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## AGENDA ITEM

For Meeting of: 12-17-09

### MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *pch*  
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Subject: Draft AO 2009-28 (Democracy Engine Inc., PAC)

We have been asked to circulate the attached draft of the subject advisory opinion.  
Please place this draft on the agenda for December 17, 2009.

Attachment

ADVISORY OPINION 2009-28

Jonathan Zucker, Esq.  
Treasurer  
Democracy Engine, Inc., PAC  
2125 14<sup>th</sup> Street, NW #101W  
Washington, DC 20009

Dear Mr. Zucker:

We are responding to your request for an advisory opinion on behalf of the Democracy Engine, Inc., PAC (the “Committee”) concerning the application of the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to the Committee’s plan to solicit the general public for contributions earmarked to Federal candidates and to serve as a conduit for these contributions.

The Commission concludes that the Committee may solicit the general public for contributions earmarked to Federal candidates and serve as a conduit for these contributions, as proposed. The earmarked contributions will not count against the Committee’s contribution limits, and the solicitation costs paid by the Committee are not contributions to the recipient candidates. Additionally, the Committee may net the processing costs from the earmarked contributions and treat them as being paid for by the recipients.

**Background**

The facts presented in this advisory opinion are based on your letter received on November 6, 2009 and telephone conversations with Commission staff.

The Committee is a political committee, registered with the Commission as a separate segregated fund (“SSF”). Its connected organization is Democracy Engine, Inc.,

1 a Delaware corporation. The Committee was not established by, and is not financed,  
2 maintained, or controlled by, any Federal candidate or political party committee, and is  
3 not affiliated with any other Federal political committee within the meaning of the Act  
4 and Commission regulations.

5 The Committee intends to solicit individual contributions from the general public,  
6 earmarked for specific candidates for Federal office, and to act as a “conduit” or  
7 “intermediary” for these contributions under 2 U.S.C. § 441a(a)(8) and 11 C.F.R. §  
8 110.6(b)(2). The Committee intends to include more than one candidate in this proposed  
9 program.

10 The Committee will not solicit or accept any contributions for its own use under  
11 the proposed program. Instead, the Committee will receive and forward only  
12 contributions earmarked to certain candidates. The Committee will refund any  
13 contribution from a solicited individual that is not earmarked for a specific candidate,  
14 along with an explanation that only earmarked contributions will be accepted. The  
15 Committee has not yet decided which candidates to include in the program, but multiple  
16 candidates will be included, and the Committee will not steer potential contributors  
17 toward any particular candidate.

18 Each solicitation by the Committee will include all disclaimers required under 11  
19 C.F.R. § 110.11. They will inform the solicited individuals that: (1) they must be lawful  
20 individual contributors under the Act; (2) they must identify a Federal candidate as the  
21 intended recipient of their contribution, and the contribution will be treated as earmarked  
22 for that candidate; (3) any contributions not earmarked for a candidate will not be  
23 accepted by the Committee and will be refunded to the contributor; and (4) earmarked

1 contributions, when aggregated with any other contributions the individual makes to the  
2 same candidates, must comply with the contribution limits established by the Act and the  
3 Commission's regulations. *See* 2 U.S.C. §441(a)(1); 11 C.F.R. § 110.1(b). The  
4 solicitations by the Committee may take a variety of forms and may be made via a variety  
5 of media such as on the Committee's website or by email.

6       The Committee will not coordinate its solicitations of earmarked contributions  
7 with any candidate or authorized committee. The Committee intends to secure the  
8 mailing address for recipient candidates or authorized committees from the recipients'  
9 filings with the Commission, and avoid contact with candidates and authorized  
10 committees prior to the first transmission of contributions earmarked for the candidate or  
11 authorized committee.

12       All earmarked contributions must be made by personal credit card. The  
13 Committee will deposit all earmarked contributions in a Committee account that is  
14 separate from the account containing the Committee's operating funds.

15       The Committee will forward earmarked contributions to the recipient candidates  
16 within ten days of receipt. The Committee will initially send a check for the amount of  
17 contributions earmarked for each candidate to the address listed on the candidate's  
18 authorized committee's FEC Form 1, as filed with the Commission. After the first  
19 transmission, the Committee will communicate with recipient candidates and authorized  
20 committees only with respect to administrative matters necessary to continue to transmit  
21 earmarked contributions, such as the nature and method of the transmission, compliance  
22 data, updated mailing addresses, etc.

