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Washington, DC 20463

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AGENDA ITEM

July 26, 2012

For Meeting of 8-2-12

MEMORANDUM

TO: The Commission

FROM: Anthony Herman *AH*
General Counsel

Kevin Deeley *KD*
Acting Associate General Counsel

Amy Rothstein *AR by KD*
Assistant General Counsel

Theodore Lutz *TL*
Attorney

Subject: AO 2012-22 (skimmerhat)

Attached are proposed drafts of the subject advisory opinion. We have been asked to have these drafts placed on the Open Session agenda for August 2, 2012.

Attachment

1 ADVISORY OPINION 2012-22

2

3 Mr. Andrew Davis

4 skimmerhat

5 281 Summer Drive NE

6 Atlanta, GA 30328

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DRAFT A

9 Dear Mr. Davis:

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We are responding to your advisory opinion request on behalf of skimmerhat, concerning the application of the Federal Election Campaign Act (the “Act”) and Commission regulations to skimmerhat’s planned web-based contribution platform. The Commission concludes that the proposed platform would be permissible under the Act and Commission regulations and that skimmerhat may grant candidates and their authorized committees limited access to manage their profiles on the platform if they compensate skimmerhat at the usual and normal charge for that service.

Background

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The facts presented in this advisory opinion are based on your letter received on June 20, 2012.

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Skimmerhat is a for-profit corporation registered in the State of Delaware.¹ Skimmerhat proposes to establish a web-based platform – skimmerhat.com (the “site”) – that will “provid[e] an easy way for users to find candidates with whom they have shared values” and “engage small donors who previously have been sitting ‘on the sidelines’ in the electoral process.”

¹ Skimmerhat is owned and operated by three individuals, none of whom is a Federal candidate.

1 Visitors to and registered members of the site (“users”) will be able to use the
2 skimmerhat platform to search for Federal candidates using any of three primary search
3 criteria: geographic location, ideological similarities, or single-issue positions.

4 Utilizing the geographic location feature, users will be presented with a map of
5 the United States and will be able to search for Federal candidates by location. As a user
6 pinpoints the location of a race in which he or she is interested, candidates will be listed,
7 along with their political party, as either “incumbents” or “challengers.” If available,
8 photographs of candidates will also be displayed. Also listed at this level is his or her
9 “popularity” among members of the site.²

10 Users may also search for candidates with whom they are ideologically similar by
11 taking a “candidate matching survey,” which poses a series of “yes/no” ideological
12 questions to users. These answers are then compared to the positions of all Federal
13 candidates.³ A list of candidates is then displayed on the results page, ranked from
14 highest to lowest, based upon the matching percentage with the user.

15 Finally, users can search for candidates based on their position on a single issue.
16 Using skimmerhat’s list of political issues, a user can find any candidate that matches the
17 user’s position on an individual issue.

18 Once matched with Federal candidates, users will be directed to a “candidate
19 page” that is hosted on the site. Every Federal candidate will have his or her own

² An up/down voting system on which to indicate popularity with candidates will be available to registered members of the site.

³ skimmerhat will use publicly available information to discern the position of candidates on various issues. Where such information is not available, or the candidate’s position is too nuanced to accurately fit within a “yes/no” framework, the question will be left as “no opinion” to avoid misrepresentation of a candidate’s position. The binary nature of the survey is designed to simplify the matching process. In the future, though, skimmerhat intends to expand upon this matching feature to allow for more nuanced answers.

1 candidate page, which will include a photo, biographical information, campaign finance
2 information, recent updates, and issue positions. Skimmerhat staff will curate candidate
3 data using information available from the candidate’s official campaign website, public
4 records (such as voting records), or other educational sources. Campaign finance data
5 and other candidate information may be curated and displayed through the use of
6 application programming interfaces (“API”)⁴ by trusted third-party resources.

7 Each candidate page will also feature an electronic contribution form, which
8 provides users with a way to make contributions to the Federal candidates with whom
9 they are matched. Contributions will be limited to \$2,500. Users will also be notified by
10 language on the contribution form that contributions in aggregate amounts in excess of
11 \$2,500 per candidate, per election cycle, are not acceptable. The information requested
12 on the contribution form will include the contributor’s name, mailing address, occupation
13 and name of employer. This information will be required for each contribution,
14 regardless of amount.⁵ If any one of these fields is left blank, the contribution will not be
15 accepted.⁶ Additionally, contributor information will be securely stored in skimmerhat’s
16 electronic logs for reporting and audit purposes.

⁴ APIs are ways to share and display data across online platforms. They can take many different forms, depending on the context and functionality of their use.

⁵ The donation form will also include the following disclaimer: “Federal law requires political committees to report the name, mailing address, occupation and name of employer for each individual whose contributions aggregate in excess of \$200 in a calendar year.”

⁶ Before the donation is accepted, each user will be required to manually select in the affirmative a check box for the following attestation:

By checking this box, I confirm that the following statements are true and accurate:

1. This contribution is made from my own funds and not those of another.

1 Skimmerhat will assess an eight percent “processing and convenience” fee per
2 transaction, which will cover credit card processing and provide a profit to the company.
3 This eight percent “convenience fee” will be applied, in a separate field, in addition to the
4 contribution amount. This convenience fee will be assessed in a manner similar to that of
5 a sales tax at the point of purchase for commercial goods. The total transaction amount
6 will be the contribution plus the eight percent fee. By assessing the convenience fee in
7 this manner, skimmerhat will pass the user’s full intended contribution amount to the
8 recipient candidate, while charging the user the fee.

9 Once the user accepts the transaction, contributions will be routed to
10 skimmerhat’s merchant account, and the eight percent fee will be directed to the
11 company’s separate business account. No funds will be commingled in skimmerhat’s
12 corporate treasury account. All disbursements of funds will be taken directly from
13 skimmerhat’s merchant account, and not from the company’s corporate treasury account.
14 Contributions will be forwarded to candidate campaigns. Along with the forwarded
15 contributions, a transmittal report will be sent to the recipient candidate committee to
16 facilitate the candidate committee’s reporting of contributions. Should a candidate
17 committee reject or refuse contributions, skimmerhat will make refunds to the original

2. This contribution is not from the general treasury funds of a corporation, labor organization or national bank.

3. I am not a Federal government contractor.

4. I am not a foreign national who lacks permanent resident status in the United States.

5. I am over the age of 18, and if not, I am a minor making this contribution of my own volition, and not at the request or direction of another individual.

