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FEDERAL ELECTION COMMISSION
Washington, D.C. 20463

January 10, 2000

AGENDA ITEM

For Meeting of: 1-13-00

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael G. Marinelli
Staff Attorney

SUBJECT: Revised Draft Advisory Opinion 1999-36

SUBMITTED LATE

Attached is the revised draft of the subject opinion for the Commission's approval on the January 13 agenda. This revised draft should be substituted for Agenda Document No. 00-05.

The changes in this draft are made because of the requester's submission on January 6 of a supplement letter with material changes to the facts presented in the original AOR. These changes pertain to the contributor verification process used for electronic checks that will be submitted by qualified Presidential candidates for Federal matching payments. The changes are denoted by the **bold font**.

Attachment

1 ADVISORY OPINION 1999-36

2
3 Joseph E. Sandler
4 Sandler & Reiff, P.C.
5 6 E Street SE
6 Washington, DC 20003

DRAFT

7
8 Dear Mr. Sandler:

9
10 This refers to your letters dated November 10, 1999, and January 5, 2000, on
11 behalf of Campaign Advantage ("Advantage"), a division of Science Writers, Inc.,
12 concerning the application of the Federal Election Campaign Act of 1971, as amended
13 ("the Act"), the Presidential Primary Matching Payment Account Act ("the Matching
14 Act"), 26 U.S.C. §§9031-9042, and Commission regulations to Advantage's proposed
15 methods to assist various political committee and candidate clients in fundraising through
16 the Internet.

17 In general, Advantage asks whether its process for receiving and transmitting
18 contributions by electronic check, online over the Internet, will comply with both the
19 cited Acts and Commission regulations, including the regulations that apply to matchable
20 contributions in a Presidential campaign.

21 **FACTS**

22 You state that Advantage is a division of Science Writers, Inc., a Maryland
23 corporation, which provides web sites, systems publications and technical requirements
24 analysis to a range of government, corporate and non-profit clients. Advantage "designs
25 and provides online solutions for Democratic [Party] candidates and progressive
26 organizations, offering to such campaigns and organizations services including the design
27 and maintenance of web sites; secure online fundraising; electronic voter contact; online

1 volunteer recruitment; and training and seminars.”

2 In addition to offering candidates a system of fundraising online via credit card,
3 Advantage plans to offer candidates, including presidential candidates and other
4 candidates for Federal office, a system for receiving contributions online, over the
5 Internet, via electronic check using electronic funds transfer. Advantage has been
6 retained by the authorized committees of certain candidates for Federal office who wish
7 to solicit contributions online, via the Internet, through the use of on-line checking. The
8 system to be offered by Advantage will work as follows:

9 1. The option of contributing to the campaign via electronic check will be built
10 into the campaign's web site. Prior to offering this option, the campaign will enter an
11 agreement with Advantage and with the electronic payment processing company,
12 eMoney.NET, authorizing use of the system described below.

13 2. The candidate's web site will then offer a potential donor the option of
14 contributing online to the candidate's campaign by credit card or by check.

15 3. If the donor clicks on the "online check" option, a contribution form will
16 appear on the screen. A sample form is included with the request. This form will
17 include, in the case of all Federal candidates, the disclaimer language required by the
18 Commission's rules, including the "best efforts" language prescribed by 11 CFR
19 104.7(b)(1). The form will also notify the prospective donor of the source restrictions
20 and contribution limits of the Act using the language set forth in Advisory Opinions
21 1995-9 and 1999-9.

22 To contribute, the donor will have to complete the form on the web site. The
23 form will require the donor to provide his or her first and last name; address; city, state

1 and zip code; e-mail address; occupation and employer; and either a social security
2 number or driver's license number. If the donor fails to provide any of the required
3 information, or leaves any of the fields blank, the web site will reject the form and prompt
4 the prospective donor to provide the missing information.

5 4. In a series of instant steps not visible to the donor, the donor's web browser is
6 then redirected to the encrypted web site of eMoney.NET, an Internet payments
7 processing company. The donor is then asked to "proceed" with payment.

8 5. The site informs the donor that he or she is receiving a digital signature
9 authentication code via the e-mail address the donor submitted. This digital signature
10 authentication code is received within a few seconds via e-mail. The site displays a check
11 form in which the donor can enter his or her check number (i.e., the next check number
12 from his or her checkbook). The donor should also, for the sake of good recordkeeping,
13 write "void" on the paper check bearing this check number. The donor is also asked to
14 enter the uniform bank routing (ABA) number; account number; bank name; and the
15 digital signature authentication code.

