both organizations are composed of entities that are “members” under the Act and regulations, due to the fact that the entities satisfy the organization's membership requirements, affirmatively accept the organization's invitation to become a member, and pay annual membership dues of a specific pre-determined amount. 11 CFR 100.8(b)(4)(iv)(B)(2) and 114.1(e)(2)(ii). With respect to the definition of “membership organization,” some of those entities have the power or authority to operate the organization pursuant to the bylaws. 11 CFR 100.8(b)(4)(iv)(A)(1) and 114.1(e)(1)(i). Moreover, both organizations' governing documents state the membership requirements in their bylaws and (as evidenced by their web sites) expressly solicit persons to become members. 11 CFR 100.8(b)(4)(iv)(A)(2) and (4), 114.1(e)(1)(ii) and (iv). The Commission assumes that each organization makes its formal organizational documents available to its members upon request and expressly acknowledges the acceptance of membership. 11 CFR 100.8(b)(4)(iv)(A)(3) and (5), 114.1(e)(1)(iii) and (v). Finally, neither is organized primarily for the

1 through the interconnectedness of the national association with each of the State
2 associations. This has entailed such features as a significant portion of the national
3 association's board of directors consisting of representatives of the State associations (*see*
4 *Advisory Opinions 1998-19, 1995-17, 1991-24, and 1977-44*); membership in the local or
5 State entity as a necessity for membership in the national association, or where such State
6 or local membership automatically provides membership in the national association (*see*
7 *Advisory Opinions 1998-19, 1995-17, 1994-19*); dues for the higher level of the
8 organization that are collected by the lower level (*see Advisory Opinions 1998-19 and*
9 *1995-17*); or prescription by the national organization of major portions of a State
10 association's by-laws (*see Advisory Opinions 1995-17 and 1994-19*). When national
11 trade associations have such features, the Commission has used these facts in its analysis
12 of both the federation status of the national association and the question of affiliation of
13 that association with State or local organization. The factors used in concluding that
14 there is a federation in such situations will very likely lead to a conclusion of affiliation
15 under the Commission regulations.

16 The Commission has also concluded that a national trade association was a
17 federation of trade associations and affiliated with its State association members where
18 the features described above were not present. The Commission, in *Advisory Opinion*
19 *1995-12*, concluded that the Independent Bankers Association of America ("IBAA") was
20 a federation of State associations and affiliated with those associations based on various
21 connections. The situation presented in that opinion was similar in certain respects to the
22 situation presented by you and may serve as a basis for comparison.

23 IBAA had a relationship with an organization known as the State Independent
24 Bankers Council ("SIBA Council") that bore a similarity to MBAA's State/Local MBA
25 Advisory Council and that served as one of the vehicles for State association input to
26 IBAA with respect to various policies.¹¹ Just as the State/Local Advisory Council has
27 one representative on a twenty-person MBAA Board of Directors, the SIBA Council had
28

purpose of influencing an election of any individual to Federal office. 11 CFR 100.8(b)(4)(iv)(A)(6) and (5), 114.1(e)(1)(vi).

¹¹ Although IBAA asserted that there were "no formal policy channels" between IBAA and the SIBA Council and that the Council did not represent individual State associations on policy matters, the Council acted as an informal advisory committee to IBAA.

1 two representatives on a large board. Despite this similarity, there were other
2 connections between the State associations and IBAA, which are absent herein, that led
3 to a conclusion that IBAA was a federation. Although representatives of each State, and
4 not each State association, sat on IBAA's board, IBAA's governance structure (unlike
5 MBAA's) was based on State divisions. The IBAA bylaws provided for State association
6 input as to the IBAA district lines within a State, the IBAA board member from each
7 State acted as a liaison to the State association and negotiated any differences between
8 IBAA and the State association as to issue differences, and IBAA bylaws required that at
9 least one State association officer sitting on the SIBA Council (each State association had
10 a seat on the SIBA Council) serve as an ex-officio member on most of IBAA's standing
11 committees. Moreover, the role of the State associations in IBAA appeared to differ
12 significantly from the role of the State mortgage bankers associations in that there was
13 greater lobbying coordination between the State and national associations, and State
14 association executives consulted regularly with the national association's SSF with
15 respect to contributions in their States. It was also significant that the State's
16 representative(s) on the IBAA board also served on the State association's board,
17 pursuant to State association bylaws, and that the State associations' bylaws singled out
18 IBAA as an organization to which they would extend assistance and cooperation.¹²

19 By contrast, MBAA does not appear to have the same relationship with the State
20 associations. The TMBA bylaws make no reference to the MBAA. MBAA's Board is
21 not organized on the basis of any State division, and the individual State associations do
22 not have the same kind of liaison relationship with the MBAA Board that was present in
23 IBAA. In addition, MBAA does not have the features of a more traditional federated
24 structure discussed above with respect to multi-tiered membership, dues collection, board
25 representation, or prescription of major portions of the bylaws. MBAA may be
26 considered as representing the State Associations to a certain extent with respect to the
27 policy interests of those associations before governmental entities, although you assert
28 that this really amounts to just voluntary cooperation between the associations and
29 MBAA to enhance MBAA's efforts on behalf of itself. MBAA has a number of other
30 contacts with its State association members, although you minimize the significance of

¹² One State association was used as the example for all of the State associations in IBAA.

