



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

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April 11, 1995

**MEMORANDUM**

**TO:** The Commission

**THROUGH:** John C. Surina  
Staff Director

**FROM:** Lawrence M. Noble  
General Counsel

N. Bradley Litchfield  
Associate General Counsel

Rosie Smith  
Senior Attorney

**Subject:** Draft AO 1995-9

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for April 20, 1995.

Attachment

**AGENDA ITEM**  
For Meeting of: APR 20 1995

**DRAFT**

1  
2  
3 **ADVISORY OPINION 1995-9**

4 **Matt Dorsey**  
5 **Treasurer**  
6 **NewtWatch PAC**  
7 **1837 16th Street, N.W.**  
8 **Washington, D.C. 20009**

9 **Dear Mr. Dorsey:**

10 **This responds to your letter dated March 8, 1995, and**  
11 **supplementary materials received on March 24, requesting an**  
12 **advisory opinion on behalf of NewtWatch PAC ("the Committee")**  
13 **concerning the application of the Federal Election Campaign**  
14 **Act of 1971, as amended ("the Act"), and Commission**  
15 **regulations to contributions to the Committee.**

16 **You state that the Committee's mission is to "provide a**  
17 **forum for publicly available information on selected public**  
18 **officials, most notably Speaker of the House Newt Gingrich"**  
19 **and that it "exists principally as a 'virtual PAC' on the**  
20 **World Wide Web." Anyone who has the necessary computer**  
21 **equipment can access the information the Committee provides**  
22 **through the Internet by using the uniform resource locator**  
23 **<http://www.cais.com/newtwatch/>. Materials available on the**  
24 **Committee's World Wide Web site about Speaker Gingrich**  
25 **include his voting record on selected issues, information**  
26 **about the Ethics Committee and FEC complaints, contribution**  
27 **data from political action committees and individuals,**  
28 **personal finances, honoraria, and his sponsorship of**  
29 **commemorative bills. The Committee filed a statement of**  
30 **organization on February 22, 1995.**

3 You present several questions regarding the Committee's  
4 use of the Internet and the World Wide Web to solicit and  
5 accept contributions.<sup>1/</sup>

6 Question 1

7 You ask the Commission to confirm that the Committee's  
8 use of the Internet, specifically a World Wide Web site, to  
9 distribute its communications regarding Speaker Gingrich and  
10 to solicit contributions constitutes general public political  
11 advertising under 11 CFR 110.11(a)(1)<sup>2/</sup>.

12 The term "general public political advertising" is not  
13 defined in the Act or Commission regulations, but may be  
14 applied on a case-by-case basis to forms of communication not  
15 specifically listed in 11 CFR 110.11. In recent years, there  
16 has been a rapid expansion of services available on the  
17 Internet, a sizable increase in the number of persons using  
18 it, increased ease of accessing the Internet, and a decline  
19 in the costs of hardware and software needed to do so. The  
20 Commission concludes that the combination of these factors  
21 means that use of the World Wide Web site operated by the  
22

23 1/ Because your committee is not the authorized committee  
24 of any presidential candidate, this advisory opinion does  
25 not address the separate and additional issues raised by 26  
26 U.S.C. §§ 9031 -- 9042 and related Commission regulations  
at 11 CFR Parts 9031-9039 regarding the use of the Internet  
by a presidential candidate to solicit or accept  
contributions.

27 2/ You also ask whether the use of the Internet constitutes  
28 political advertising in a general public communication  
29 under 11 CFR 100.7(b)(15)(i) and 100.7(b)(17)(i). These  
30 provisions are applicable only to state and local  
committees of political parties, and thus do not appear to  
be implicated by the activities of your committee.

3 Committee should be viewed as a form of general public  
4 political advertising under 11 CFR 110.11.

5 The materials available on the Committee's World Wide  
6 Web site on and after March 14, 1995 include the following  
7 disclaimer: "Paid for by NewtWatch and not authorized by any  
8 candidate or candidate's committee." The Commission  
9 concludes that the wording of this disclaimer complies with  
10 2 U.S.C. §441d(a)(a)(3) and 11 CFR 110.11(a)(1)(iv)(A).<sup>3/</sup>

11 Disclaimers are located at the end of the home page<sup>4/</sup> and  
12 immediately following the request for contributor  
13 information. They are printed in the same size type as much  
14 of the body of the communication. Accordingly, the  
15 disclaimers are presented in a clear and conspicuous manner,  
16 as required by 11 CFR 110.11(a)(1).