If this box is not checked, the contribution will not be accepted. In addition, skimmerhat plans to make an effort to screen, and reject, all contributions from foreign nationals, government contractors, national banks, and corporations organized by authority of any law of Congress.

1 contributor and disable the contribution form on that candidate's page to prevent further
2 contributions.

3 Skimmerhat will provide candidates with the option of assuming limited
4 managerial control over basic biographical information on their candidate pages, as well
5 as setting positions on issues. Before gaining access to their candidate pages, candidates
6 or persons associated their authorized committees must first be approved by skimmerhat
7 to ensure they are "legitimate representatives of the campaign." Candidates and their
8 authorized committees must also agree to Terms of Service,⁷ which explicitly prohibit the
9 use of the skimmerhat platform to conduct fundraising outside of skimmerhat or "for any
10 activity that can be reasonably deemed outside of that which enhances the quality and
11 accuracy of candidate information available to users." Should skimmerhat discover any
12 activity or contribution that violates its Terms of Service, candidates will be warned, and
13 the activity or content removed from the website. skimmerhat will retain the right to
14 reassume control over candidate pages should it deem a permission change necessary.

15 ***Questions Presented***

- 16 1. *Under the proposed plan, can skimmerhat receive earmarked contributions from*
17 *individuals and forward those contributions to Federal candidates without*
18 *committing an impermissible action under the Act?*
- 19 2. *Would skimmerhat's processing and convenience fee of eight percent count*
20 *towards a user's individual contribution limit to a candidate?*
- 21 3. *Can skimmerhat provide factual information about candidates to its users?*

⁷ Skimmerhat has not yet drafted the "Terms of Service" referred to here. It plans to finalize them before launching its site.

1 4. *Under the proposed plan, could candidates be granted limited access to manage*
2 *their profiles without causing skimmerhat to provide a material service to the*
3 *candidate, creating an impermissible action under the Act?*

4 5. *Can skimmerhat use Federal Election Commission data pertaining to candidate*
5 *finance information that is either compiled directly by skimmerhat staff, or*
6 *curated through APIs?*

7 6. *Under the proposed plan, is skimmerhat required to file any reports with the*
8 *Federal Election Commission?*

9 ***Legal Analysis and Conclusions***

10 1. *Under the proposed plan, can skimmerhat receive earmarked contributions from*
11 *individuals and forward those contributions to Federal candidates without*
12 *committing an impermissible action under the Act?*

13 Yes, skimmerhat may receive earmarked contributions from individuals and
14 forward those contributions to Federal candidates without engaging in an impermissible
15 action under the Act.

16 The Act and Commission regulations prohibit corporations from making a
17 contribution in connection with a Federal election. *See* 2 U.S.C. 441b(a); 11 CFR
18 114.2(b)(1). A “contribution” includes any “direct or indirect payment, distribution, loan,
19 advance, deposit, or gift of money, or any services, or anything of value . . . to any
20 candidate, campaign committee, or political party or organization, in connection with any
21 [Federal] election.” 2 U.S.C. 441b(b)(2); 11 CFR 114.2(b)(1); *see also* 2 U.S.C.
22 431(8)(A)(i); 11 CFR 100.52(a). “Anything of value” includes in-kind contributions,

1 such as the provision of goods or services without charge or at a charge that is less than
2 the usual and normal charge. *See* 11 CFR 100.52(d)(1). “Usual and normal charge” is
3 defined as the price of goods in the market from which they ordinarily would have been
4 purchased at the time of the contribution, or the commercially reasonable rate prevailing
5 at the time the services were rendered. *See* 11 CFR 100.52(d)(2).

6 Skimmerhat proposes to transmit contributions to political committees without
7 receiving payment from political committees. The Commission has previously
8 concluded that companies that process contributions to political committees as a service
9 to the political committees must be compensated for those services to avoid making in-
10 kind contributions. *See* Advisory Opinion 2007-04 (Atlatl). Companies that process
11 contributions as a service to contributors, however, do not need to be compensated for
12 these services by the recipient political committees because the companies are not
13 providing any services or anything of value to the recipient political committees. *See,*
14 *e.g.,* Advisory Opinion 2011-19 (GivingSphere).

15 Here, skimmerhat will provide a commercial service to its users when it transmits
16 their contributions to candidates. As an initial matter, skimmerhat proposes to provide its
17 services to its users on a strictly nonpartisan, issue-neutral basis. skimmerhat will operate
18 exclusively on a commercial basis, and the transaction fee that it will charge will cover its
19 credit card processing costs and provide a profit to the company.

20 The commercial service, further, will be provided to individual contributors, not
21 candidates. Skimmerhat proposes to “provide services to contributors that [extend] well
22 beyond the mere processing of contributions.” Advisory Opinion 2007-04 (Atlatl).

1 Through its platform, skimmerhat's users will be able to search for and identify recipient
2 candidates by geographic location, ideological similarities, and issue positions. Users
3 will make contributions to those candidates from skimmerhat's website, rather than from
4 the candidates' own websites, and otherwise irrespective of candidate involvement with
5 skimmerhat's candidate pages. And, further, upon agreeing to skimmerhat's terms of
6 service, skimmerhat will transmit users' funds only at the request of its users, not
7 pursuant to negotiated agreements with political committees. *Compare* Advisory
8 Opinion 2011-19 (GivingSphere) (hosting a database and website through which
9 customers identify recipients and transmit funds) *with* Advisory Opinion 2007-04 (Atlal)
10 (proposing only to process online credit card contributions initiated on political
11 committees' websites). Therefore, skimmerhat may transmit its users' contributions to
12 candidates without its services constituting a prohibited in-kind contribution to those
13 candidates.

14 Skimmerhat's proposed service closely resembles the services approved by the
15 Commission in Advisory Opinion 2011-19 (GivingSphere). In that advisory opinion, as
16 here, a corporation proposed to develop a web-based platform through which its
17 customers could identify political committees and transfer contributions to political
18 committees. *Id.* Because, as discussed above, skimmerhat will provide services to its
19 customers and not political committees, skimmerhat's proposal is analogous to widely
20 available delivery services, such as United Parcel Service, which a contributor may use to

1 deliver a contribution, or an electronic bill-pay service, such as those provided by banks.⁸

2 *See also* Advisory Opinion 2011-06 (Democracy Engine). Thus, as further explained in
3 the response to Question 6 below, skimmerhat would also not be operating as a conduit or
4 intermediary for contributions. *See* 2 U.S.C. 441a(a)(8); 11 CFR 110.6(b)(2)(ii).

5 Accordingly, skimmerhat may undertake its proposal without engaging in an
6 impermissible action under the Act and Commission regulations.