16 6. The donor then enters this information on the form, including the digital
17 signature authentication code.

18 7. The form will ask the donor to check a series of boxes attesting that his or her
19 contribution is made with funds within the source restrictions and contribution limits of
20 the Act, using the language set forth in Advisory Opinions 1995-9 and 1999-9.
21 Specifically, the contributor will be required to attest that he or she is a U.S. citizen or
22 legal permanent resident residing in the U.S.; that he or she is contributing his or her own
23 personal funds; that he or she is not a minor; that the funds do not come from the general

1 treasury funds of a corporation, labor organization or national bank; and that the donor is
2 not a Federal contractor. You state that, as in Advisory Opinions 1995-9 and 1999-9, the
3 failure to check any of the attestation boxes will cause the web site to reject the form, and
4 display a message noting the applicable source restriction. The web site will then prompt
5 the donor to answer the question. If any question is answered in a way that disqualifies
6 the contribution, the web site will inform the donor that he or she is ineligible to
7 contribute. The web site will then prompt the donor to correct any missing or inaccurate
8 information, or to cancel the transaction.

9 8. The donor is then asked to "submit contribution." When the donor clicks this
10 button, if the contribution is excessive, the site will so inform the donor and request that
11 an amount within the limit be entered into the check form.

12 **After the donor clicks "submit contribution," and before the contribution is**
13 **processed, the Internet payments processing company eMoney.NET automatically**
14 **performs four screening functions on the donor information:**

- 15 • **The ABA transit number is checked with a check-sum algorithm**
16 **for validity;**
- 17 • **The checking account number is put through a filter to determine**
18 **only if there is any identifiable problem with the number itself**
19 **(but the account number is not checked against any other**
20 **information about the checking account, such as the name or**
21 **address of the account holder);**
- 22 • **The check number is put through a filter to determine if it appears**

1 to be in proper sequence;

- 2 • The donor's phone number is checked to ensure it is consistent
3 with the donor's zip code.

4 9. At the option of the candidate, an additional screening process may be
5 imposed, through transmission of the checking information to a check verification
6 system. This system is a match of the information provided by the contributor
7 against a database of information supplied by participating merchants about
8 checking accounts with which they have experienced some problem, such as a
9 bounced check or closed account. If no information has been reported by a
10 participating merchant about a particular checking account, this verification system
11 will not verify any further information about the donor or his or her account. If any
12 merchant has reported any information about the donor that includes the donor's
13 driver's license number or social security number, that information will be called up
14 based on the driver's license or social security number provided by the donor on the
15 Advantage form, but may not be reported to Advantage if such reporting is barred
16 by the Fair Credit Reporting Act and/or Fair Debt Collection Act.¹ If the checking
17 account cannot be verified through the check authorization system, or does not pass the
18 system's verification screen, the web site will display to the donor, and an e-mail will also
19 be sent to the donor with, a declined transaction number and a toll-free number to contact

¹ You state that this optional screening process does not provide any universal means of verifying donor information against a database of checking account information provided by banks. You state that it is your understanding that no such universal screening process exists. In other words, when a paper check is provided to a merchant, in person, there is no system in existence that will allow the merchant, in real time, to verify that the address on the check or provided by the customer matches the address on file with the drawee bank for the checking account, unless that customer is flagged by the type of database of information supplied by participating merchants described above.

1 for further information.

2 10. If this additional screening option is used and the verification is
3 successful, or if the additional screening option is not used but all of the information
4 entered by the donor on the electronic form can be understood by the computer
5 system in place, then an Automated Clearing House ("ACH") debit entry is
6 automatically and securely submitted through the system of a third party processor
7 to a bank offering electronic funds transfer services. This "originating financial
8 institution," you explain, has its own Federal Reserve System line account, allowing it to
9 clear transactions with other banks over the "fed wire," which is the system banks use to
10 settle with each other for items drawn on a bank and presented to that drawee bank for
11 payment. The originating financial institution directly debits the bank account of the
12 donor. Thereafter, after allowing for the typical 72-hour "Hold in Lieu of Returns," the
13 originating financial institution directly credits the bank account of the campaign.²

14 11. A confirmation of the transaction is generated to the donor, instantly, on the
15 screen and via e-mail. The donor's web browser is then transferred back to the candidate's
16 web site.