17 Question 2

18 You ask whether the Committee may use the Internet, the  
19 World Wide Web and related technology to accept contributions  
20 "using credit cards, electronic fund transfers and  
21 potentially other electronic means." You state that you wish  
22 to use the service of First Virtual Holding Company ("FVHC"),  
23 a financial services company specifically created to enable  
24

25 \_\_\_\_\_  
26 <sup>3/</sup> The materials attached to your advisory opinion request  
27 included a different formulation of the disclaimer, which  
does not need to be addressed given that the previous  
disclaimer was updated as of March 14th.

28 <sup>4/</sup> A home page is the first page a user will see when  
29 accessing a particular World Wide Web site. It functions  
30 as a combination of an introduction, a table of contents  
and an advertisement for the Web site.

3 on-line commerce via the Internet. Included in your request  
4 is part of the on-line information provided by FVHC to  
5 sellers and purchasers describing its services. Contributors  
6 would need to have accounts with FVHC and provide FVHC with  
7 their credit card number. Contributors then complete the  
8 Committee's solicitation form and provide their FVHC Account  
9 ID number (which is not the same as their credit card  
10 number). The Committee will then notify FVHC of the  
11 transaction. Before the transaction is actually processed,  
12 however, FVHC sends the contributor an e-mail message  
13 requesting confirmation of the transaction. The contributor  
14 has the option of either approving or disapproving the  
15 transaction. From time to time, the contributor's credit  
16 card would be billed for accrued charges and the Committee's  
17 checking account would be credited with payment.

18 The Commission has not previously considered this type  
19 of procedure. The Commission has, however, recognized that  
20 the Act and regulations allow lawful contributions to be made  
21 not only by personal check, but also in other ways, including  
22 properly documented use of contributors' credit cards  
23 (Advisory Opinions 1978-68 and 1984-45), automatic fund  
24 transfers from contributors' bank accounts to a committee  
25 account (Advisory Opinion 1989-26) and telephone calls to 900  
26 line services (Advisory Opinions 1991-20 and 1990-1). The  
27 situation you present involves the use of credit cards and  
28 appears to be very similar to these situations. Accordingly,  
29 the Commission concludes that nothing in the Act or  
30

3 Commission regulations precludes the implementation of your  
4 proposed contribution system, provided the recordkeeping and  
5 reporting requirements described below are followed.

6 Under Commission regulations, a contribution is  
7 considered "made" when the contributor relinquishes control.  
8 11 CFR 110.1(b)(6). In the situation you propose, the  
9 Commission would view the date the contributor sends the  
10 electronic confirmation to FVHC as the date the contribution  
11 is made. This situation is similar to the transactions  
12 presented in Advisory Opinion 1990-4. The date your  
13 committee receives the contribution will be the date on which  
14 the Committee receives notice that the contributor has  
15 confirmed the charge to his or her FVHC account.

16 The expenses incurred by FVHC, which is a corporation,  
17 in providing services facilitating this program would be a  
18 prohibited contribution by FVHC if uncompensated. 2 U.S.C.  
19 §441b(a); 11 CFR 114.2(b). You state that FVHC charges a 2%  
20 commission on all transactions, and that the Committee  
21 intends to pay and report this normal and customary  
22 commission as an operating expenditure pursuant to 11 CFR  
23 104.3(b)(1)(i) and (3)(i). In a subsequent communication,  
24 you provided materials indicating that FVHC also charges a  
25 \$10 registration fee, a 29-cent fee per transaction, and a \$1  
26 processing fee each time a payment is made by FVHC to your  
27 account.

28 The Commission concludes that these amounts are  
29 operating expenditures of the Committee and are reportable by  
30

3 it pursuant to the Act. 2 U.S.C. §§432(c)(5) and  
4 434(b)(5)(A); 11 CFR 102.9(b) and 104.3(b)(3) and (4). The  
5 2% charge, and the other fees to be paid by the Committee,  
6 appear to be the usual and normal charge for the services to  
7 be provided by FVHC. 11 CFR 100.7(a)(1)(iii)(A). See  
8 Advisory Opinions 1989-26 and 1978-68. Note that the  
9 Committee must treat the full amount of a donor's  
10 contribution as the contributed amount for purposes of the  
11 limits and reporting provisions of the Act, even though the  
12 Committee will receive a lesser amount because of FVHC's  
13 fees.