7 2. *Would skimmerhat's processing and convenience fee of eight percent count*
8 *towards a user's individual contribution limit to a candidate?*

9 No, skimmerhat's processing and convenience fee of eight percent will not count
10 towards a user's individual contribution limits to a candidate.

11 As discussed in the answer to Question 1, above, the Commission has
12 distinguished between situations in which a company provides services to recipient
13 political committees, and situations in which a company provides services to its
14 customers. In Advisory Opinion 2007-04 (Atlatl), the contractual relationship was
15 between the company that processed the contributions and the recipient political
16 committee. The Commission concluded that the amount of contributions to political
17 committees must include fees paid by contributors to the company. In contrast, in
18 Advisory Opinion 2011-06 (Democracy Engine), the Commission concluded that the
19 amount of the contributions would not include processing fees paid by contributors,
20 because the services provided by the vendor were "at the request and for the benefit of

⁸ Consistent with this analogy, skimmerhat makes clear that, if a candidate or committee refuses to accept a contribution, it will return a contributor's funds and it will prevent candidates from using the skimmerhat platform to raise contributions outside of skimmerhat.

1 the contributors, not of the recipient political committees.” Thus, fees paid for those
2 services did not “relieve the recipient political committees of a financial burden they
3 would otherwise have had to pay for themselves,” and were not contributions to the
4 recipient political committees. Advisory Opinion 2011-06 (Democracy Engine).

5 Similarly, here, skimmerhat will provide its services at the request and for the
6 benefit of its customers, and not the recipient political committees. Therefore, because
7 payment of the convenience fee will not relieve any recipient political committee of a
8 financial burden that it would otherwise have had to pay for itself, the payment of the
9 convenience fee by the subscribers will not constitute a contribution by the subscribers to
10 any recipient political committee.

11 3. *Can skimmerhat provide factual information about candidates to its users?*

12 Yes, skimmerhat may provide factual information about candidates to its users.

13 Skimmerhat’s business model includes providing its customers with tools that
14 they can use to gain information about and to evaluate potential recipient candidates. To
15 this end, skimmerhat proposes to enable users to identify candidates by geographic
16 location, through a candidate matching survey, and by their positions on issues. A
17 candidate page will include a photograph, biographical information, campaign finance
18 information, recent updates, issue positions, and a donation page. Skimmerhat will
19 initially develop the pages using information from candidates’ websites, public records,
20 and through the use of APIs. Skimmerhat intends to generate page content on a
21 nonpartisan, issue-neutral basis and has a vested commercial interest in seeking
22 participation of users from all political parties and ideological backgrounds.

1 The Act and Commission regulations do not address whether a commercial entity
2 may provide to its customers in the regular course of business the type of information that
3 skimmerhat proposes to provide to its customers. The Commission has already
4 concluded, however, that skimmerhat may forward contributions to candidates as a
5 service to its customers, *see* Question 1, and the information to be provided customers
6 will supplement that service. Skimmerhat's proposal is similar to the one considered by
7 the Commission in Advisory Opinion 2011-19 (GivingSphere), in which a corporation
8 wished to provide basic factual information about candidates to its customers for their use
9 in determining to whom to make contributions through the corporation's web platform.
10 The Commission approved the proposal because the provision of factual information to
11 customers appeared to be a corollary of creating a web platform through which users
12 could identify political committees and transmit contributions. Advisory Opinion
13 2011-19 (GivingSphere).

14 Accordingly, skimmerhat may provide factual information about Federal
15 candidates to its users as proposed.

16 4. *Under the proposed plan, could candidates be granted limited access to manage*
17 *their profiles without causing skimmerhat to provide a material service to the*
18 *candidate, creating an impermissible action under the Act?*

19 Yes, candidates could be granted limited access to manage their profiles so long
20 as they compensate skimmerhat at the usual and normal charge for that service.

21 The Act and Commission regulations prohibit corporations from making a
22 contribution in connection with a Federal election. *See* 2 U.S.C. 441b(a); 11 CFR

1 114.2(b)(1). The prohibition on corporate contributions extends to “*any* services, or
2 *anything* of value.” 2 U.S.C. 441b(b)(2) (emphasis added); *see also* Advisory Opinion
3 2010-21 (ReCellular). The Commission has on multiple occasions reaffirmed the
4 distinction between companies that provide services to political committees and those
5 that provide services to their users. When a company provides a service to a political
6 committee, the company must be compensated for that service to avoid making an in-
7 kind contribution. Advisory Opinion 2011-19 (GivingSphere) (internal citations
8 omitted).

9 As discussed above, skimmerhat’s web-based contribution platform is provided
10 exclusively as a service to its users; skimmerhat does not “seek to . . . provide a service
11 to[] Federal candidates or candidate committees.” Indeed, it is that aspect of
12 skimmerhat’s proposal which is critical to the Commission’s determination that the
13 processing and convenience fee of eight percent will not count towards a user’s
14 individual contribution limits to a candidate. *See* Question 2.

15 Skimmerhat’s proposal to allow candidates “the option of assuming limited
16 managerial control over [their candidate pages],” however, would result in skimmerhat
17 providing a service to Federal candidates. Thus, skimmerhat would need to be paid for
18 the usual and normal charge of that service to avoid the making of an in-kind
19 contribution. *See* Advisory Opinion 2010-21 (ReCellular) (concluding that recipient
20 political committees must reimburse a corporation for the corporation’s cost of emailing
21 the committees contributor data unless “the cost is borne by the consumers”).

1 5. *Can skimmerhat use Federal Election Commission data pertaining to candidate*
2 *finance information that is either compiled directly by skimmerhat staff, or*
3 *curated through APIs?*

4 Yes, skimmerhat may use Commission data pertaining to candidate finance
5 information that is either compiled directly by skimmerhat staff or curated through APIs.

6 Political committees must file certain statements, notices, and reports with the
7 Commission, which the Commission makes public. 2 U.S.C. 434, 438(a)(4); *see also* 11
8 CFR Part 104. The Act provides that “any information copied from such reports or
9 statements may not be sold or used by any person for the purpose of soliciting
10 contributions or for commercial purposes, other than using the name and address of any
11 political committee to solicit contributions from such committee.” 2 U.S.C. 438(a)(4);
12 *see also* 11 CFR 104.15(a).