17 12. The entire transaction, from the time the donor submits the contribution
18 payment order form to the time conformation of the payment transaction is received,
19 takes on average only 8 to 15 seconds. You also emphasize that all of the checking
20 account and other information submitted by the donor on the payment order form is

² You explain that this transaction works in essentially the same way as customer-authorized electronic funds transfers used by checking account customers to allow a mortgage company to withdraw the mortgage payment automatically from their account each month, or to authorize, e.g., a utility company to take the amount of the customer's utility bill out of the customer's checking account each month.

1 transmitted at all times over the Internet in encrypted form.

2 13. After the electronic check "clears," that is, the campaign's account is credited,
3 the campaign will receive, on a timely basis, in electronic form or on paper, all necessary
4 information about the donation, including all required contributor information, date,
5 amount, etc., for inclusion (electronically if possible) in the campaign's database used to
6 generate its reports to the Commission. Confirmation that the electronic check has
7 "cleared" is also received by the campaign directly from eMoney.NET via e-mail.³

8 14. For purposes of the itemized reporting of contributions pursuant to 11 CFR
9 104.8, the campaign will report the date of the credit to its account as the date of receipt
10 of the contribution, in accordance with the Commission's guidance in Advisory Opinion
11 1989-26.

12 15. For the use of this system, each participating campaign will pay certain fees
13 to Advantage. For purposes of this request, you ask the Commission to assume that these
14 are the usual and normal charges for electronic checking transactions of this nature.

15 **ACT AND COMMISSION REGULATIONS**

16 The Act defines the term "contribution" to include, *inter alia*, a gift or "deposit of
17 money" by any person for the purpose of influencing any election for Federal office. 2
18 U.S.C. §431(8)(A)(i). While the Act prohibits contributions of currency which, in the
19 aggregate, exceed \$100, it does not require that contributions be made only by check or
20 similar paper draft. See 2 U.S.C. §441g.

³ The campaign also receives confirmation of the credit entry on its bank account statement, so that the electronic check contribution can be included in the reconciliation of the campaign's bank account, for purposes of determining cash on hand, just like the clearing and crediting of any paper check.

1 For purposes of entitlement to Federal matching payments, the term contribution
2 "means a gift of money made by a written instrument which identifies the person making
3 the contribution by full name and mailing address, but does not include a subscription,
4 loan, advance, or deposit of money, or anything of value or anything described in
5 subparagraph (B), (C), or (D) of section 9032(4)." 26 U.S.C. §9034(a); see also 11 CFR
6 9034.2.

7 With regards to a contribution made by credit card or debit card, recently revised
8 Commission regulations define "written instrument" to mean either a transaction slip or
9 other writing signed by the cardholder, or in the case of such a contribution made over the
10 Internet, an electronic record of the transaction created and transmitted by the cardholder,
11 and including the name of the cardholder and the card number, which can be maintained
12 electronically and reproduced in a written form by the recipient candidate or candidate's
13 committee. 11 CFR 9034.2(b); the text of these recently revised regulations is at 64 *Fed.*
14 *Reg.* 32397 (June 17, 1999).

15 The written instrument shall be: payable on demand; and to the order of, or
16 specifically endorsed without qualification to, the Presidential candidate, or his or her
17 authorized committee. The written instrument shall contain: the full name and signature
18 of the contributor(s); the amount and date of the contribution; and the mailing address of
19 the contributor(s). For purposes of this section, the term signature means, in the case of a
20 contribution by a credit card or debit card, either an actual signature by the cardholder
21 who is the donor on a transaction slip or other writing, or in the case of such a
22 contribution made over the Internet, the full name and card number of the cardholder who
23 is the donor, entered and transmitted by the cardholder. 11 CFR 9034.2(b) and (c).

1 Contributions by credit or debit card are matchable contributions provided that evidence
2 is submitted by the committee that the contributor has affirmed that the contribution is
3 from personal funds and not from funds otherwise prohibited by law. 11 CFR
4 9034.2(c)(8)(ii).

5 APPLICATION TO PROPOSAL

6
7 Within the context of Federal candidates who do not propose to receive matchable
8 contributions, the Commission has previously sanctioned the use of the Internet to make
9 contributions "using credit cards, electronic fund transfers and potentially other electronic
10 means." See Advisory Opinion 1995-9. Your on-line check process is a form of
11 electronic fund transfer and, therefore, is permissible for Federal candidates not seeking
12 matching funds.

