

AGENDA DOCUMENT NO. 11-26



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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**AGENDA ITEM**

For Meeting of 5/20/11

May 20, 2011 **SUBMITTED LATE**

MEMORANDUM

TO: The Commission

FROM: Christopher Hughey *ch*  
Acting General Counsel

Rosemary C. Smith *ACS*  
Associate General Counsel

Amy L. Rothstein *ALR*  
Assistant General Counsel

Esther D. Heiden *EDH*  
Attorney

Subject: Draft AO 2011-06 (Democracy Engine)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for May 26, 2011.

Attachment

1 ADVISORY OPINION 2011-06

2

3 Laurence E. Gold, Esq.  
4 Trister, Ross, Schadler, and Gold PLLC  
5 1666 Connecticut Ave., NW  
6 Fifth Floor  
7 Washington, DC, 20009

**DRAFT**

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9 Dear Mr. Gold:

10 We are responding to your advisory opinion request on behalf of Democracy  
11 Engine, LLC, Democracy Engine, Inc., PAC, Mr. Jonathan Zucker, and Mr. Erik  
12 Pennebaker, concerning the application of the Federal Election Campaign Act of 1971, as  
13 amended (the “Act”), and Commission regulations, to the Vendor’s proposal to collect  
14 and forward contributions from these individuals to political committees.

15 The Commission concludes that Democracy Engine, LLC’s proposal described  
16 below is permissible, and that the convenience fees paid by Mr. Zucker and Mr.  
17 Pennebaker to Democracy Engine, LLC for its services do not constitute contributions to  
18 the recipient political committees.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on  
21 April 8, 2011 and your email received on May 20, 2011.

22 Democracy Engine, LLC (the “Vendor”) is the sole stockholder of Democracy  
23 Engine, Inc.<sup>1</sup> Democracy Engine, Inc. is the connected organization of the separate  
24 segregated fund (“SSF”), Democracy Engine Inc., PAC (the “Committee”). Mr. Zucker

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<sup>1</sup> Democracy Engine Inc. is not a party to this request.

1 and Mr. Pennebaker are United States citizens and members of the restricted class of  
2 Democracy Engine, Inc.

3 The Vendor is a for-profit limited liability company offering a web-based  
4 payment service that provides individuals (“subscribers”) with the ability to make  
5 contributions to Federal political committees in the ordinary course of the Vendor’s  
6 broader donation-processing business. Mr. Zucker and Mr. Pennebaker intend to become  
7 subscribers and to use the Vendor’s services as described below.

8 A subscriber who wishes to make a contribution using the Vendor’s web-based  
9 payment service must first go to the Vendor’s website and identify the intended recipient  
10 political committee and the amount of the contribution that the subscriber wishes to  
11 make. If the recipient political committee is not already included in the Vendor’s  
12 directory of potential recipients, the Vendor adds that recipient political committee to its  
13 directory. If the recipient political committee is an SSF, such as the Committee, then the  
14 Vendor ensures that the subscriber is a member of the restricted class of the SSF’s  
15 connected organization. The Vendor does not solicit contributions for any political  
16 committee or other entity, nor does the Vendor exercise any direction or control over any  
17 subscriber’s choice of recipient political committees.

18 If a subscriber designates a political committee as a recipient, the Vendor informs  
19 the subscriber of the contribution limits established by 11 CFR 110.1. The Vendor will  
20 not process contributions that the Vendor ascertains or believes will exceed those limits.  
21 The subscriber is required to provide information to the Vendor that the recipient political  
22 committee must maintain or report, including the subscriber’s name, mailing address,

1 employer, and occupation.<sup>2</sup> See 2 U.S.C. 431(13) and 434(b)(3)(A); 11 CFR 104.8(a).

2 The Vendor will forward this information to the recipient political committee.

3 Additionally, the subscriber is required to attest to various facts to show compliance with

4 the Act's amount limitations and source prohibitions, as well as the Vendor's

5 requirements.<sup>3</sup>

6 To use the Vendor's services to make a contribution or a donation, a subscriber  
7 must enter into a contract with the Vendor governing the terms of the transaction ("Terms  
8 of Service"). The Terms of Service will include the following provisions:

9 a. "The amount of each Contribution that you [the Subscriber] make using the  
10 [Vendor's] Services (net of all fees charged to you under this Agreement)  
11 constitutes a "contribution" to a Recipient that is a political candidate or political  
12 committee that is registered with the Federal Election Commission or a  
13 comparable state or local governmental body, or a "donation" to any other  
14 Recipient, and it will be reported as such in accordance with applicable laws,  
15 rules and regulations."