13 The prohibition on the use of information in Commission filings serves to prevent
14 information about individual contributors from being sold or used for commercial
15 purposes.⁹ *See, e.g.,* Advisory Opinion 2004-24 (NGP Software); Advisory Opinion
16 1983-44 (Cass Communications); Advisory Opinion 1981-38 (Campac Publications);
17 Advisory Opinion 1980-101 (Weinberger). The prohibition is a “broad prophylactic
18 measure intended to protect the privacy of the contributors about whom information is
19 disclosed in FEC public records.” Advisory Opinion 2003-24 (NCTFK). The

⁹ The legislative history of the 1979 Amendments to the Act indicates that Congress intended the prohibition on the copying and use of names and addresses to protect individual contributors. H.R. Rep. No. 422 at 23 (1979). Congress was concerned that the Act’s reporting requirements would “open up the citizens who are generous and public spirited enough to support our political activities to all kinds of harassment.” 117 Cong. Rec. 30057 (1971) (statement of Sen. Bellmon). Senator Bellmon stated that the amendment prohibiting the use of contributor information was intended to “protect the privacy of the generally very public-spirited citizens who make a contribution to a political campaign or a political party.” *Id.*

1 Commission has allowed the sale or use of the name and address of political committees
2 for commercial purposes. *See, e.g.*, Advisory Opinion 2004-24 (NGP Software);
3 Advisory Opinion 1989-19 (Johnson); Advisory Opinion 1980-101 (Weinberger). For
4 example, in Advisory Opinion 1980-101 (Weinberger), the Commission approved the
5 publication and sale of a “directory of comprehensive information concerning [political
6 committees]” so long as the directory did not “identify individuals who made
7 contributions to the [political committees.]” *See also* Advisory Opinion 1989-19
8 (Johnson) (approving a proposal to sell portions of political committee reports that “did
9 not contain the names of individual contributors”).

10 Skimmerhat proposes to provide its customers with factual information about
11 candidates, including campaign finance data obtained from reports filed with the
12 Commission, on its candidate pages. Skimmerhat represents that it will use only
13 campaign finance data regarding candidate fundraising totals and will not use information
14 regarding individual contributors.

15 Accordingly, because the information that skimmerhat seeks to use concerns
16 political committees, rather than individual contributors, skimmerhat may use
17 Commission data pertaining to candidate finance information that is either compiled
18 directly by skimmerhat staff or curated through APIs.

19 6. *Under the proposed plan, is skimmerhat required to file any reports with the*
20 *Federal Election Commission?*

21 No, under the proposed plan, skimmerhat will not be required to file any reports
22 with the Commission.

1 The Act and Commission regulations require certain persons to file reports with
2 the Commission. For example, a “treasurer of a political committee shall file reports of
3 receipts and disbursements.” *See* 2 U.S.C. 434(a)(1); 11 CFR 104.1. Persons who spend
4 above threshold amounts on independent expenditures or electioneering communications
5 must file reports with the Commission. *See* 2 U.S.C. 434(c), (f); 11 CFR 104.20, 109.10.

6 Based on the facts set forth in the request, skimmerhat will be a commercial
7 service provider, not a political committee, and therefore will not be subject to the
8 reporting requirements for political committees. *See* 2 U.S.C. 434(a)(1); 11 CFR 104.1.
9 Skimmerhat also will not engage in express advocacy. Thus, it will not be subject to the
10 reporting requirements for persons making independent expenditures. *See* 2 U.S.C.
11 431(17) (“The term ‘independent expenditure’ means an expenditure by a person . . .
12 expressly advocating the election or defeat of a clearly identified candidate . . .”); *see*
13 *also* 11 CFR 100.16. Moreover, given that all relevant communications will take place
14 on the Internet, skimmerhat’s proposal will not implicate the reporting requirements for
15 persons making electioneering communications. *See* 2 U.S.C. 434(f)(3)(A)(i) (“The term
16 ‘electioneering communications’ means any broadcast, cable, or satellite communications
17 . . .”); *see also* 11 CFR 100.29.

18 The Act and Commission regulations also require intermediaries or conduits of
19 earmarked contributions to report the original source of such a contribution and the
20 recipient candidate or authorized committee. 2 U.S.C. 441a(a)(8); 11 CFR 110.6(c). The
21 provisions addressing earmarked contributions prevent the circumvention of contribution
22 limits [and prohibitions] by ensuring that “contributions to candidates count toward

1 FECA contribution limits . . . regardless of whether contributors give contributions
2 directly to candidates or whether contributors earmark, or otherwise direct, the
3 contributions to candidates through a conduit or intermediary.” Advisory Opinion 2006-
4 30 (ActBlue); *see also* Federal Election Commission v. National Republican Senatorial
5 Committee, 761 F.Supp. 813, 819-20 (D.D.C. 1991) rev'd on other grounds, 966 F.2d
6 1471 (D.C. Cir. 1992). The contributions made through the skimmerhat platform are not
7 contributions to an intermediary and earmarked for a candidate or authorized committee;
8 they are direct contributions to the candidate or authorized committee made via a
9 commercial processing service. In past Advisory Opinions, the Commission has
10 concluded that certain electronic transactional services that assist a contributor in making
11 a contribution do not run afoul of the prohibition on corporations acting as a conduit or
12 intermediary for earmarked contributions because certain electronic transactional services
13 are so essential to the flow of modern commerce that they are akin to “delivery services,
14 bill-paying services, or check writing services.” Advisory Opinion 2011-06 (Democracy
15 Engine). For that reason, the Commission has not required commercial processing agents
16 to file reports as an intermediary or conduit of earmarked contributions. *See e.g.*,
17 Advisory Opinion 2012-17 (Red Blue T); Advisory Opinion 2012-09 (Points for
18 Politics); Advisory Opinion 2011-19 (Giving Sphere); Advisory Opinion 2011-06
19 (Democracy Engine).

20 Thus, skimmerhat’s proposal would not subject it to any reporting requirements
21 under the Act or Commission regulations. However, under the proposal skimmerhat
22 would receive a contribution for an authorized political committee, it would be required

1 to forward the contribution within 10 days of it being made. 11 CFR 102.8(a).

2 Moreover, if the contribution is in excess of \$50, skimmerhat must forward certain

3 identifying information to the recipient committee. *Id.*

4 This response constitutes an advisory opinion concerning the application of the
5 Act and Commission regulations to the specific transaction or activity set forth in your
6 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
7 of the facts or assumptions presented, and such facts or assumptions are material to a
8 conclusion presented in this advisory opinion, then the requestor may not rely on that
9 conclusion as support for its proposed activity. Any person involved in any specific
10 transaction or activity which is indistinguishable in all its material aspects from the
11 transaction or activity with respect to which this advisory opinion is rendered may rely on
12 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
13 conclusions in this advisory opinion may be affected by subsequent developments in the
14 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
15 The cited advisory opinions are available on the Commission's website, www.fec.gov, or
16 directly from the Commission's Advisory Opinion searchable database at
17 <http://www.fec.gov/searchao>.