14 Your request recognizes your obligation to comply with  
15 the recordkeeping and reporting requirements of the Act.  
16 2 U.S.C. §§432 and 434. The documentation required under  
17 2 U.S.C. §432(c) and regulation sections 102.9 and 104.14  
18 must be preserved and available for audit, inspection or  
19 examination by the Commission for at least three years after  
20 the filing of the report to which the documentation relates.  
21 See 2 U.S.C. §432(d) and 11 CFR 102.9(c) and 104.14(b)(3).

22 When applying the requirements of these regulations, the  
23 Commission has previously permitted the maintenance of  
24 certain types of committee records in non-paper form. See  
25 Advisory Opinions 1994-40 and 1993-4. Electronic  
26 transactions of this nature must entail the creation and  
27 maintenance of a complete and reliable "paper trail" for  
28 recordkeeping, disclosure and audit purposes. In addition to  
29 the records FVHC will provide to you regarding contributions,  
30

3 you have indicated in a subsequent communication that the  
4 contributor information, confirmation records and  
5 attestations (see discussion below) will be sent  
6 electronically to a computer file containing a log of  
7 contributor data.<sup>5/</sup> The Committee should take steps to ensure  
8 that the contributor data is backed up in a form that enables  
9 the Committee to maintain either machine readable or paper  
10 copies of these records for three years after the date on  
11 which it reports the contributions.

12 Question 3

13 You ask whether the Committee, using the Internet and  
14 related technology, can adequately insure that it makes best  
15 efforts to obtain, maintain and submit contributor  
16 information required by the Act. This includes the name and  
17 address of any individual whose previous contributions to the  
18 Committee in the same calendar year aggregate over \$200,  
19 together with the date and full amount of the individual's  
20 contribution, as well as his or her occupation and employer.  
21 2 U.S.C. §§432(c)(1) and (c)(3) and 434(b)(3)(A); 11 CFR  
22 102.9(a)(2) and 104.3(a)(4)(i). For contributions in excess  
23 of \$50 that aggregate to \$200 or less for the calendar year,  
24 a record of the same information must be kept minus the  
25 occupation and employer's name. 2 U.S.C. §432(c)(2) and 11  
26 CFR 102.9(a)(1). See Advisory Opinion 1980-99 with respect  
27

28  
29 <sup>5/</sup> The "server" is a computer that stores and distributes  
30 the pages for a particular World Wide Web site. It also  
records the contributor data log.



3 to contributions of \$50 or less.

4 You have provided a sample of the on-line contributor  
5 response form you propose to use to obtain this information.  
6 You explain that if a potential contributor fails to supply  
7 this information, he or she will receive an immediate message  
8 asking again for the information.<sup>6/</sup>

9 The Commission notes that 11 CFR 104.7(b)(2) requires  
10 you to make one oral or written follow-up attempt to obtain  
11 the information for any contribution you receive that exceeds  
12 \$200 and lacks the contributor's identification. The request  
13 must be made no later than thirty days after the Committee  
14 receives the contribution. In the unique situation you  
15 present, the follow-up request may consist of an electronic  
16 message sent to the contributor's E-mail address. However,  
17 such request must be made after the committee receives notice  
18 of the donor's confirmation and must meet the specific  
19 requirements of 11 CFR 104.7(b)(2). Accordingly, if the  
20 above steps are taken, your method would appear to satisfy  
21 the Act's recordkeeping and reporting requirements.

22 Question 4

23 Your request raises a question as to whether you can  
24 adequately ensure that contributions from prohibited sources  
25 are not made or accepted, given the unique global nature of  
26 the Internet and the unrestricted access to your World Wide  
27

28 \_\_\_\_\_  
29 6/ The Commission suggests that you modify the reference  
30 "(Required for First Virtual)" so as to make clear that it  
applies to the FVHC identification number rather than the  
occupation and employer information.