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<sup>2</sup> The Vendor's website includes the following statement: "Candidates and committees registered with the Federal Election Commission are required to use their best efforts to collect and report the name, address, employer, and occupation of all contributors. We require you to enter this information so that we can provide it to those recipients of your contributions. This helps ensure that your contribution will be accepted."

<sup>3</sup> The Vendor's website includes the following attestation language:

"I confirm that the following statements are true and accurate:

1. I am not a federal contractor.
2. I am at least eighteen years old.
3. I am either a United States citizen or a lawful permanent resident of the United States.
4. This contribution is made from my own funds, and funds are not being provided to me by another person or entity for the purpose of making this contribution.
5. If I am making this contribution with a credit or debit card, I am making this contribution with my own personal credit or debit card and not with a corporate or business credit or debit card or a card issued to another person.
6. If I am making this contribution with an electronic check, the electronic check is drawn on my personal account and not a corporate or business account or the account of another person."

1        b. “You agree to pay all fees for your use of the [Vendor’s] Services.”

2        c. “In accordance with applicable law, each Recipient may record and, if required,  
3        publicly report the Subscriber’s Contribution. Such amount also will be credited  
4        to Subscriber in calculating Subscriber’s compliance with applicable legally  
5        prescribed contribution limits.”

6        In accordance with the Terms of Service, the Vendor deducts a convenience fee  
7        from the subscriber’s payment before transmitting the remaining amount to the recipient  
8        political committee. The convenience fee is set to cover all of the fees and costs of the  
9        financial institutions involved in the credit card transaction (*i.e.* the bank issuing the  
10       credit card, the card association, the card processor, and the card network) and the  
11       Vendor’s costs, and to provide a reasonable profit to the Vendor. The Vendor, and not  
12       the recipient political committee, pays the fees and costs to those financial institutions.  
13       The Vendor indicates that it will set the convenience fee in a commercially reasonable  
14       manner in accordance with market conditions with respect to all recipients, regardless of  
15       whether the recipient is a political committee or a non-political entity, and that this  
16       amount will reflect a complete payment of the Vendor’s costs plus an amount as profit.

17        After the subscriber provides the Vendor with the required information, attests to  
18        his or her ability to make the contribution, and agrees to the Terms of Service, the Vendor  
19        accepts the subscriber’s payment by means of credit card, debit card, or electronic check.  
20        The Vendor then deposits the subscriber’s contribution, via a Vendor merchant account,  
21        into a Vendor bank account (the “Transfer Account”) that is completely segregated from  
22        the Vendor’s corporate operating funds. The Vendor will transfer the subscriber’s funds  
23        from its Transfer Account to the recipient political committee no later than ten days after

1 the subscriber authorizes the contribution to the recipient political committee. The  
2 Vendor aggregates all subscriber contributions that it has received for a given recipient  
3 since the Vendor's last transfer to that recipient political committee and subtracts the  
4 convenience fees. The Vendor then remits the remainder to the recipient political  
5 committee by either a check or an authorized clearinghouse electronic transfer. The  
6 Vendor also transmits to each recipient political committee the necessary information  
7 about each subscriber whose contribution is included in the transfer, including the  
8 subscriber's name, mailing address, employer, occupation, and date and amount of  
9 contribution.

10 The Vendor will not enter into any contractual agreement with any of the  
11 recipient political committees, except possibly a contract limited to ensuring that  
12 authorized clearinghouse electronic transfers of funds may be effectuated.

13 ***Questions Presented***

- 14 1. *Would the Vendor's services in processing subscribers' contributions to the*  
15 *Committee and other recipient political committees result in impermissible corporate*  
16 *contributions by the Vendor to those political committees?*
- 17 2. *Would a subscriber's payment to the Vendor of the convenience fee constitute a*  
18 *contribution to the Committee or any other recipient political committee?*
- 19 3. *How, if at all, should the Committee report the convenience fee to the*  
20 *Commission?*

21

1 ***Legal Analysis and Conclusions***

2 1. *Would the Vendor's services in processing subscribers' contributions to the*  
3 *Committee and other recipient political committees result in impermissible corporate*  
4 *contributions by the Vendor to those political committees?*

5 No, the Vendor's services in processing subscribers' contributions to the  
6 Committee and other recipient political committees would not result in impermissible  
7 corporate contributions by the Vendor to those political committees because the Vendor  
8 is not providing services or anything else of value to the Committee or any other recipient  
9 political committee.

