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LATE COMMENT
AOR 1999-17

Bradley Litchfield, Esq.
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: *Comments of Aristotle Publishing, Inc. on Advisory Opinion Request 1999-17 by Governor George W. Bush for President Exploratory Committee*

Dear Mr. Litchfield:

On behalf of Aristotle Publishing, Inc. this letter respectfully comments on FEC Advisory Opinion Request 1999-17 (June 7, 1999), from the Governor George W. Bush for President Exploratory Committee (the "Committee").

Specifically, this letter addresses the Committee's question concerning the legality of a vendor using its own "merchant ID" numbers for clients for whom the vendor is collecting and forwarding credit card contributions received through the Internet. Aristotle urges the FEC to advise the Committee that, provided certain formalities are observed, such an arrangement is permitted under the Federal Election Campaign Act, 2 U.S.C. §431 *et seq.*, the Presidential Primary Matching Payment Act, 26 U.S.C. 9031 *et seq.*, and the Commission's regulations.

Aristotle makes this recommendation in light of the Internet's role as an important tool to increase democratic participation, Congress's strong support for greater use of the Internet, and the Commission's recent provisional approval of matching funds for Internet credit card contributions. Aristotle also makes this recommendation in light of the desirability of increasing efficiency, reducing the cost of campaigns, and eliminating the specter of allegations that credit card companies may have discriminatorily denied merchant IDs to certain campaigns.

For purposes of the following discussion, please presume that all Internet contributions at issue will be collected in accordance with the principles set forth in FEC Advisory Opinion 1999-09 (Bradley campaign request for matchability of credit card contributions) and FEC Advisory Opinion 1995-09 (NewtWatch PAC request concerning Internet credit card contributions). In addition, please presume that all Internet contributions would be forwarded to the campaigns in accordance with the time requirements of 2 U.S.C §432(b)(1) and (2), and 11 CFR 102.8, with appropriate documentation.

Aristotle's Interest

Aristotle's interest in this issue is substantial. The company publishes software and offers related services allowing federal candidates to receive contributions by credit card through the Internet. Several presidential campaign clients are currently using such software and services.

The Forwarding of Campaign Contributions Collected By A Vendor Does Not Constitute An Illegal Corporate Contribution If The Vendor Receives The Usual and Customary Charge for Its Services

The Commission has considered a number of business arrangements between political committees and companies to assist the committees in raising funds. See FEC Advisory Opinions 1991-20 (900-number calls), 1991-26 (same), 1994-33 (pre-paid phone calling cards), and 1995-34 (credit card contributions through 900-number). The Commission has repeatedly stated that if the vendor does not receive the "usual and customary charges" for its services, it will have made an illegal corporate contribution. In discussing the proper charge, "the Commission has focused with particularity on the need for an adequate profit and on the advance of services or contribution proceeds without assurance of adequate compensation to the vendor." See Advisory Opinion 1994-33.

From Aristotle's perspective, the company has and will price its fees to satisfy this standard. The company will pay the transaction processing fees associated with collecting and forwarding the funds. These fees will necessarily be directly related to the volume of contributions received by a campaign. Such costs, along with costs associated with account servicing, record-keeping, accounting, billing review, and legal review, would normally be accounted for in overhead, and are intended and projected to be covered by the fees deducted by Aristotle from actual contributions received.

Although Aristotle may charge an initial fee for a campaign to use the service, the company does not believe that an up-front deposit to cover "set-up" costs should be mandated. The cost of downloading Aristotle's contribution software and establishing a link to Aristotle's web server is minimal. Such acts will be performed by the campaigns, and thus these minimal costs will be borne by the campaigns themselves. Furthermore, unlike more elaborate direct mail or 900-number fundraising arrangements that require significant customization, once the software is downloaded and the link is established with the server, the candidate is effectively ready to begin accepting contributions.

Finally, unlike some 900-number contribution programs where contributors may elect not to pay, credit card authorizations are far less likely to be subject to refund. As the Commission has previously noted:

When a person makes a 900 line phone call, he or she has not yet made a contribution. The caller has merely pledged to make a contribution, and according to the facts presented by you, may decide not to make the payment. The contribution does not occur until the caller pays, e.g., on the phone bill. When a person makes a contribution by credit card, however, the contribution is considered to have been made at the time that the card or card number is presented. See Advisory Opinion 1990-4. The contributor is strictly obligated by the card agreement to make payment of the credit card bill and incurs substantial penalties with possible collection fees and cancellation of future credit privileges for nonpayment.

FEC Advisory Opinion 1990-14 (emphasis added).

Therefore, to provide for the unlikely event that a refund is required under unusual circumstances, it should be sufficient for the campaign to guarantee to cover all refunds. If the campaign failed to pay in a reasonable time, the vendor would deduct the amount from any future contributions. *See* FEC Advisory Opinion 1991-20. To the extent the vendor must pay any refund before collecting from the client committee, such arrangement would simply need to comply with permissible standards for extensions of credit in the ordinary course of business.¹ *See also* FEC Advisory Opinion 1995-34, n.4 (“[S]hould there be unexpected losses due to a large amount of refusals by callers to pay, any payment by [the vendor] that is not covered by the amounts charged to the committee or the revenues from paid calls must be paid by the committee within a reasonable period of time.”)