3 Web site. You have described in detail the methods you  
4 intend to employ to safeguard against the receipt of  
5 excessive contributions, contributions in the name of  
6 another, and contributions from corporations, labor  
7 organizations, national banks, federal government contractors  
8 and foreign nationals, which are prohibited by the Act.  
9 2 U.S.C. §§441b, 441f, 441e, and 441a(a)(1)(A). The sample  
10 solicitation materials you submitted include a form on which  
11 contributors are asked to attest that they are making the  
12 contribution from their own funds and not those of another.  
13 They are also asked to attest that the contribution is not  
14 from the general treasury funds of a corporation, labor  
15 organization or national bank. The sample form also requests  
16 attestations that contributors are not Federal government  
17 contractors and are not foreign nationals who lack permanent  
18 resident status in the United States.

19 You have also included samples of the on-line responses  
20 would-be contributors will receive if any of these boxes are  
21 checked "no" or left blank. The proposed responses state in  
22 large type: "Sorry, Federal law prevents us from accepting  
23 contributions from a foreign national who lacks permanent  
24 resident status in the United States;" "Sorry, Federal law  
25 prevents us from accepting contributions from a Federal  
26 government contractor;" "Sorry, Federal law prevents us from  
27 accepting contributions from general treasury funds of a  
28 corporation, labor organization or national bank;" and  
29 "Sorry, Federal law prevents us from accepting contributions  
30

3 from funds other than those of the donor." In smaller type,  
4 each of these responses to potential contributors also says  
5 "If you think you may have filled out the contribution form  
6 incorrectly you should try again."

7 The following cautionary language should be substituted  
8 instead of your proposed language, to let potential  
9 contributors know that the Act may affect not only the  
10 ability of the Committee to accept their contributions, but  
11 also their ability to contribute: "Sorry, Federal law  
12 prohibits foreign nationals who lack permanent residence  
13 status from contributing to NewtWatch;"<sup>7/</sup> "Sorry, Federal law  
14 prohibits corporations, labor organizations or national banks  
15 from contributing general treasury funds to NewtWatch;"  
16 "Sorry, Federal law prohibits any person from contributing  
17 another person's funds to NewtWatch;" and "Sorry, Federal law  
18 prohibits government contractors from contributing to  
19 NewtWatch."

20 The Commission notes that the Committee may receive  
21 responses to its solicitation from minor children (persons  
22 under 18 years of age) who have access to the Internet and  
23 the Committee's World Wide Web site. The Committee may  
24 accept these contributions if the minor makes the decision to  
25 contribute knowingly and voluntarily, and the child  
26 contributes his or her own funds, and the contribution is not  
27 controlled by another individual or made from the proceeds of  
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29 

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<sup>7/</sup> As discussed below, a revised committee name should be  
30 substituted for the name "NewtWatch."

3 a gift given to provide funds to be contributed. 11 CFR  
4 110.1(i)(2). Accordingly, to ensure that contributions from  
5 minors meet these standards, you should revise your  
6 attestation to inform potential contributors of these  
7 requirements.

8 Other Issues

9 A. Committee and Project Names

10 You state that as Treasurer of the Committee it is your  
11 intention to fully comply with the Act and regulations. The  
12 Commission notes that the following issues are also raised by  
13 your proposed activity.

14 First, the Committee, which is not the authorized  
15 committee of any candidate, and the World Wide Web site are  
16 both named "NewtWatch." Reports filed by Speaker Gingrich's  
17 authorized committee, Friends of Newt Gingrich, show that the  
18 Speaker's authorized committee received over \$5000 in  
19 contributions after the 1994 general election and reported no  
20 debts or obligations, thereby qualifying him as a candidate  
21 for 1996. 2 U.S.C. §431(2).

22 The Act and Commission regulations prohibit an  
23 unauthorized committee from including the name of any  
24 candidate in its committee name. 2 U.S.C. §432(e)(4); 11 CFR  
25 102.14(a). This restriction applies to the use of a  
26 candidate's first name where the first name clearly conveys  
27 the identity of the candidate. See, Buckley v. Valeo, 424  
28 U.S. 1, 43 fn. 51 (1976) (candidate is clearly identified  
29 where his or her name, nickname, initials, photograph, or  
30

3 other unambiguous reference appear as part of a  
4 communication). The Commission concludes that the term  
5 "NewtWatch" may not be used as part of the Committee's name.