10 The Act and Commission regulations prohibit corporations from making a  
11 contribution in connection with a Federal election. *See* 2 U.S.C. 441b(a); 11 CFR  
12 114.2(b)(1). A "contribution" includes "any direct or indirect payment, distribution, loan,  
13 advance, deposit, or gift of money, or any services, or anything of value . . . to any  
14 candidate, campaign committee, or political party or organization, in connection with any  
15 [Federal] election . . ." 2 U.S.C. 441b(b)(2); 11 CFR 114.2(b)(1); *see also* 2 U.S.C.  
16 431(8)(A)(i); 11 CFR 100.52(a). "Anything of value" includes all in-kind contributions,  
17 including the provision of goods or services without charge or at a charge that is less than  
18 the usual and normal charge. *See* 11 CFR 100.52(d)(1). "Usual and normal charge" is  
19 defined as the price of goods in the market from which they ordinarily would have been  
20 purchased at the time of the contribution, or the commercially reasonable rate prevailing  
21 at the time the services were rendered. *See* 11 CFR 100.52(d)(2).

22 In determining whether a company that processes contributions to a political  
23 committee is itself making a contribution to that political committee, the Commission has

1 previously distinguished between companies that provide services to political committees  
2 and companies that provide services to subscribers. *See* Advisory Opinions 2007-04  
3 (Atlatl) and 2006-08 (Brooks). In Advisory Opinion 2006-08 (Brooks), a company  
4 wished to process contributions from its subscribers to political committees, among other  
5 services. The company proposed to accept funds from its subscribers, which it would  
6 deposit into a merchant account and later disburse to candidates and political committees  
7 at the direction of its subscribers. The company did not anticipate entering into any  
8 contractual relationship with the recipient political committees. The Commission  
9 determined that the company would be providing services to its individual subscribers,  
10 and likened these services to companies that provide “delivery services, bill-paying  
11 services, or check writing services.”

12 In Advisory Opinion 2007-04 (Atlatl), by contrast, a company wishing to process  
13 online credit card contributions to political committees proposed a system under which an  
14 individual contributor would go to a political committee’s website and then click on a  
15 link that would take the individual to the company’s website, where the individual could  
16 then make an online contribution to the political committee. The company proposed to  
17 enter into agreements with the recipient political committees and to negotiate with the  
18 political committees to determine the amount of a convenience fee to be paid to it by  
19 individual contributors. The Commission concluded that this situation differed materially  
20 from the one presented in Advisory Opinion 2006-08 (Brooks) because, in Advisory  
21 Opinion 2006-08 (Brooks), the services provided by the vendor were “at the request and  
22 for the benefit of the contributors, not of the recipient political committees.”

1           The situation presented in the instant advisory opinion is materially  
2 indistinguishable from the one considered by the Commission in Advisory Opinion  
3 2006-08 (Brooks). The Vendor here does not propose to enter into any contractual  
4 relationship with any of the recipient political committees, except possibly for the limited  
5 purpose of effectuating authorized clearinghouse transfers. Instead, the Vendor plans to  
6 enter into agreements with each of its subscribers and to process contributions at the  
7 request of its subscribers from the Vendor's own website. The Vendor will transfer funds  
8 and information about a subscriber to a recipient political committee only at the request  
9 of the subscriber, and not at the request of a political committee. Because the Vendor  
10 will process contributions at the request and for the benefit of its subscribers, and not the  
11 recipient political committees, the Vendor's services are akin to delivery services, bill-  
12 paying services, or check writing services for its subscribers, just as in Advisory Opinion  
13 2006-08 (Brooks).<sup>4</sup> Therefore, because the Vendor is providing services only to the  
14 subscribers, and not to any political committee, the Vendor's proposal would not result in  
15 impermissible contributions by the Vendor to any political committee.<sup>5</sup>  
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<sup>4</sup> The Commission need not determine whether the Vendor would qualify as a "commercial vendor" under 11 CFR 114.2(f)(1) because the Vendor is not providing services to any candidate or political committee. *See also* 11 CFR 116.1(c).