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On behalf of the Commission,

Caroline Hunter
Chair

1 ADVISORY OPINION 2012-22

2
3 Mr. Andrew Davis
4 skimmerhat
5 281 Summer Drive NE
6 Atlanta, GA 30328

DRAFT B

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9 Dear Mr. Davis:

10
11 We are responding to your advisory opinion request on behalf of skimmerhat,
12 concerning the application of the Federal Election Campaign Act (the “Act”) and
13 Commission regulations to skimmerhat’s planned web-based contribution platform. The
14 Commission concludes that the proposed platform would be permissible under the Act
15 and Commission regulations.

16 ***Background***

17 The facts presented in this advisory opinion are based on your letter received on
18 June 20, 2012.

19 Skimmerhat is a for-profit corporation registered in the State of Delaware.¹
20 Skimmerhat proposes to establish a web-based platform – skimmerhat.com (the “site”) –
21 that will “provid[e] an easy way for users to find candidates with whom they have shared
22 values” and “engage small donors who previously have been sitting ‘on the sidelines’ in
23 the electoral process.”

24 Visitors to and registered members of the site (“users”) will be able to use the
25 skimmerhat platform to search for Federal candidates using any of three primary search
26 criteria: geographic location, ideological similarities, or single-issue positions.

¹ Skimmerhat is owned and operated by three individuals, none of whom is a Federal candidate.

1 Utilizing the geographic location feature, users will be presented with a map of
2 the United States and will be able to search for Federal candidates by location. As a user
3 pinpoints the location of a race in which he or she is interested, candidates will be listed,
4 along with their political party, as either “incumbents” or “challengers.” If available,
5 photographs of candidates will also be displayed. Also listed at this level is his or her
6 “popularity” among members of the site.²

7 Users may also search for candidates with whom they are ideologically similar by
8 taking a “candidate matching survey,” which poses a series of “yes/no” ideological
9 questions to users. These answers are then compared to the positions of all Federal
10 candidates.³ A list of candidates is then displayed on the results page, ranked from
11 highest to lowest, based upon the matching percentage with the user.

12 Finally, users can search for candidates based on their position on a single issue.
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14 user’s position on an individual issue.

15 Once matched with Federal candidates, users will be directed to a “candidate
16 page” that is hosted on the site. Every Federal candidate will have his or her own
17 candidate page, which will include a photo, biographical information, campaign finance
18 information, recent updates, and issue positions. Skimmerhat staff will curate candidate
19 data using information available from the candidate’s official campaign website, public

² An up/down voting system on which to indicate popularity with candidates will be available to registered members of the site.

³ skimmerhat will use publicly available information to discern the position of candidates on various issues. Where such information is not available, or the candidate’s position is too nuanced to accurately fit within a “yes/no” framework, the question will be left as “no opinion” to avoid misrepresentation of a candidate’s position. The binary nature of the survey is designed to simplify the matching process. In the future, though, skimmerhat intends to expand upon this matching feature to allow for more nuanced answers.

1 records (such as voting records), or other educational sources. Campaign finance data
2 and other candidate information may be curated and displayed through the use of
3 application programming interfaces (“API”)⁴ by trusted third-party resources.

4 Each candidate page will also feature an electronic contribution form, which
5 provides users with a way to make contributions to the Federal candidates with whom
6 they are matched. Contributions will be limited to \$2,500. Users will also be notified by
7 language on the contribution form that contributions in aggregate amounts in excess of
8 \$2,500 per candidate, per election cycle, are not acceptable. The information requested
9 on the contribution form will include the contributor’s name, mailing address, occupation
10 and name of employer. This information will be required for each contribution,
11 regardless of amount.⁵ If any one of these fields is left blank, the contribution will not be
12 accepted.⁶ Additionally, contributor information will be securely stored in skimmerhat’s
13 electronic logs for reporting and audit purposes.

⁴ APIs are ways to share and display data across online platforms. They can take many different forms, depending on the context and functionality of their use.

⁵ The donation form will also include the following disclaimer: “Federal law requires political committees to report the name, mailing address, occupation and name of employer for each individual whose contributions aggregate in excess of \$200 in a calendar year.”

⁶ Before the donation is accepted, each user will be required to manually select in the affirmative a check box for the following attestation:

By checking this box, I confirm that the following statements are true and accurate:

1. This contribution is made from my own funds and not those of another.
2. This contribution is not from the general treasury funds of a corporation, labor organization or national bank.
3. I am not a Federal government contractor.
4. I am not a foreign national who lacks permanent resident status in the United States.
5. I am over the age of 18, and if not, I am a minor making this contribution of my own volition, and not at the request or direction of another individual.

If this box is not checked, the contribution will not be accepted. In addition, skimmerhat plans to make an effort to screen, and reject, all contributions from foreign nationals, government contractors, national banks, and corporations organized by authority of any law of Congress.

1 Skimmerhat will assess an eight percent “processing and convenience” fee per
2 transaction, which will cover credit card processing and provide a profit to the company.
3 This eight percent “convenience fee” will be applied, in a separate field, in addition to the
4 contribution amount. This convenience fee will be assessed in a manner similar to that of
5 a sales tax at the point of purchase for commercial goods. The total transaction amount
6 will be the contribution plus the eight percent fee. By assessing the convenience fee in
7 this manner, skimmerhat will pass the user’s full intended contribution amount to the
8 recipient candidate, while charging the user the fee.

9 Once the user accepts the transaction, contributions will be routed to
10 skimmerhat’s merchant account, and the eight percent fee will be directed to the
11 company’s separate business account. No funds will be commingled in skimmerhat’s
12 corporate treasury account. All disbursements of funds will be taken directly from
13 skimmerhat’s merchant account, and not from the company’s corporate treasury account.
14 Contributions will be forwarded to candidate campaigns. Along with the forwarded
15 contributions, a transmittal report will be sent to the recipient candidate committee to
16 facilitate the candidate committee’s reporting of contributions. Should a candidate
17 committee reject or refuse contributions, skimmerhat will make refunds to the original
18 contributor and disable the contribution form on that candidate’s page to prevent further
19 contributions.

