



FEDERAL ELECTION COMMISSION
Washington, DC 20463

April 19, 2001

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2001-04

Kenneth A. Gross
Skadden, Arps, Slate, Meagher & Flom, LLP
1140 New York Avenue, N.W.
Washington, DC 20005-2111

Dear Mr. Gross:

This refers to your letter dated March 6, 2001, with enclosures, on behalf of the Morgan Stanley Dean Witter & Co. Political Action Committee ("MSDWPAC"), requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the use of electronic signatures by restricted class employees to authorize payroll deductions of contributions.

MSDWPAC is the separate segregated fund ("SSF") of Morgan Stanley Dean Witter & Co. ("MSDW"). You state that MSDWPAC currently solicits funds from persons within its restricted class in accordance with the Act and Commission regulations.¹ To solicit and collect such contributions from MSDW's executive and administrative personnel, MSDWPAC employs, among other methods, a payroll deduction plan. You explain that, under this plan, MSDWPAC sends a written solicitation and payroll deduction form by interoffice mail to its restricted class members. Typically, a restricted class member will sign the payroll deduction form to indicate his or her voluntary assent, designate the amount to be deducted, and then return the completed authorization form to MSDWPAC.

¹ As noted below, the "restricted class" personnel of a corporation consists of the corporation's executive and administrative employees and its stockholders. The families of these personnel are also included. See 2 U.S.C. §441b(b)(4)(A)(i); 11 CFR 114.1(c)(1), 114.1(j) and 114.5(g)(1).

You further explain that, given the near-ubiquitous use of computer and Internet technology in the workplace today, MSDWPAC would like to solicit its restricted class members via the Internet and accept their payroll deduction authorizations in a form other than the traditional, written signature on a paper document. Specifically, MSDWPAC proposes to establish an Internet website which would enable its restricted class members to authorize payroll deductions via electronic signature.

Included with your request are several exhibits illustrating the appearance of each “page” or screen image of the proposed website. *See generally*, Exhibits A1-A8. The first page that a user sees upon typing the correct address to the site contains a login screen that requires the user to enter a personally unique employee identification number. This number will be checked against a database of eligible restricted class members. Only those users whose employee identification numbers are verified as belonging to the eligible restricted class will be permitted access to the website. If the identification number matches, the user can proceed to the next series of webpages where the actual process to authorize the payroll deduction can begin.

When the user clicks on the screen option from a menu list to make a “pledge,” a further series of screens appears. The user is first asked to type his or her home address and occupation. On a subsequent screen, the user must verify the user’s e-mail address. You state that this step ensures that users will be sent e-mails confirming their contributions. As before, all of the above information must be provided and is rechecked against the data base for restricted class employees. It must be correctly matched before access is given to subsequent steps in the authorization process.

The next screen that appears gives the user the opportunity to specify the amount the user wishes to contribute. A statement on the screen informs the user that the suggested guideline amount is merely a suggestion and that the contributor is not under any obligation to follow it or to make a contribution, and that no employment advantage or disadvantage occurs from not making the contribution, or not following the guideline. After the user clicks the “next” icon on this screen, the final page appears.

This page presents the last step in the deduction authorization process and you offer two different formats, depending on the type of electronic signature the Commission approves. Both versions contain affirmation statements which require users to review a series of Commission required disclaimers.² In your preferred version of the page, the screen contains the final statement: “By entering your full name below you are agreeing to all of the above items” and then provides a space for the user to type his or her name. Once the user clicks on the “submit” icon, this would constitute the electronic signature of the user. In the second version, the final line would read “By entering your full name and Social Security Number below you are agreeing to all of the above items.” Again,

² These include an acknowledgment that the user is a U.S. citizen, or permanent resident alien, and the recognition of the political purpose of the PAC and the uses of contributions to the PAC. The affirmation statements also attest to the user’s willing decision to make the contribution and that the contribution is not made with corporate treasury funds or through use of a business credit card.

this would constitute the electronic signature for the second version of the page once the user provides the information and clicks the “submit” icon. At the conclusion of the process, with the sending of confirmatory e-mails to the user, the enrollment process in the payroll deduction program is complete.

