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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

2004 JUL 15 P 4: 42

July 15, 2004

**AGENDA ITEM**  
For Meeting of: 7-22-04

**MEMORANDUM**

TO: The Commission

THROUGH: James A. Pehrkon *JAP*  
Staff Director

FROM: Lawrence H. Norton *LHN*  
General Counsel

Rosemary C. Smith *ACS*  
Associate General Counsel

Mai T. Dinh *MTD*  
Assistant General Counsel

Margaret Perl *MP*  
Staff Attorney *by MTD*

Subject: Draft AO 2004-19

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for July 22, 2004.

Attachment

1 ADVISORY OPINION 2004-19

2  
3  
4 Mr. Andrew W. Mitchell  
5 President, DollarVote.org  
6 908 N. Wayne Street  
7 Suite 303  
8 Arlington, Virginia 22201  
9

**DRAFT**

10  
11 Dear Mr. Mitchell:

12 This responds to your letters dated May 19, June 2 and June 7, 2004 requesting an  
13 advisory opinion concerning the application of the Federal Election Campaign Act of 1971,  
14 as amended (“the Act”), and Commission regulations to your proposed internet-based  
15 service.

16 ***Background***

17 You state that you are the president of DollarVote.org (“DollarVote”), a Virginia C  
18 corporation, which plans to provide certain nonpartisan commercial services to both  
19 citizens and candidates via a website. You describe the central service as the “DollarVote  
20 plan” (“Plan”). You state that under this two-part Plan, DollarVote accepts and forwards  
21 contributions from individuals earmarked for candidates in specific upcoming elections.

22 Under the Plan, DollarVote would compose and post on its website various position  
23 statements on certain political issues, referred to as “DollarBills.” DollarVote selects the  
24 issues to include on the website and writes the DollarBill statements without any candidate  
25 participation. You state that individual citizens may access the website upon paying a  
26 proposed \$10 annual subscription fee. Individual subscribers may then view the DollarBills  
27 and “vote” by choosing to contribute funds to the candidate or candidates who have posted  
28 on the website their “promise” to support that position statement. If there are not yet any

1 actual candidates listed as “promising” to support that DollarBill at the time of the  
2 individual’s vote, the contributed funds will go to the first future candidate who registers a  
3 “promise” for that DollarBill. You state that the subscriber also selects an “alternative  
4 recipient organization” from a list of available non-profit entities organized under section  
5 501(c)(3) of the Internal Revenue Code (“501(c)(3) organizations”). DollarVote will  
6 forward the contribution to this alternative recipient 501(c)(3) organization if no candidate  
7 “promises” to support the selected DollarBill by the second Tuesday of October. You state  
8 that these 501(c)(3) organizations will be notified of their selection in the DollarVote  
9 process and presented with the opportunity to refuse to participate. You explain that you  
10 will also charge subscribers a small processing fee (proposed as 5% of the contribution) per  
11 vote. When a subscriber completes the purchase with a credit card, DollarVote will retain  
12 the subscription and processing fees in the corporation’s general accounts, but the  
13 contributed funds will be routed to a merchant account separate from the corporation’s  
14 general accounts.

15 You explain that the second half of the Plan would entail charging candidates a  
16 “substantial account fee” once per election for the ability to register “promises” related to  
17 the DollarBills posted on the website. You state that if one or more candidates have  
18 “promised” to support a DollarBill, their names will be visible to the individual subscribers  
19 under the DollarBill. All contributions already “voted” for a DollarBill, if any, will be  
20 forwarded to the first candidate who has “promised” regarding that DollarBill. If multiple  
21 candidates “promise” on the same DollarBill, then all additional contributions will be  
22 distributed equally between the listed candidates. You state that once a candidate has

1 registered a “promise,” the earmarked contributions for that DollarBill, minus transaction  
2 charges, will be forwarded to the candidate(s) within 10 days of receipt.

3 You also list particular terms and conditions, which you anticipate will be included  
4 in any future agreements with candidates to obtain DollarVote’s services. Among these  
5 terms are the following:

- 6 • DollarVote may set a limit on the number of promising candidates who may  
7 simultaneously receive funds earmarked with respect to a particular position  
8 statement.
- 9 • No candidate may be the “first promiser” on more than one DollarBill.
- 10 • DollarVote may set a limit on the total amount of funds a candidate may receive  
11 during a designated election.
- 12 • DollarVote may disallow candidates from promising for certain combinations of  
13 DollarBills.

14 Your request describes the screening and processing measures you propose to  
15 include in your service to prevent excessive contributions and contributions from prohibited  
16 sources under the Act. You state that these procedures are modeled after relevant past  
17 advisory opinions regarding contributions through the Internet. You also describe  
18 additional details of the Plan, and include sample web pages regarding the “voting” and  
19 contribution processes, sample DollarBills. You also provide detailed descriptions of the  
20 processing of contributions through merchant accounts to the final candidate(s) or  
21 alternative recipient organization. You also state that DollarVote plans to provide a number

1 of other “informative and interactive” services that will not involve contributions to  
2 candidates.