20 Skimmerhat will provide candidates with the option of assuming limited
21 managerial control over basic biographical information on their candidate pages, as well
22 as setting positions on issues. Before gaining access to their candidate pages, candidates
23 or persons associated their authorized committees must first be approved by skimmerhat

1 to ensure they are “legitimate representatives of the campaign.” Candidates and their
2 authorized committees must also agree to Terms of Service,⁷ which explicitly prohibit the
3 use of the skimmerhat platform to conduct fundraising outside of skimmerhat or “for any
4 activity that can be reasonably deemed outside of that which enhances the quality and
5 accuracy of candidate information available to users.” Should skimmerhat discover any
6 activity or contribution that violates its Terms of Service, candidates will be warned, and
7 the activity or content removed from the website. skimmerhat will retain the right to
8 reassume control over candidate pages should it deem a permission change necessary.

9 ***Questions Presented***

- 10 1. *Under the proposed plan, can skimmerhat receive earmarked contributions from*
11 *individuals and forward those contributions to Federal candidates without*
12 *committing an impermissible action under the Act?*
- 13 2. *Would skimmerhat’s processing and convenience fee of eight percent count*
14 *towards a user’s individual contribution limit to a candidate?*
- 15 3. *Can skimmerhat provide factual information about candidates to its users?*
- 16 4. *Under the proposed plan, could candidates be granted limited access to manage*
17 *their profiles without causing skimmerhat to provide a material service to the*
18 *candidate, creating an impermissible action under the Act?*
- 19 5. *Can skimmerhat use Federal Election Commission data pertaining to candidate*
20 *finance information that is either compiled directly by skimmerhat staff, or*
21 *curated through APIs?*

⁷ Skimmerhat has not yet drafted the “Terms of Service” referred to here. It plans to finalize them before launching its site.

1 6. *Under the proposed plan, is skimmerhat required to file any reports with the*
2 *Federal Election Commission?*

3 ***Legal Analysis and Conclusions***

4 1. *Under the proposed plan, can skimmerhat receive earmarked contributions from*
5 *individuals and forward those contributions to Federal candidates without*
6 *committing an impermissible action under the Act?*

7 Yes, skimmerhat may receive earmarked contributions from individuals and
8 forward those contributions to Federal candidates without engaging in an impermissible
9 action under the Act.

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).

17 Skimmerhat proposes to transmit contributions to political committees⁸ without
18 receiving payment from political committees. The Commission has previously
19 concluded that companies that process contributions to political committees as a service
20 to the political committees must be compensated for those services to avoid making in-
21 kind contributions. *See* Advisory Opinion 2007-04 (Atlatl). Companies that process

⁸ skimmerhat indicates that contributions processed through its site “will be limited to \$2,500.” The Commission notes that for 2011-2012 election cycle, an individual may give to a Federal candidate \$2,500 *per election*. In other words, a Federal candidate who participates in two elections during the current election cycle may receive contributions from an individual totaling \$5,000.

1 contributions as a service to contributors, however, do not need to be compensated for
2 these services by the recipient political committees because the companies are not
3 providing any services or anything of value to the recipient political committees. *See,*
4 *e.g.,* Advisory Opinion 2011-19 (GivingSphere).

5 Here, skimmerhat will provide a commercial service to its users when it transmits
6 their contributions to candidates. Through its platform, skimmerhat's users will be able
7 to search for and identify recipient candidates by geographic location, ideological
8 similarities, and issue positions. Users will make contributions to those candidates from
9 skimmerhat's website, rather than from the candidates' own websites, and otherwise
10 irrespective of candidate involvement with skimmerhat's candidate pages. And, further,
11 upon agreeing to skimmerhat's terms of service, skimmerhat will transmit users' funds
12 only at the request of its users, not pursuant to negotiated agreements with political
13 committees. *Compare* Advisory Opinion 2011-19 (GivingSphere) (hosting a database
14 and website through which customers identify recipients and transmit funds) *with*
15 Advisory Opinion 2007-04 (Atlatl) (proposing only to process online credit card
16 contributions initiated on political committees' websites).

17 Skimmerhat's proposed service closely resembles the services approved by the
18 Commission in Advisory Opinion 2011-19 (GivingSphere). In that advisory opinion, as
19 here, a corporation proposed to develop a web-based platform through which its
20 customers could identify political committees and transfer contributions to political
21 committees. *Id.* Because, as discussed above, skimmerhat will provide services to its
22 customers and not political committees, skimmerhat's proposal is analogous to widely
23 available delivery services, such as United Parcel Service, which a contributor may use to

1 deliver a contribution, or an electronic bill-pay service, such as those provided by banks.⁹
2 *See also* Advisory Opinion 2011-06 (Democracy Engine). Thus, as further explained in
3 the response to Question 6 below, skimmerhat would also not be operating as a conduit or
4 intermediary for contributions. *See* 2 U.S.C. 441a(a)(8); 11 CFR 110.6(b)(2)(ii).

5 Accordingly, skimmerhat may undertake its proposal without its services
6 constituting a prohibited in-kind contribution or otherwise engaging in an impermissible
7 action under the Act and Commission regulations.

8 2. *Would skimmerhat's processing and convenience fee of eight percent count*
9 *towards a user's individual contribution limit to a candidate?*

10 No, skimmerhat's processing and convenience fee of eight percent will not count
11 towards a user's individual contribution limits to a candidate.

12 As discussed in the answer to Question 1, above, the Commission has
13 distinguished between situations in which a company provides services to recipient
14 political committees, and situations in which a company provides services to its
15 customers. In Advisory Opinion 2007-04 (Atlatl), the contractual relationship was
16 between the company that processed the contributions and the recipient political
17 committee. The Commission concluded that the amount of contributions to political
18 committees must include fees paid by contributors to the company. In contrast, in
19 Advisory Opinion 2011-06 (Democracy Engine), the Commission concluded that the
20 amount of the contributions would not include processing fees paid by contributors,
21 because the services provided by the vendor were "at the request and for the benefit of

⁹ Consistent with this analogy, skimmerhat makes clear that, if a candidate or committee refuses to accept a contribution, it will return a contributor's funds and it will prevent candidates from using the skimmerhat platform to raise contributions outside of skimmerhat.

1 the contributors, not of the recipient political committees.” Thus, fees paid for those
2 services did not “relieve the recipient political committees of a financial burden they
3 would otherwise have had to pay for themselves,” and were not contributions to the
4 recipient political committees. Advisory Opinion 2011-06 (Democracy Engine).