You state that MSDWPAC seeks the Commission’s guidance as to whether the alternative forms of electronic signature proposed above would constitute proper authorization by the restricted class members under the Act.

ACT AND COMMISSION REGULATIONS

An exception to the Act’s general prohibition on corporate contributions provides that a corporation may solicit contributions to its SSF from its “restricted class,” which includes the corporation’s executive and administrative employees and stockholders.³

2 U.S.C. §441b(b)(4)(A)(i); 11 CFR 114.1(c), 114.1(j) and 114.5(g)(1). Commission regulations permit the use of a payroll deduction plan for soliciting and collecting voluntary contributions from restricted class employees to a corporation’s SSF. 11 CFR 114.1(f), 114.5(k)(1). The permissibility of such a plan is dependent upon compliance by the corporation and the SSF with the requirements of voluntariness set out in 2 U.S.C. §441b(b)(3) and 11 CFR 114.5(a)(1)--(5). These include, but are not limited to, requiring that a corporate solicitation inform the employee of the political purposes of the SSF, and of his or her right to refuse to contribute without any reprisal. Moreover, when the solicitation suggests a guideline for contributions, it must make clear that the guidelines are merely suggestions, that the individual may contribute more or less than the guidelines suggest, and that the corporation will not favor or disfavor anyone for the amount of their contribution or the decision not to contribute. 11 CFR 114.5(a)(2)--(5).

When a payroll deduction or other check-off process is used for an SSF, there must be an affirmative authorization by the contributor in order to permit the deduction. *See, Federal Election Commission v. National Education Association (“NEA”),* 457 F.Supp. 1102 (D.D.C. 1978).⁴ The specific and voluntary donative intent of the solicited employee needs to be manifested in a written authorization by him prior to the actual deduction of any contributions. *See* Advisory Opinion 1997-25. This is often accomplished through the sending of a solicitation and payroll deduction (paper) form to the employee who, if she desires to contribute in this way, designates the amount to be deducted during the pay period and then indicates her assent via signature. This signature is necessary as a unique identifier of the employee.

³ Corporation employees (even if they fall outside the executive or administrative personnel class) who participate in company stock ownership programs may, under certain circumstances, qualify as company stockholders. If so qualified, they may participate in the use of a payroll deduction plan for collecting contributions for the corporation’s SSF. *See* Advisory Opinions 1998-12, 1996-10 and 1983-17.

⁴ In *NEA*, the court determined that a union’s use of a reverse check-off procedure to collect contributions to its SSF results in involuntary contributions. The court concluded that the reverse check-off violated the Act because it “require[d] the dissenter to act to prevent a contribution rather than requiring his affirmative assent to make one.” *NEA*, at 1106.

In addition to denoting to the corporation and the SSF that a particular employee has authorized the deduction from his salary, the signature also indicates that fact to the Commission. Commission regulations provide that each political committee required to file any report or statement with the Commission shall:

[m]aintain records, including bank records, with respect to the matters required to be reported, including vouchers, worksheets, receipts, bills and accounts, which shall provide in sufficient detail the necessary information and data from which the filed reports and statements may be verified, explained, clarified, and checked for accuracy and completeness.

11 CFR 104.14(b)(1). The committee must preserve such records for audit or inspection by the Commission for a period of at least three years after the related report or statement is filed. See 11 CFR 104.14(b)(3) and 102.9(c). A payroll deduction authorization form, signed by the contributor, is a record supporting each report disclosing a contribution made pursuant to that authorization.⁵ The contributor's signature indicates to the Commission that the particular employee authorized his contribution.

