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ATTORNEYS AT LAW

2006 JAN 27 P 4:55

January 27, 2005

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FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL

Federal Election Commission  
Office of General Counsel  
999 E Street, NW  
Washington, DC 20463

AOR 2006-08

Re: Request for Advisory Opinion

Dear Commissioners:

This firm seeks an Advisory Opinion for a for-profit corporation (the "Corporation") organizing to provide commercial services to persons interested in making contributions to political and non-profit organizations. With the growing complexity of federal and state campaign finance laws (and increasing penalties for non-compliance), donors are looking for new service providers to assist them in making lawful and reportable contributions.

The Corporation's mission is to provide donation management services to individuals for a fee. An individual can become a customer of the Corporation by signing a contract, paying a service fee, and depositing funds they can later direct to political and non-profit organizations. The Corporation will transmit the money as directed, provide the recipients with all required information about the donors, and advise the donors on their contribution limits and account balances. Money on deposit which a donor does not wish to contribute will be returned upon request, but the service fee remains the property of the Corporation.

Accordingly, we seek an Advisory Opinion from the Federal Election Commission on the legality of a for-profit corporation providing these commercial services to prospective donors.

### FACTS

What follows are the salient facts of how the Corporation is designed and intends to operate:

- The Corporation will be incorporated as a for-profit entity.
- The Corporation will not be established, financed, maintained or controlled by any candidate or political committee.
- The Corporation intends to provide state and federal political and non-profit (501(c)(3) and (c)(4) for example) donation management services to individuals. The Corporation does not intend to have corporate clients at this time.
- The Corporation plans to accept funds from individuals who will, at a later date, direct those funds be contributed to candidates, committees or causes the customer selects.

- The customer will initially deposit the money he or she intends to contribute, plus a service fee. These monies will be segregated: the service fee will be deposited into the Corporation's treasury, while the money the individual has deposited for future contributions will be held in a different merchant account. The contributions will stay in merchant accounts until the customers designate the recipient candidates, committees or causes or ask for the money to be returned.
- Once a designation has been received, the Corporation will forward the funds to the recipient within 10 days.
- The Corporation will collect each individual's occupation and employer information and provide it to the recipient committees and causes where applicable. The Corporation will provide up-to-date information to donors regarding their remaining contribution limits and account balance.
- The Corporation will not electioneer, engage in federal election activity, or expressly advocate the election or defeat of candidates or causes.
- The Corporation will adopt various screening and verification procedures to prevent the making of prohibited contributions, and will process contributions only insofar as they have been deemed permissible. It will disallow individuals from exceeding contribution limits within the purview of its service. It will provide mechanisms by which customers can manage their contribution activity to date and their planned contributions. Upon registration for the service, customers will be informed of the Federal Election Campaign Act's (the "Act") contribution limits and source restrictions (and state laws, where applicable).<sup>1</sup>

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<sup>1</sup> The attestation language will include the following:

Federal law prohibits contributions from the general treasury funds of corporations, labor organizations or national banks. Therefore we are required to ask you confirm the following statements:

1. This contribution is made from my own funds, and not those of another.
2. This contribution is not made from the general treasury funds of a corporation, labor organization or national bank.
3. I am not a Federal government contractor, nor am I a foreign national who lacks permanent resident status in the United States.  
[For credit or debit card transactions]
4. This contribution is made on a personal credit or debit card for which I have the legal obligation to pay, and is made neither on a corporate or business entity card nor on the card of another.

Failure to sign or attest to any of the attestations above will result in the rejection of the funds. Additionally, the Corporation plans to inform prospective customers their contributions will be publicly identified on the recipient's disclosure reports.

- The Corporation expects its customers will continue to directly receive numerous solicitations for contributions from political committees and recommendations from their friends or the membership organizations to which they belong. The donors will, in turn, alert the corporation of their ongoing contribution decisions, and may ask the corporation to record the fundraising event (if any) the contribution corresponds to, or the person who solicited the contribution.
- The Corporation may itself begin receiving contribution solicitations from candidates, parties and causes that it will pass on to its customers. Customers may indicate to the corporation what solicitations they are, and are not, interested in receiving.<sup>2</sup>
- The Corporation will not censor any customer's choice on the disbursement of their money – at all times, the money on account remains the property of the individual – the Corporation is only providing an accounting and forwarding service.