5 Similarly, here, skimmerhat will provide its services at the request and for the
6 benefit of its customers, and not the recipient political committees. Therefore, because
7 payment of the convenience fee will not relieve any recipient political committee of a
8 financial burden that it would otherwise have had to pay for itself, the payment of the
9 convenience fee by the subscribers will not constitute a contribution by the subscribers to
10 any recipient political committee.

11 3. *Can skimmerhat provide factual information about candidates to its users?*

12 Yes, skimmerhat may provide factual information about candidates to its users.

13 Skimmerhat’s business model includes providing its customers with tools that
14 they can use to gain information about and to evaluate potential recipient candidates. To
15 this end, skimmerhat proposes to enable users to identify candidates by geographic
16 location, through a candidate matching survey, and by their positions on issues. A
17 candidate page will include a photograph, biographical information, campaign finance
18 information, recent updates, issue positions, and a donation page. Skimmerhat will
19 initially develop the pages using information from candidates’ websites, public records,
20 and through the use of APIs. Skimmerhat has a vested commercial interest in seeking
21 participation of users from all political parties and ideological backgrounds.

22 Skimmerhat’s proposal is similar to the one considered by the Commission in
23 Advisory Opinion 2011-19 (GivingSphere), in which a corporation wished to provide

1 basic factual information about candidates to its customers for their use in determining to
2 whom to make contributions through the corporation's web platform. The Commission
3 approved the proposal because the provision of factual information to customers
4 appeared to be a corollary of creating a web platform through which users could identify
5 political committees and transmit contributions. Advisory Opinion
6 2011-19 (GivingSphere).

7 Here, too, the information provided by skimmerhat to its customers will
8 supplement the overall service offered by the site. Accordingly, skimmerhat may provide
9 factual information about Federal candidates to its users as proposed.

10 4. *Under the proposed plan, could candidates be granted limited access to manage*
11 *their profiles without causing skimmerhat to provide a material service to the*
12 *candidate, creating an impermissible action under the Act?*

13 Yes, candidates could be granted limited access to manage their profiles.

14 The Act and Commission regulations prohibit corporations from making a
15 contribution in connection with a Federal election. *See* 2 U.S.C. 441b(a); 11 CFR
16 114.2(b)(1). As noted above, a contribution includes "any gift, subscription, loan,
17 advance, or deposit of money or anything of value made by any person for the purpose of
18 influencing any election for Federal office." 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a);
19 *see also* 2 U.S.C. 441b(b)(2); 11 CFR 114.2(b)(1). "Anything of value" includes all in-
20 kind contributions, including the provision of goods or services without charge or at a
21 charge that is less than the usual and normal charge. *See* 11 CFR 100.52(d)(1). "Usual
22 and normal charge" is defined as "the price of goods in the market from which they
23 ordinarily would have been purchased at the time of the contribution, or the commercially

1 reasonable rate prevailing at the time the services were rendered.” *See* 11 CFR
2 100.52(d)(2).

3 The Commission has previously recognized that political committees may use
4 web-based platforms without paying a fee when such use results in marketing or
5 increased revenue for the platform provider. *See* Advisory Opinions 2010-06 (Famos),
6 2011-19 (GivingSphere). In those circumstances, the Commission has concluded that the
7 free use of the web platform represents “a commercially reasonable transaction made in
8 the ordinary course of business.” *Id.*

9 Skimmerhat will provide candidates with the option of assuming limited
10 managerial control over basic biographical information on the site’s candidate pages, as
11 well as setting positions on issues. Skimmerhat has represented in its request that
12 allowing candidates to manage their profiles in this way would increase the accuracy of
13 the site’s data and the effectiveness of the skimmerhat matching process, both of which
14 advance skimmerhat’s commercial interest in matching donors to like-minded candidates
15 and increase skimmerhat’s profits. As such, skimmerhat’s proposal to let candidates
16 manage their profile pages would represent a “commercially reasonable transaction made
17 in the ordinary course of business.”

18 Further, skimmerhat’s plan to have Federal candidates manage the site’s
19 candidate pages is not “for the purpose of influencing an election.” As skimmerhat notes
20 in its request: “The company and its online assets are operated on a commercial basis
21 only . . . and does not seek to influence federal elections in any way. In fact, skimmerhat
22 has a vested commercial interest in seeking participation of users from all political parties
23 and ideological backgrounds.” Request at 2. Accordingly, skimmerhat will be engaging

1 in the proposed activity for genuinely commercial purposes and not for the purpose of
2 influencing any Federal election.¹⁰ *See, e.g.*, Advisory Opinion 2008-10
3 (VoterVoter.com).

4 For the reasons stated above, skimmerhat’s proposal to have Federal candidates
5 assume limited control of the site’s profile pages would not result in a prohibited in-kind
6 contribution from skimmerhat or otherwise engage in an impermissible action under the
7 Act.¹¹

8 5. *Can skimmerhat use Federal Election Commission data pertaining to candidate*
9 *finance information that is either compiled directly by skimmerhat staff, or*
10 *curated through APIs?*

11 Yes, skimmerhat may use Commission data pertaining to candidate finance
12 information that is either compiled directly by skimmerhat staff or curated through APIs.

13 Political committees must file certain statements, notices, and reports with the
14 Commission, which the Commission makes public. 2 U.S.C. 434, 438(a)(4); *see also* 11
15 CFR Part 104. The Act provides that “any information copied from such reports or
16 statements may not be sold or used by any person for the purpose of soliciting
17 contributions or for commercial purposes, other than using the name and address of any

¹⁰ Additionally, even if limited managerial access to the site’s candidate profiles constitutes “anything of value” to a Federal candidate, such access would be provided by skimmerhat at the “usual and normal charge.” As the Commission has noted previously, “virtually all web-based platforms now offered in the marketplace are made available free of charge.” Advisory Opinion 2010-06 (Famos). Just as Federal candidates may, without charge, create a Facebook page, establish a Twitter feed, or start a YouTube channel, they may similarly assume control of a skimmerhat profile page without a resultant in-kind contribution.

¹¹ The Commission also notes that by providing candidates with this access skimmerhat will “merely serve a passive function to provide complete information about elections” that the Commission has previously found does not result in an in-kind contribution to candidates. Advisory Opinion 1999-25 (DNet), *see also* Advisory Opinion 1999-24 (EZone).

1 political committee to solicit contributions from such committee.” 2 U.S.C. 438(a)(4);
2 *see also* 11 CFR 104.15(a).