1           The Committee will pay all costs associated with its solicitation of earmarked  
2 contributions, including a proportionate share of its overhead expenses, using  
3 contributions it receives from the restricted class of Democracy Engine, Inc. The amount  
4 of contributions transmitted to each recipient candidate or authorized committee will be  
5 reduced by the full processing costs, including credit card processing fees and other  
6 expenses such as check printing and postage, incurred by the Committee for the  
7 earmarked transaction. The Committee intends to contract with a vendor who will  
8 provide all processing services for a flat percentage of each contribution. However, if the  
9 Committee is unable to do so, all costs will be allocated among the recipients in  
10 proportion to their earmarked contributions from a particular contributor. The  
11 Committee's connected organization, Democracy Engine, Inc., will not pay any costs  
12 associated with these solicitations or the administration of this program.

13           The Committee will report to the Commission and to the candidate or authorized  
14 committee all transactions related to the earmarked contributions in accordance with  
15 Commission regulations at 11 C.F.R. § 110.6(c)(1).

16       ***Questions Presented***

- 17       1. *May the Committee pay for solicitations to the general public for earmarked*  
18 *contributions to Federal candidates passed through the Committee's accounts?*  
19       2. *If the answer to question 1 is yes, then will the solicitation costs paid by the*  
20 *Committee be in-kind contributions to the candidates who receive the earmarked*  
21 *contributions?*

1

2 ***Legal Analysis and Conclusions***

3 *1. May the Committee pay for solicitations to the general public for earmarked*  
4 *contributions to Federal candidates passed through the Committee's accounts?*

5 Yes, the Committee may pay for solicitations to the general public for earmarked  
6 contributions to Federal candidates passed through the Committee's accounts, so long as  
7 the Committee pays for the solicitations with voluntary contributions it receives pursuant  
8 to the Act and Commission regulations, and does not solicit the general public for  
9 contributions to any SSF, including itself. Further, the earmarked contributions  
10 themselves will not count against the limits on the Committee's contributions to  
11 candidates because the facts indicate that the Committee will not exercise any direction  
12 or control over the choice of the recipient candidates.

13 The Act prohibits corporations from making any contributions or expenditures<sup>1</sup> in  
14 connection with a Federal election.<sup>2</sup> *See* 2 U.S.C. §441b; *see also* 11 C.F.R. § 114.2.  
15 With some exceptions, this prohibition extends to communications that expressly  
16 advocate the election or defeat of a clearly identified Federal candidate made by a  
17 corporation to anyone outside of the corporation's restricted class. *See* 2 U.S.C.  
18 §441b(b)(2)(A); 11 C.F.R. § 114.4.

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<sup>1</sup> The Supreme Court sought additional briefing and held a rehearing on September 9, 2009, in *Citizens United v. FEC*, S. Ct., No. 08-205 on whether it should overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and part of *McConnell v. FEC*, 540 U.S. 93 (2003). *Austin* upheld the prohibition on corporate independent expenditures.

<sup>2</sup> Contributions include direct or indirect payments or gifts of money or any services, or anything of value to any candidate for Federal office. *See* 2 U.S.C. §441b(b)(2); 11 C.F.R. § 114.1(a)(1).

1           The Act does not, however, impose the same restrictions on communications  
2   made by a corporation's SSF, such as the Committee. Instead, the Act allows an SSF to  
3   use voluntary contributions that have been properly made to the SSF to fund  
4   communications to the general public on any subject, including communications that  
5   expressly advocate the election or defeat of clearly identified Federal candidates, so long  
6   as the communications do not solicit contributions to any SSF, including the SSF making  
7   the communication. *See 2 U.S.C. §441b(b)(4)(A)(i); 11 C.F.R. § 114.5(i); see also*  
8   Advisory Opinion 2007-27 (ActBlue).