13 The Commission notes that this opinion considers directly, for the first time, the
14 use of electronic checks through the Internet to make matchable contributions to
15 Presidential candidates.⁴ Recently revised Commission regulations describe the
16 matchability of credit card contributions or those made by debit card. However, in
17 Advisory Opinion 1999-9, which first discussed the permissibility of credit card
18 contributions, the Commission used the term "credit card" to include the use of a "debit
19 card," as well as "other similar electronic fund transfer methods." The Commission,
20 therefore, concludes that its regulations on the matchability of credit card contributions

⁴ In Advisory Opinion 1989-26, the Commission approved the use of automatic fund transfer from a contributor's bank account to a candidate committee as a means to facilitate the making of contributions. And again, in Advisory Opinion 1995-9 with respect to contributions that were not to be matched, the Commission approved the making of contributions through the Internet "using credit cards, electronic fund transfers and potentially other electronic means."

1 are applicable to contributions made by the online electronic check system, as described
2 in your proposal.

3 In this regard, the Commission notes that the screening procedures in your
4 proposal for credit card contributions raised over the Internet are well within the "safe
5 harbor" discussed in Advisory Opinion 1999-9 for matchable contributions. See
6 Advisory Opinion 1999-9 and the Explanation and Justification for the Commission's
7 revised regulations permitting credit card contributions at 64 *Fed. Reg.* 32394 (June 17,
8 1999), see also Advisory Opinion 1999-22. They would permit an authorized committee
9 of a Presidential candidate, relying on Advantage 's services, to submit evidence that "the
10 contributor has affirmed that the contribution is from personal funds and not from funds
11 otherwise prohibited by law." 11 CFR 9034.2(c)(8)(ii).⁵ Therefore, with some
12 modifications your proposal is permissible under the Matching Act and Commission
13 regulations.

14 Since the Commission has determined that the new regulations, which cover the
15 use of credit and debit cards, are applicable to the on-line electronic check system
16 described in your proposal, the Commission also concludes that the documentation
17 requirements developed for credit cards and debit cards, as discussed in the
18 Commission's Guideline for Presentation in Good Order, would apply as well (with some

⁵ The Commission stated in its Explanation and Justification that:

A committee should take steps to insure that controls and procedures are in place to minimize the possibility of contributions by foreign nationals, by Federal Government contractors, and by labor organizations, or by an individual using corporate or other business entity credit accounts. Such controls and procedures should also help the recipient committee identify contributions made by the same individual using different or multiple credit card accounts; and contributions by two or more individuals who are each authorized to use the same account, but where the legal obligation to pay the account only extends to one (or more) of the card holders, and not to all of them. 64 *Fed. Reg.* 32396.

1 modifications) to the on-line check system. See 11 CFR 9033.1(b)(9).⁶ For example, any
2 information from the third party processors, documenting the transmission of funds in a
3 credit card or debit card situation, would likewise be required where an electronic check
4 transaction is transmitted through any third party processor, as described in your request.

5 **Another provision in the Commission's Guidelines, in particular, requires**
6 **the documentation and verification of a donor's address when the Internet is used**
7 **for credit or debit card contributions. However, you explain that for on-line checks**
8 **there is no "universal means of verifying donor information against a database of**
9 **checking account information provided by banks." Despite this technological**
10 **limitation, the Commission concludes that some documentation is both possible and**
11 **required for the on-line check system you describe. To assist the Commission with**
12 **the documentation of the matchable on-line check contributions, Advantage must**
13 **provide to Presidential campaigns seeking matching funds (and these committees**
14 **must provide to the Commission) each contributor's checking account number and**
15 **bank transit number for that account. The Commission notes that this**
16 **documentation would also be provided to the Commission if the matchable**
17 **contributions were made on traditional paper checks. See 11 CFR 9036.1(b)(3) and**
18 **9036.2(b)(1)(vi).**

⁶ Not all of these requirements, however, would be applicable to your situation. The Commission notes, for example, that the on-line check process discussed in this request differs from the credit card system for making Internet contributions discussed in Advisory Opinion 1999-22. The on-line check process, since it directly transfers funds from the contributor's bank account to the account of the campaign, does not require the services of a vendor to clear a credit card contribution or hold the contribution funds in the vendor's own accounts. Therefore, the need for a separate vendor merchant account number (for matchable contributions), or for the segregation of all contributions (matchable or not) from the vendor's corporate accounts, does not arise in this situation.