3 The prohibition on the use of information in Commission filings serves to prevent
4 information about individual contributors from being sold or used for commercial
5 purposes.¹² *See, e.g.*, Advisory Opinion 2004-24 (NGP Software); Advisory Opinion
6 1983-44 (Cass Communications); Advisory Opinion 1981-38 (Campac Publications);
7 Advisory Opinion 1980-101 (Weinberger). The prohibition is a “broad prophylactic
8 measure intended to protect the privacy of the contributors about whom information is
9 disclosed in FEC public records.” Advisory Opinion 2003-24 (NCTFK). The
10 Commission has allowed the sale or use of the name and address of political committees
11 for commercial purposes. *See, e.g.*, Advisory Opinion 2004-24 (NGP Software);
12 Advisory Opinion 1989-19 (Johnson); Advisory Opinion 1980-101 (Weinberger). For
13 example, in Advisory Opinion 1980-101 (Weinberger), the Commission approved the
14 publication and sale of a “directory of comprehensive information concerning [political
15 committees]” so long as the directory did not “identify individuals who made
16 contributions to the [political committees.]” *See also* Advisory Opinion 1989-19
17 (Johnson) (approving a proposal to sell portions of political committee reports that “did
18 not contain the names of individual contributors”).

¹² The legislative history of the 1979 Amendments to the Act indicates that Congress intended the prohibition on the copying and use of names and addresses to protect individual contributors. H.R. Rep. No. 422 at 23 (1979). Congress was concerned that the Act’s reporting requirements would “open up the citizens who are generous and public spirited enough to support our political activities to all kinds of harassment.” 117 Cong. Rec. 30057 (1971) (statement of Sen. Bellmon). Senator Bellmon stated that the amendment prohibiting the use of contributor information was intended to “protect the privacy of the generally very public-spirited citizens who make a contribution to a political campaign or a political party.” *Id.*

1 Skimmerhat proposes to provide its customers with factual information about
2 candidates, including campaign finance data obtained from reports filed with the
3 Commission, on its candidate pages. Skimmerhat represents that it will use only
4 campaign finance data regarding candidate fundraising totals and will not use information
5 regarding individual contributors.

6 Accordingly, because the information that skimmerhat seeks to use concerns
7 political committees, rather than individual contributors, skimmerhat may use
8 Commission data pertaining to candidate finance information that is either compiled
9 directly by skimmerhat staff or curated through APIs.

10 6. *Under the proposed plan, is skimmerhat required to file any reports with the*
11 *Federal Election Commission?*

12 No, under the proposed plan, skimmerhat will not be required to file any reports
13 with the Commission.

14 The Act and Commission regulations require certain persons to file reports with
15 the Commission. For example, a “treasurer of a political committee shall file reports of
16 receipts and disbursements.” *See* 2 U.S.C. 434(a)(1); 11 CFR 104.1. Persons who spend
17 above threshold amounts on independent expenditures or electioneering communications
18 must file reports with the Commission. *See* 2 U.S.C. 434(c), (f); 11 CFR 104.20, 109.10.

19 Based on the facts set forth in the request, skimmerhat will be a commercial
20 service provider, not a political committee, and therefore will not be subject to the
21 reporting requirements for political committees. *See* 2 U.S.C. 434(a)(1); 11 CFR 104.1.
22 Skimmerhat also will not engage in express advocacy. Thus, it will not be subject to the
23 reporting requirements for persons making independent expenditures. *See* 2 U.S.C.

1 431(17) (“The term ‘independent expenditure’ means an expenditure by a person . . .
2 expressly advocating the election or defeat of a clearly identified candidate”); *see*
3 *also* 11 CFR 100.16. Moreover, given that all relevant communications will take place
4 on the Internet, skimmerhat’s proposal will not implicate the reporting requirements for
5 persons making electioneering communications. *See* 2 U.S.C. 434(f)(3)(A)(i) (“The term
6 ‘electioneering communications’ means any broadcast, cable, or satellite communications
7”); *see also* 11 CFR 100.29.

8 The Act and Commission regulations also require intermediaries or conduits of
9 earmarked contributions to report the original source of such a contribution and the
10 recipient candidate or authorized committee. 2 U.S.C. 441a(a)(8); 11 CFR 110.6(c). The
11 provisions addressing earmarked contributions prevent the circumvention of contribution
12 limits [and prohibitions] by ensuring that “contributions to candidates count toward
13 FECA contribution limits . . . regardless of whether contributors give contributions
14 directly to candidates or whether contributors earmark, or otherwise direct, the
15 contributions to candidates through a conduit or intermediary.” Advisory Opinion 2006-
16 30 (ActBlue); *see also* Federal Election Commission v. National Republican Senatorial
17 Committee, 761 F.Supp. 813, 819-20 (D.D.C. 1991) rev'd on other grounds, 966 F.2d
18 1471 (D.C. Cir. 1992). The contributions made through the skimmerhat platform are not
19 contributions to an intermediary and earmarked for a candidate or authorized committee;
20 they are direct contributions to the candidate or authorized committee made via a
21 commercial processing service. In past Advisory Opinions, the Commission has
22 concluded that certain electronic transactional services that assist a contributor in making
23 a contribution do not run afoul of the prohibition on corporations acting as a conduit or

1 intermediary for earmarked contributions because certain electronic transactional services
2 are so essential to the flow of modern commerce that they are akin to “delivery services,
3 bill-paying services, or check writing services.” Advisory Opinion 2011-06 (Democracy
4 Engine). For that reason, the Commission has not required commercial processing agents
5 to file reports as an intermediary or conduit of earmarked contributions. *See e.g.*,
6 Advisory Opinion 2012-17 (Red Blue T); Advisory Opinion 2012-09 (Points for
7 Politics); Advisory Opinion 2011-19 (Giving Sphere); Advisory Opinion 2011-06
8 (Democracy Engine).

9 Thus, skimmerhat’s proposal would not subject it to any reporting requirements
10 under the Act or Commission regulations.

11 This response constitutes an advisory opinion concerning the application of the
12 Act and Commission regulations to the specific transaction or activity set forth in your
13 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
14 of the facts or assumptions presented, and such facts or assumptions are material to a
15 conclusion presented in this advisory opinion, then the requestor may not rely on that
16 conclusion as support for its proposed activity. Any person involved in any specific
17 transaction or activity which is indistinguishable in all its material aspects from the
18 transaction or activity with respect to which this advisory opinion is rendered may rely on
19 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
20 conclusions in this advisory opinion may be affected by subsequent developments in the
21 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

1 The cited advisory opinions are available on the Commission's website, www.fec.gov, or
2 directly from the Commission's Advisory Opinion searchable database at
3 <http://www.fec.gov/searchao>.

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On behalf of the Commission,

Caroline Hunter
Chair