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Rec'd ORC Policy
Aug. 1, 2000 - PM

July 31, 2000

Via Hand-Delivery

Mr. Darryl R. Wold
Chairman
Federal Election Commission
999 E Street, NW
Washington, DC 20436

AOR 2000-22

Re: REQUEST FOR AN ADVISORY OPINION

Dear Chairman Wold:

This letter represents a formal request for an advisory opinion by the Federal Election Commission ("FEC" or "Commission"), in accordance with 2 U.S.C. § 437f, on behalf of the Air Transport Association of America, the American Land Title Association, the Council of Insurance Agents and Brokers, the Independent Insurance Agents of America, and the Society of Independent Gasoline Marketers of America (collectively, "Associations"). In accordance with the new federal requirements enunciated in the recently enacted "Electronic Signatures in Global and National Commerce Act" ("E-Signatures Act" or "Act"),¹ the Associations ask the FEC to verify that the use of an electronic signature by a corporate representative constitutes a valid written authorization for a trade association to solicit political action committee ("PAC") contributions from restricted class employees.

Pursuant to 11 C.F.R. § 114.8, a trade association may solicit contributions to a separate segregated fund from the stockholders and executive or administrative personnel of its member corporations, as well as the families of these individuals (*i.e.*, "restricted class employees"). First, however, the trade association must receive "separate and specific approval" from corporate representatives. To accomplish this, the Associations – all of which have PACS and corporate members – send a solicitation form (usually by mail) to the representative of each member corporation. The corporate representative then typically signs the authorization form and sends it back through the mail to his or her respective Association. The Associations would like

¹ Pub. L. 106-229 (signed June 30, 2000).

to have the additional options of receiving executed corporate authorizations via electronic mail or through password protected websites.

We believe that the E-Signatures Act empowers the Associations to obtain corporate authorizations through such electronic commerce mechanisms. The Act generally prohibits “a signature, contract, or other record” to “be denied legal effect, validity, or enforceability solely because it is in electronic form[.]”² This rule is expressly applicable to “any transaction in or affecting interstate or foreign commerce.”³ A corporate representative’s submission of a signed authorization clearly constitutes the creation of a contractual obligation that is “in or affect[s]” interstate commerce. Indeed, as noted above, the primary mechanism for submitting such corporate authorizations is through the mails and it has long been accepted that the use of the mails itself constitutes “interstate commerce.”⁴ It is thus clear under the terms of the Act that an authorization in electronic form should not be denied legal effect or validity solely because it is in that form.⁵

The FEC recognized this rule even before Congress enacted the E-Signatures Act when it approved a similar request submitted by Microsoft last year.⁶ The company wanted to develop a payroll deduction system to facilitate contributions from its employees. As part of the system, Microsoft wanted its employees to have an opportunity to authorize payroll deductions by either electronic signature or traditional written signature, before the deductions were made. The FEC granted the use of electronic signatures to authorize payroll deductions for an employee's

² E-Signatures Act, Sec. 101(a).

³ *Id.*

⁴ *See, e.g.*, 18 U.S.C. § 1958 (use of the mails included within statute imposing criminal penalties for the “use of interstate commerce facilities in the commission of murder-for-hire); 15 U.S.C. § 61 (governing activities of commodity trading advisors and pool operators that “take place and are negotiated and performed by *the use of the mails and other means and instrumentalities of interstate commerce*”). In addition, in *United States v. Espy* (E.D. La. Crim. Action No. 96-198), the United States indictment included a count based on the “transport[ation] in interstate commerce” of an illegal corporate campaign contribution.

⁵ The Act dictates that Federal agencies “shall not adopt any regulation, order, or guidance . . . unless . . . such regulation, order or guidance is consistent with Section 101[.]” E-Signatures Act, Sec. 104(b)(2).

⁶ Advisory Opinion 1999-3 (Federal Election Commission) at 4, as viewed at <<http://herndon3.sdrdc.com/ao/ao/990003.html>>.

contributions to a PAC, as long as (1) the employee could also use an electronic signature to revoke or modify the amount of his authorization at any time, and (2) a record of the submission of the authorizing signature is maintained in a retrievable manner. This was premised on Microsoft's assurance that various safeguards would preserve the security and integrity of the electronic signature. In making this decision, the Commission observed that it

has previously interpreted its regulations to be consistent with contemporary technological innovations, including the maintenance of records in non-paper form ... where the use of the technology would not compromise the intent of the Act or regulations.⁷

In our case, the Associations can and will maintain the necessary security measures to safeguard any electronic signature processes that they institute. Each of the Associations maintains a list of the corporate representatives to whom they can directly send electronic mail, and each Association has the capacity to ensure that only authorized corporate representatives have access to the corporate authorization forms through the use of private password access to a secured portion of the Association's website. These passwords can be coded so that only the corporate representatives can get solicitations for authorization forms. The corporate representatives would then be permitted to either provide written authorization via either an electronic signature or a traditional written signature. With modern security measures – such as the use of passwords for access and the implementation of electronic notification to confirm receipt of the form – the Associations can safeguard the integrity of these electronically signed documents.

In addition, the Associations recognize that the use of electronic means to obtain the requisite corporate authorizations does not in any way relieve them from their obligations to comply with any FEC regulatory requirement, including their obligation to maintain a record of the authorization.

The agreements between trade associations and their corporate members are clearly contractual and they clearly affect interstate commerce. As such, they are governed by the E-Signatures Act. The use of electronic means in gaining corporate authorization, in lieu of traditional paper records, should be considered a legitimate and valid method for completing this transaction. It is consistent with the E-Signatures Act, as well as with prior FEC guidance. The Associations seek an advisory opinion from the FEC confirming that the use of electronic signatures to execute corporate authorizations is permissible.

⁷ *Id.* at 3.

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We would be happy to answer any questions and to provide any additional materials that may assist the Commission with its consideration of this request.

Sincerely,

Handwritten signature in black ink, appearing to be "Scott A. Sinder" and "Stephen Gold".

Scott A. Sinder
Stephen Gold
Counsel to the Associations