9           Commission regulations do not distinguish between communications by an SSF  
10   that expressly advocate the election or defeat of a clearly identified Federal candidate, on  
11   the one hand, and communications that solicit contributions to a clearly identified Federal  
12   candidate, on the other hand, so long as the SSF pays for the communications with  
13   voluntary contributions and does not solicit contributions to any SSF in the  
14   communications. *See 11 C.F.R. § 114.5(i).*

15          Further, Commission regulations specifically provide that corporate facilitation  
16   “does not include” when an SSF “collect[s] and forward[s] contributions earmarked to a  
17   candidate in accordance with 11 C.F.R. § 110.6,” and the so long as the solicitation costs  
18   are paid by the SSF with funds comprised of permissible funds received under the Act.  
19   11 C.F.R. § 114.2(f)(3)(ii); *see also* Explanation and Justification for Final Rules on  
20   Corporate and Labor Organization Activity; Express Advocacy and Coordination with  
21   Candidates, 60 FR 64260, 64265 (Dec. 14, 1995) (“Corporate/Labor Activity E&J”)  
22   (SSFs “may continue to *solicit*, collect and forward earmarked contributions to candidates  
23   under 11 C.F.R. § 110.6. The money expended by the [SSF] to solicit earmarked

1 contributions must come from permissible sources under the [Act]”) (emphasis added).

2 Neither the regulation nor the E&J limits the SSF’s ability to solicit, collect, and forward  
3 earmarked contributions only to contributions from the SSF’s restricted class.

4 All contributions made through a conduit or intermediary to a candidate are  
5 considered to be contributions from the original contributor to the candidate and must,  
6 when aggregated with other contributions to the same candidate from that contributor,  
7 comply with the contribution limits set forth in the Act and Commission regulations. *See*  
8 2 U.S.C. §441a(a)(8); 11 C.F.R. § 110.6(a). Such earmarked contributions are considered  
9 to be contributions from the original source. If the conduit exercises direction or control  
10 over the choice of the recipient candidate, such contributions also are considered to be  
11 contributions from the conduit. *See* 11 C.F.R. § 110.6(d).

12 The Commission has determined that even a situation in which a political  
13 committee engaged in a mass mailing containing “a clear suggestion that the individual  
14 receiving the communication make a contribution to a specific candidate through [the  
15 nonconnected committee]” did not constitute direction or control by the nonconnected  
16 committee. Advisory Opinion 1980-46 (National Conservative PAC); *see also* Advisory  
17 Opinion 2006-30 (ActBlue) (contributions earmarked through a website on which a  
18 nonconnected committee listed only prospective candidates whom the nonconnected  
19 committee deemed to be “serious” did not result in the nonconnected committee  
20 exercising direction or control over an individual’s choice about whether to make a  
21 contribution to a specific candidate).

22 Accordingly, the Committee may solicit the general public for contributions  
23 earmarked to Federal candidates that will be collected and forwarded by the Committee,



1 so long as the Committee pays for the solicitation costs with permissible funds received  
2 under the Act and does not solicit the general public for any contributions to itself or any  
3 other SSF.<sup>3</sup> While the contributions are considered contributions from the original  
4 contributor to the candidate, they are not contributions to or from the Committee, because  
5 the Committee will not exercise any direction or control over the choice of the recipient  
6 candidate. Similarly, here, the Committee will be providing the public with multiple  
7 candidates from whom to choose, and, thus, is not exercising any direction or control  
8 over the individual contributor's choice of candidate or timing of the contribution.<sup>4</sup>

9 *2. If the answer to question 1 is yes, then are the solicitation costs paid by the Committee*  
10 *in-kind contributions to the candidates who receive the earmarked contributions?*

11 No, the solicitation costs are not in-kind contributions to the candidates who  
12 receive the earmarked contributions. If the Committee's solicitations contain express  
13 advocacy, the solicitation costs may constitute independent expenditures. *See* 2 U.S.C. §  
14 431(17); 11 C.F.R. § 100.22.