3 ***Question Presented***

4 *May DollarVote receive earmarked contributions from individuals and forward*  
5 *those contributions to Federal candidates or to certain 501(c)(3) organizations under the*  
6 *proposed Plan?*

7 ***Legal Analysis and Conclusions***

8 No, DollarVote may not do so because it is a corporation and may not act as a  
9 conduit or intermediary for earmarked contributions, and DollarVote does not meet the  
10 commercial fundraising firm exception to the definition of “conduit or intermediary” in 11  
11 CFR 110.6(b)(2).<sup>1</sup>

12 The Act and Commission regulations permit a conduit or intermediary to collect and  
13 forward contributions from individuals that have been earmarked for a specific candidate,  
14 subject to certain limitations and reporting requirements. 2 U.S.C. 441a(a)(8); 11 CFR  
15 110.6. However, Commission regulations state that any person who is prohibited from  
16 making contributions or expenditures is also prohibited from acting as a conduit or  
17 intermediary for contributions earmarked to candidates. 11 CFR 110.6(b)(2)(ii). Because  
18 DollarVote is a corporation prohibited from making contributions, it may not use the  
19 proposed Plan to collect and forward earmarked contributions under 11 CFR 110.6 unless it  
20 meets a regulatory exception to the definition of “conduit or intermediary.” *See also* 2  
21 U.S.C. 441b(a); 11 CFR 110.6(b)(2)(ii) and 114.2(b)(1). Commission regulations establish

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<sup>1</sup> While it appears that DollarVote would qualify for the “commercial vendor” exception in 11 CFR 114.2(f)(1) under the facts you present, it must also satisfy the more narrow exception for a “commercial fundraising firm” under 11 CFR 110.6(b)(2)(i)(D) for the Plan to comply with all of the requirements of the Act and Commission regulations.

1 certain exceptions to this definition, including “[a] commercial fundraising firm retained by  
2 the candidate or the candidate’s authorized committee to assist in fundraising.” 11 CFR  
3 110.6(b)(2)(i)(D).

4 Commission regulations created this exception from the definition of “conduit or  
5 intermediary” because a commercial fundraising firm hired by a candidate’s authorized  
6 committee is more properly considered an agent of the committee than an independent  
7 conduit or intermediary. *See* Final Rules and Explanation and Justification of Regulations  
8 on Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution  
9 Limitations and Earmarked Contributions, 54 Fed. Reg. 34098, 34106 (Aug. 17, 1989).

10 This interpretation is consistent with the other exceptions to the definition of “conduit or  
11 intermediary” for campaign employees and volunteers, joint fundraising representatives,  
12 affiliated committees, and authorized individuals who hold significant positions in the  
13 campaign – all of whom are acting as agents of the candidate or the authorized committee  
14 when engaging in fundraising. *See* 11 CFR 110.6(b)(2)(i)(A), (B), (C) and (E). However,  
15 under the proposed Plan, DollarVote’s authority and autonomous decision-making exceeds  
16 those of an agent acting at the instruction of the candidates or candidate committees who  
17 will subscribe to the services offered.<sup>2</sup>

18 First, DollarVote exclusively determines the wording and posting of the DollarBills  
19 made available for contributions and promises by candidates. DollarVote chooses which  
20 issues it will post on the website and writes the position statements without input from the

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<sup>2</sup> Your request does not seek recognition under the “commercial fundraising firm” exception. Instead, your discussions of proposed reporting, screening, and transferring of contributions illustrates your intent to act as an independent conduit or intermediary under section 110.6, not as an agent of the candidate committees. However, because DollarVote is a corporation, it cannot act as an independent conduit or intermediary under section 110.6. *See* 11 CFR 110.6(b)(2)(ii).

1 candidates who subscribe to DollarVote's services. In this way, DollarVote is acting  
2 independently and not as an agent of the candidates' committees.

3 Moreover, DollarVote ultimately decides to whom the money is sent, not the  
4 contributor who "votes," because the proposed terms and conditions of the Plan allow  
5 DollarVote to decide which candidates receive contributions earmarked for a particular  
6 DollarBill, and how much money each candidate will receive. DollarVote would regulate  
7 how much each candidate will be given when the contributed amounts are split because it  
8 can set a limit on the number of promising candidates for a particular DollarBill, thereby  
9 increasing or decreasing each candidate's pro-rated amount. DollarVote also explicitly  
10 determines how much money each candidate receives because it can set a limit on the total  
11 funds a candidate may receive from all DollarBill promises combined during the election.  
12 In addition to choosing and writing the DollarBill statements themselves, DollarVote  
13 directs the candidates' choices of "promises" by determining the number of total candidates  
14 for certain promises, prohibiting a candidate from being the "first promiser" on more than  
15 one DollarBill, and reserving the right to stop candidates from promising on certain  
16 combinations of DollarBills (as determined by DollarVote). The result is that DollarVote  
17 exercises substantial influence over the distribution of the contributions, allowing for the  
18 opportunity to benefit certain candidates instead of others. Under the Plan, DollarVote's  
19 discretion over the disposition of contributions establishes that DollarVote is not an "agent"  
20 of the contracting candidates. *Compare* the Plan *with* Advisory Opinion 2002-07. Thus,  
21 DollarVote does not qualify as a "commercial fundraising firm" under section  
22 110.6(b)(2)(i)(D).