6 In contrast to the committee name restrictions, a  
7 candidate's name may be used in the title of a special  
8 project operated by an unauthorized committee if the project  
9 title clearly and unambiguously shows opposition to the named  
10 candidate. 11 CFR 102.14(b)(3). The operation of a World  
11 Wide Web site would be considered a project of the Committee.  
12 The Commission notes that under the regulations, phrases  
13 showing clear and unambiguous opposition to a candidate are  
14 not limited to specific words such as "defeat" or "oppose."  
15 The use of the term "watch," when coupled with a candidate's  
16 name, conveys clear and unambiguous opposition to the  
17 candidate being watched. "NewtWatch" connotes the need to  
18 keep Speaker Gingrich carefully and constantly under close  
19 scrutiny, and the need to be on the alert or to be on one's  
20 guard with respect to Speaker Gingrich. Accordingly, the Act  
21 and Commission regulations do not prohibit the Committee from  
22 using the name "NewtWatch" as a project name.

23 B. Use of FEC Contributor Data

24 Second, a perusal of the materials available through the  
25 World Wide Web site includes lists of contributors who gave  
26 \$200 or more to Speaker Gingrich's authorized committee.  
27 These lists include the contributors' cities and states but  
28 do not include their street addresses or telephone numbers.  
29 The lists are preceded by the statement, "While FEC data is  
30

3 public information, use of this data for fundraising purposes  
4 is prohibited by federal law."

5 The Act requires the Commission to make available for  
6 public inspection and copying committee reports containing  
7 the name and mailing address of individual contributors  
8 giving over \$200 per calendar year. The Act further provides  
9 that "any information copied from such reports or statements  
10 may not be sold or used by any person for the purpose of  
11 soliciting contributions or for commercial purposes, other  
12 than using the name and address of any political committee to  
13 solicit contributions from such committee." 2 U.S.C.  
14 §438(a)(4). Commission regulations recognize an exception  
15 for information used in "newspapers, magazines, books or  
16 other similar communications." 11 CFR 104.15(c).

17 Based on the legislative history of the Act, the  
18 Commission has previously stated that the principal purpose  
19 of restricting the sale or use of information copied from  
20 reports is to protect individual contributors from having  
21 their names sold or used for commercial purposes. See  
22 Advisory Opinions 1995-5, 1989-19, 1984-2 and 1980-101. The  
23 sponsor of the amendment creating this restriction stated  
24 that the purpose was the protection of the privacy of the  
25 "very public-spirited citizens" who make contributions to  
26 campaigns. 117 Cong. Rec. 30057-58 (1971) (remarks of  
27 Senator Bellmon). In Federal Election Commission v.  
28 Political Contributions Data, Inc., 943 F.2d 190 (2d Cir.

3 1991) ("FEC v. PCD"), the Second Circuit concluded that where  
4 a similar list lacked mailing addresses and phone numbers,  
5 and contained a caveat against solicitation and commercial  
6 use, there is little risk, if any, of solicitation or  
7 harassment of contributors. The court stated that it was  
8 "virtually certain that these reports will be used for  
9 informative purposes (similar to newspapers, magazines, and  
10 books ...)."

11 The Commission concludes that the inclusion of the lists  
12 of contributors to the Friends of Newt Gingrich committee  
13 does not violate 2 U.S.C. §438(a)(4). The lists do not  
14 appear to contain sufficient information to generate  
15 solicitations to Speaker Gingrich's contributors. Moreover,  
16 the public posting of contributor information on the World  
17 Wide Web site appears similar to the situation in FEC v. PCD.

18 Nevertheless, the Commission cautions you that the  
19 statement you include in the communications available on the  
20 World Wide Web site should be amended to reflect that the  
21 statutory prohibition applies to the sale or use of  
22 contributors' names copied from FEC reports for commercial  
23 purposes, as well as sale or use for purposes of soliciting  
24 contributions.

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This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. §437f.

Sincerely,

Danny L. McDonald  
Chairman

Enclosures (AOs 1995-5, 1994-40, 1993-4, 1991-20, 1990-4, 1990-1, 1989-26, 1989-19, 1984-45, 1984-2, 1980-101, 1980-99 and 1978-68)