1 these contacts by noting that groups of other MBAA members have similar types of
2 contacts and interactions. In the sense that MBAA is a representative of these State trade
3 associations and has a relationship with these organizations, it may be construed as a
4 federation of trade associations. Nevertheless, a Commission conclusion that MBAA is a
5 loose federation would not dispose of the issue presented if the State associations are not
6 construed as affiliates of the federation under 11 CFR 100.5(g).

7 *State Associations as Affiliates of MBAA*

8 Although there are relationships between MBAA and the State associations, facts
9 and descriptions presented by you provide support for a conclusion that TMBA is not
10 affiliated with MBAA under Commission regulations. Although the State associations as
11 a group have a seat on the MBAA Board of Directors, this constitutes only one of 20
12 directors, and, unlike IBAA's situation, there do not seem to be other official links
13 between the national board and the State association boards, such as seats held by
14 national board members on the State board, pursuant to State association bylaws.
15 MBAA's Boards of Governors, which are the subordinate governing bodies, do not
16 include official representation of the State associations. Moreover, you note a lack of
17 overlap of directors, governors, officers and employees between MBAA and TMBA (as
18 the representative State association). In addition, it is significant that there is only a small
19 overlap between the memberships of MBAA and the State associations, using Texas as
20 the example. The overlap percentages differed markedly from the overlap percentages in
21 Advisory Opinion 1995-12, where membership overlap was a significant factor in
22 determining that IBAA was not just a federation but was also affiliated with the State
23 associations.¹³ See 11 CFR 11 CFR 100.5(g)(4)(ii) and 11 CFR 110.3(a)(3)(ii)(B), (C),
24 (D), and (E). The lack of a more traditional federated structure, e.g., as to membership
25 structure, board overlap, and prescription of by-laws, also is relevant to the application of
26 factors (B), (C), (D), and (E) and provides further support for a conclusion of non-
27 affiliation. The Commission also takes into account your description of the nature of the
28 contact and consultation between MBAA and the State associations. Although the

¹³ In the State association example used for Advisory Opinion 1995-12, 57 percent of the member banks in the State were members of both associations, 83 percent of IBAA members in the State were members of the State association, and 65 percent of the State association members were members of IBAA. Compare the membership overlap data in Advisory Opinion 2000-28, n.4, and 1996-38.

1 consultation with the State associations as to MBAA's public policy concerns and as to
2 issues affecting the State associations as MBAA members is important and reflects a
3 degree of influence between the national and State associations, you emphasize the loose
4 nature of this interaction.

5 With respect to the provision, or the arrangement for the provision of funds or
6 goods between MBAA and the State associations, the Commission notes the lack of dues
7 consolidation. The Campus MBA program involves some arrangement for State
8 associations to receive revenues resulting from disbursements by MBAA but these funds
9 constitute a very small part of the operations of the associations. The endowment of
10 grants by MBAA for Habitat also amounts to an insignificant portion of the budgets of
11 the associations involved. The Commission assumes that there are no other programs or
12 arrangements that would cumulatively entail a significant part of the funding for the
13 operations of either MBAA or the State associations. *See* 11 CFR 100.5(g)(4)(ii) and 11
14 CFR 110.3(a)(3)(ii)(G) and (H).

15 You assert the lack of involvement by MBAA or MBAA PAC in the formation of
16 any of the State associations or any of the PACs of the State associations. You also assert
17 the lack of personnel overlap or control between the MBAA and the State associations'
18 PACs and the lack of discussion between the PACs as to their activities on both a Federal
19 and non-Federal level. *See* 11 CFR 100.5(g)(4)(ii) and 11 CFR 110.3(a)(3)(ii)(I) and (J).

20 Based on the foregoing consideration of the affiliation factors in the context of the
21 overall relationship between MBAA and TMBA and other State associations (as well as
22 the relationships among the PACs), the Commission concludes that TMBA is not an
23 affiliate of MBAA under the Commission regulations, and that MBAA PAC and TMBA
24 PAC are not affiliated. Therefore, the two PACs do not have to aggregate the
25 contributions received by them and do not have to aggregate the contributions made by
26 them, for the purposes of the Act's contribution limits at 2 U.S.C. 441a. The
27 Commission's conclusion also means that TMBA's incorporated members may not give
28 prior approval to MBAA for solicitation of their restricted class personnel for
29 contributions to MBAA PAC, and that the restricted class personnel of TMBA's
30 incorporated members may not be solicited for contributions to MBAA PAC, unless
31 those incorporated members are also members of MBAA in their own right. *See* 11 CFR

1 114.8(c) and (d). Similarly, the restricted class personnel of MBAA's incorporated
2 members may not be solicited for contributions to TMBA PAC, unless those incorporated
3 members are members of TMBA in their own right and have given prior approval to
4 TMBA.

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
8 any of the facts or assumptions presented and such facts or assumptions are material to a
9 conclusion presented in this opinion, then the requester may not rely on that conclusion
10 as support for its proposed activity.

11 Sincerely,

12
13 David M. Mason
14 Chairman
15

16 Enclosures (AOs 2001-18, 2000-28, 1998-19, 1996-38, 1995-36, 1995-17, 1995-12,
17 1994-19, 1991-24, and 1977-44)
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32