<sup>5</sup> Because the Committee's connected organization is a subsidiary of the Vendor, the Vendor and the Committee are *per se* affiliated under 11 CFR 100.5(g)(3). *See also* Advisory Opinion 2006-12 (IAM). Corporations may pay the administrative costs of SSFs established by affiliated organizations without making a contribution. *See* 11 CFR 114.5(b); *see also* Advisory Opinion 2006-12 (IAM). Therefore, even if the Vendor were providing something of value to the Committee in processing contributions to the Committee, no corporate contribution would result.

1 2. *Would a subscriber's payment to the Vendor of the convenience fee constitute a*  
2 *contribution to the Committee or any other recipient political committee?*

3 No, a subscriber's payment to the Vendor of the convenience fee would not  
4 constitute a contribution to the Committee or any other recipient political committee.

5 As discussed in the answer to Question 1, above, the Commission has  
6 distinguished between situations in which a company provides services to recipient  
7 political committees, and situations in which a company provides services to its  
8 subscribers. In Advisory Opinion 2007-04 (Atlatl), the Commission concluded that the  
9 amount of contributions to political committees must include fees paid by contributors to  
10 the company that processed the contributions, where the contractual relationship was  
11 between the company and the recipient political committee. In contrast, in Advisory  
12 Opinion 2006-08 (Brooks), the Commission concluded that the amount of the  
13 contributions would not include processing fees paid by contributors. In so concluding,  
14 the Commission noted that the services provided by the vendor in Advisory Opinion  
15 2006-08 (Brooks) were "at the request and for the benefit of the contributors, not of the  
16 recipient political committees," and thus did not "relieve the recipient political  
17 committees of a financial burden they would otherwise have had to pay for themselves."<sup>6</sup>  
18 Advisory Opinion 2007-04 (Atlatl). For this reason, the services provided to contributors  
19 were not considered to be contributions to the recipient political committees.

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<sup>6</sup> Compare, *e.g.*, Advisory Opinions 1999-08 (Specter), 1995-34 (Politechs), 1995-09 (NewtWatch), 1994-33 (VITEL), and 1991-01 (Deloitte & Touche PAC), in which the Commission concluded that the amount of credit card contributions includes the entire amount authorized by a contributor, even if the recipient political committee receives a smaller amount, because the company processing the contribution has deducted processing fees.

1           As previously noted, like the company in Advisory Opinion 2006-08 (Brooks),  
2 the Vendor here is offering services at the request and for the benefit of its subscribers,  
3 and not the recipient political committees. Therefore, because the payment of the  
4 convenience fee will not relieve the Committee or any other recipient political committee  
5 of a financial burden that it would otherwise have had to pay for itself, the payment of the  
6 convenience fee by the subscribers will not constitute a contribution by the subscribers to  
7 the Committee or any other recipient political committee.

8       3.     *How, if at all, should the Committee report the convenience fee to the*  
9 *Commission?*

10           As explained in the answer to Question 2, above, the subscriber's payment of the  
11 convenience fee will not constitute a contribution to the Committee. Therefore, because  
12 the subscriber's payment of the convenience fee is not a contribution or any other form of  
13 receipt by the Committee, the Committee need not report the convenience fee to the  
14 Commission. 2 U.S.C. 434(a)(1) and (b)(2); 11 CFR 104.3(a).

15           The Commission expresses no opinion regarding the application of State law to  
16 the proposed activities because those questions are not within the Commission's  
17 jurisdiction.

18           This response constitutes an advisory opinion concerning the application of the  
19 Act and Commission regulations to the specific transaction or activity set forth in your  
20 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
21 of the facts or assumptions presented, and such facts or assumptions are material to a  
22 conclusion presented in this advisory opinion, then the requestor may not rely on that  
23 conclusion as support for its proposed activity. Any person involved in any specific

1 transaction or activity which is indistinguishable in all its material aspects from the  
2 transaction or activity with respect to which this advisory opinion is rendered may rely on  
3 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or  
4 conclusions in this advisory opinion may be affected by subsequent developments in the  
5 law including, but not limited to, statutes, regulations, advisory opinions, and case law.  
6 The cited advisory opinions are available on the Commission's website, [www.fec.gov](http://www.fec.gov), or  
7 directly from the Commission's Advisory Opinion searchable database at  
8 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Cynthia L. Bauerly  
Chair