APPLICATION TO PROPOSAL

As noted in the request, the Commission has previously considered, in Advisory Opinion 1999-3, the use of electronic signatures by a restricted class to authorize payroll deductions of contributions to an SSF. In that opinion, the Commission approved the use of digital electronic signatures by Microsoft employees to facilitate the making of the contributions to Microsoft's separate segregated fund. The protocols adopted by Microsoft, to ensure that only authorized employees could submit the payroll deduction authorizations, included the use of individual passwords for each employee and the use of confirmatory e-mail messages sent after the submission of the deduction authorization. See Advisory Opinion 1999-3. These elements, central to the Commission's conclusions, are included in your proposal as well.⁶ You also affirm that qualified contributors to MSDWPAC will have the same ability as the contributors in Advisory Opinion 1999-3 to modify or revoke their authorizations and that such authorizations will be maintained in a retrievable manner in the event of a Commission audit or investigation. Again, this aspect was also important in the Commission's approval of Microsoft's proposal.

The main distinction between your situation and Advisory Opinion 1999-3 is that MSDWPAC will use a different form of electronic signature to activate the payroll deduction than was approved in the prior opinion. Microsoft used a digital signature, while MSDWPAC proposes to use the standard "click through" process which forms the

⁵ This means that the payroll deduction authorization, whether in paper document or electronic record format, must be retained for three years from the filing date of each PAC report on which a contribution pursuant to that authorization is disclosed. See 11 CFR 104.14(b)(3).

⁶ In the exhibits, which illustrate the different screens a contributor will view when accessing MSDW's web site, you note that the information provided by the viewer at each stage of the process will be compared to the data base that encompasses the restricted class members. At all stages, the information provided must fit into that database and match with a specific individual in the restricted class for the process to continue.

basis for much of Internet commercial transactional activity. However, the Commission concludes that this distinction is not significant. While the Commission has not previously considered the “click through” process for contributions made by a restricted class to an SSF, it has previously approved situations where this method was used to make contributions to Presidential candidate committees (Advisory Opinions 1999-9 and 1999-22). Furthermore, while past opinions on Internet contributions have provided a safe harbor as to the security measures political committees may adopt, once basic security and verification concerns (as identified in Advisory Opinions 1999-9 and 1999-3) were addressed, these opinions did not purport to restrict or delineate the specific type of technology that must be utilized. *See* Advisory Opinion 1999-9. Therefore, the Commission concludes that the first method you propose to accept payroll deduction authorization for contributions by the restricted class to MSDWPAC is permissible.⁷ The alternative proposal, which uses social security numbers to verify the identity of the contributor, is substantially similar to the preferred method. Therefore, it also would be permissible.

This response constitutes an advisory opinion concerning the 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,

(signed)

Danny L. McDonald
Chairman

Enclosures (AOs 2000-22, 1999-22, 1999-9, 1999-3, 1998-12, 1997-25, 1996-10, 1995-9 and 1983-17)

⁷ The request cites the recent Electronic Signatures in Global and National Commerce Act (“E-Signatures Act”), Pub. L. 106-229 (June 30, 2000), in support of MSDWPAC’s proposal to obtain voluntary contributions by means of electronic, payroll deduction authorizations and refers to Advisory Opinion 2000-22. In that opinion, the Commission concluded that it was unnecessary to determine whether the E-Signatures Act could apply to certain transactions by a trade association SSF, which were regulated by the FECA, since the transactions “are not denied legal effect due to the use of an electronic signature or record.” The Commission reiterates that view here where an electronic payroll deduction process would be used to make contributions to the SSF of a business corporation. As explained above, the Commission’s approach here is similar to that prescribed in the E-Signatures Act in that, once the basic policy concerns underlying the FECA and Commission regulations are met, the result is technologically neutral. For a discussion of the policy basis of the E-Signatures Act, see Dorothy J. Glancy, *Electronic Signature Statute Blazes Uniform Trail for Electronic Commerce*, 69 U.S. Law Week 2467 (2001).