The concern that the vendor would bear all, or nearly all of the risk, with the Committee assuming little or no risk, therefore is not present. *Cf.* FEC Advisory Opinion 1991-20.

The fact pattern set forth in the Committee’s request refers to the vendor’s retention of 10% of the contributions collected. Aristotle respectfully urges the Commission to advise the Committee that, whatever percentage of contributions is retained, as long as the company charges its usual and customary charge for the services, including an adequate profit for the vendor, and does not grant improper extensions of credit, then no unlawful corporate contribution will have been made.

The Use Of A Vendor’s Merchant Account To Collect And Disburse Contributions For Multiple Clients Should Be Permissible If Certain Conditions Are Met

The Commission has previously considered business arrangements where a vendor has collected and disbursed contributions, utilizing a single depository account for multiple clients. *See* FEC Advisory Opinion 1991-26 (vendor’s single depository account used for campaign contributions made to multiple clients as a result of 900-number calls); FEC Advisory Opinion 1991-20 (same); FEC Advisory Opinion 1995-34 (vendor’s single depository account used for credit card contributions made through 900-number to multiple political clients).

The Commission has approved such arrangements where the vendor a) has a potentially large number of political customers, b) maintains separate book accounts for each committee customer, and c) maintains an account for political committee proceeds separate from the vendor’s other corporate accounts. *See id.*

The rationale underlying such Advisory Opinions is equally applicable to a situation where a vendor expects to collect a significant number of Internet contributions for multiple clients under a single

¹ As the Commission stated in FEC Advisory Opinion 1991-20, n. 4:

In determining whether credit is being extended in the ordinary course of business, the Commission will consider whether the commercial vendor is following its established procedures and past practices in approving the extension of credit, whether the commercial vendor received prompt and full payment if it previously extended credit to the same candidate or committee, and whether the extension of credit conforms to the usual and normal practice of the vendor’s trade or industry. 11 CFR 116.3 (c)(1)-(3)

merchant ID in a single account. For a potentially large number of political customers, the arrangement would create efficiencies and reduce campaign costs. Separate book accounts for each committee customer would facilitate any audit that may be necessary. Creation of a separate account for political committee funds would prevent, "insofar as it is practicable, the commingling of political committee funds with corporate funds". See FEC Advisory Opinion request 1991-20.

Aristotle respectfully urges the Commission to advise the Committee that use of a single merchant ID for multiple clients is lawful, provided that no unlawful corporate contribution is involved, *if*:

1. the vendor maintains separate book accounts for each political customer; and
2. the vendor establishes a bank account for its political committee contributions, separate from the company's other business accounts.

The Commission has also advised that, in a similar situation, the vendor "should inform the committees of the identity of the depository so that each committee may disclose the depository on an amended statement of organization." See FEC Advisory Opinion 1995-34.

Compelling Policy Reasons Support Approving The Use Of A Single Merchant Account To Collect Campaign Contributions From Multiple Clients

Compelling policy reasons further support the approval of the use of a single merchant account under the conditions described above.

The structure creates efficiencies by freeing a campaign from the burden of devoting time and resources to obtaining separate merchant IDs from each credit card issuer that the candidate wishes to utilize. Aristotle, for example, currently offers a candidate the immediate ability to take contributions through American Express, Visa, MasterCard, and shortly, Discover Card. Each issuer has its own application forms, rules, time frames, and "creditworthiness" requirements.

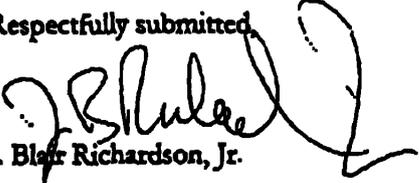
The sheer logistics and administrative requirements of dealing with these entities -- particularly if the amounts involved are relatively small -- would unnecessarily burden a campaign's staff and resources. A vendor collecting contributions under its own merchant ID, however, assumes the responsibility of efficiently managing these contacts for all of its clients, thus reducing the costs to campaigns.

On a broader level, a greater potential problem may be created by denying candidates the right to utilize a vendor that provides a merchant ID with a range of related services for collecting Internet contributions. A principle benefit of the use of the Internet for campaigning is the cost-effectiveness of the medium to raise funds. Yet a requirement that allows only campaigns deemed by issuers to be "credit worthy" to take contributions online would be inherently problematic, and would place too much importance on the varying standards used by credit card companies in issuing merchant IDs. This scenario further creates the specter of allegations that credit card companies may have discriminatorily denied certain campaigns merchant IDs for Internet contributions, and thus possibly influenced elections.

Conclusion

For the foregoing reasons, Aristotle respectfully urges the Commission to advise the Committee that a vendor's use of a single merchant ID in collecting and processing Internet campaign contributions for multiple clients is lawful, provided that the vendor and campaign satisfy the conditions set forth above.

Respectfully submitted,


J. Blair Richardson, Jr.

Counsel for Aristotle Publishing, Inc.