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<sup>3</sup> Although it is not required to do so, the Committee proposes to treat the processing costs as being paid for by the recipient candidates or authorized committees by offsetting such costs from the contributions forwarded to the earmarked recipients. As suggested by the approach set forth in Advisory Opinion 1995-34 (Politechs), the full amount of each earmarked contribution is a contribution to the recipient in that amount, and should be included in the recipients' reports of contributions and, if appropriate, itemized contributions. *See* 2 U.S.C. §434(b)(2)(A) and (3)(A); 11 C.F.R. § 104.3(a)(2)(i), (3)(i), and (4)(i). The processing costs, such as credit card processing fees, check printing and postage, and other expenses incurred by the Committee for the earmarking transaction, are reportable as the operating expenditures of each respective recipient. *See* AO 1995-34. (Although AO 1995-34 involved a vendor providing contribution processing services to political committees with whom it had directly contracted, the Commission concludes the same general reporting principles would apply to a third-party conduit transmitting earmarked contributions to a recipient committee.)

Should the Committee follow this approach, the recipients will need to be informed of both the full amounts of the earmarked contribution as well as the processing costs that the Committee is offsetting. Accordingly, the Committee should provide this information as part of the "compliance data" it intends to provide in its communications with recipients concerning administrative information.

<sup>4</sup> The Commission notes that the Committee also may have to file conduit reports pursuant to 11 C.F.R. § 110.6 for these contributions.

1 In Advisory Opinion 2003-23 (WE LEAD), the Commission approved a similar  
2 proposal by WE LEAD, a nonconnected political committee, to treat all costs associated  
3 with WE LEAD's solicitation of earmarked contributions from the general public as  
4 independent expenditures so long as the solicitations were not coordinated with any  
5 Federal candidate, authorized committee of a candidate, or agent of either. *See* 11 C.F.R.  
6 §§ 109.20 and 109.21.<sup>5</sup> Although here, the Committee is a corporate-sponsored SSF, the  
7 analysis in Advisory Opinion 2003-23 was not limited to nonconnected committees, and  
8 the Commission concludes that it is equally applicable to an SSF's activities.<sup>6</sup>

9 As set forth in the background discussion above and in the Request, the  
10 Committee represents that it will not coordinate any of its solicitations of earmarked  
11 contributions with any Federal candidate or authorized committee within the meaning of  
12 2 U.S.C. §441a(a)(7)(B)(i) and 11 C.F.R. §§ 109.20 and 109.21. Accordingly, the  
13 Committee's solicitation costs would not constitute in-kind contributions to the  
14 candidates or authorized committees who receive the earmarked contributions, but may  
15 constitute independent expenditures.

16 This response constitutes an advisory opinion concerning the application of the  
17 Act and Commission regulations to the specific transaction or activity set forth in your

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<sup>5</sup> There was no indication of any potential coordination of the solicitation with a political party committee, and thus the Commission did not address any potential contribution resulting from coordination with a political party committee under 11 C.F.R. § 109.20 or 109.21.

<sup>6</sup> When the Commission promulgated 11 C.F.R. § 114.2(f)(2) and (3), the Commission noted that while an SSF "may continue to solicit, collect and forward earmarked contributions . . . ," the money expended by the SSF on these activities "will count against the [SSF's] contribution limit for the candidate(s) involved." See Explanation and Justification for 114.2(f), 60 Fed. Reg. 64260, 64265. That language is not reflected in the regulations themselves and appears to merely follow the conclusion of Advisory Opinion 1980-46 (National Conservative Political Action Committee), which the Commission subsequently superseded on this specific point in Advisory Opinion 2003-23.

1 request. *See* 2 U.S.C. §437f. The Commission emphasizes that, if there is a change in  
2 any of the facts or assumptions presented, and such facts or assumptions are material to a  
3 conclusion presented in this advisory opinion, then the requestor may not rely on that  
4 conclusion as support for its proposed activity. Any person involved in any specific  
5 transaction or activity which is indistinguishable in all its material aspects from the  
6 transaction or activity with respect to which this advisory opinion is rendered may rely on  
7 this advisory opinion. *See* 2 U.S.C. §437f(c)(1)(B). Please note the analysis or  
8 conclusions in this advisory opinion may be affected by subsequent developments in the  
9 law including, but not limited to, statutes, regulations, advisory opinions, and case law.  
10 The cited advisory opinions are available on the Commission's Web site at  
11 <http://saos.nictusa.com/saos/searchao>.

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13 On behalf of the Commission,  
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18 Steven T. Walther  
19 Chairman