### ANALYSIS

1. The Corporation's planned business is similar to other commercial operations the Commission has approved in earlier Advisory Opinions. *See, e.g.*, Advisory Opinions 2004-19 and 2002-07. Those opinions stand for the proposition that, under the proper circumstances, a corporation may handle contributions and expenditures without violating the prohibition at 2 U.S.C. § 441b if it qualifies as a "commercial vendor."

In Advisory Opinion 2002-007, the Commission determined a corporation could collect and forward contributions to political committees as a commercial venture in somewhat similar circumstances as those presented in this request. The Commission concluded, even though the requestor was providing something of value to political committees and facilitating the making of individual contributions, it was acting as a permissible "commercial vendor" based on an analysis of the corporation's compensation, handling of earmarked contributions, and screening procedures. *See* Advisory Opinion 2002-007. Similarly, in Advisory Opinion 2004-19, the Commission concluded a corporation would be operating permissibly as a "commercial vendor" under 11 CFR 114.2(f)(1) if: "(1) its services are rendered for the usual and normal charge paid by authorized candidate committees;" (2) it "forwards earmarked contributions to candidates through separate merchant accounts;" and (3) "its website incorporates adequate screening procedures to ensure it is not forwarding illegal contributions." *Id.*

In this case, subscribers or customers of the Corporation's services will pay a fee of either a fixed amount or varied on the amount of each transaction.<sup>3</sup> In either event this arrangement is designed to constitute the "usual and normal charge" for such services. *See* Advisory Opinion

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<sup>2</sup> The Corporation is considering providing a service that, for an additional fee, customers may receive the corporation's commentary and analysis of state and federal officeholders, non-profits, campaigns and events.

<sup>3</sup> The Corporation is considering various business models and marketing plans and will design a fee structure that is both reasonable and meets the Commission's concerns. One possible model includes charging the recipient committees a shipping and handling fee.

constitute the "usual and normal charge" for such services. *See* Advisory Opinion 2002-07. The Corporation will receive payment for these services in advance of, or concurrently with, the transfer of contributions to the recipients, and will not forward any contributions without an assurance of payment.<sup>4</sup>

The requestor concedes this business plan is somewhat novel and the Commission cannot make any specific finding regarding what a comparable "usual and normal charge" would be, including an adequate profit and compensation. Nevertheless, the Corporation will structure its fee schedule in such a way as to create commercially reasonable relationships with its donor customers. By doing so, the Corporation would be providing services in the ordinary course of business as a "commercial vendor" and not engaging in the prohibited facilitation of contributions under 11 CFR 114.2(f)(1).

The requestor's plan ensures the contributions designated for specific candidates will not become corporate funds that are improperly contributed to the candidate committees. *See* Advisory Opinion 2002-07. All contributions would be processed through a separate merchant account and would not be commingled with the Corporation's treasury account. Additionally, the screening and verification procedures for electronic payments will meet the standards established in previous advisory opinions. *See* Advisory Opinions 1999-09 and 1999-22.

The Corporation's plan stands in contrast to those where the Commission has reviewed fundraising efforts by political committees using certain "affinity marketing arrangements." *See* Advisory Opinions 1992-40, 1988-12 and 1979-17. Under these affinity marketing arrangements, a corporation (sometimes a bank) would market its services to potential customers who were also identified as supporters of a particular political party or candidate. The party or other political committee would endorse the product or service offered by the corporation. In some of these proposals, the corporation would pay a fee to the political party in return for the endorsements. Rather than viewing these as commercial transactions, the Commission regarded them as fundraising efforts by political committees. The Commission specifically concluded the fact a business corporation receives something of value (an endorsement of its product or service) in exchange for payments that purported to be the proceeds of a commercial sale did not change the nature of the transaction as a contribution. Instead, the payments received by the political committees were regarded as contributions subject to the prohibitions of 2 U.S.C. 441b.

In this case, the Corporation's plan is more similar to those Advisory Opinions where a political committee pays a telemarketing firm a commercially reasonable fee in exchange for the firm's efforts to market services that offer an opportunity to contribute to a committee. Those opinions dealt with bona fide commercial relationships between political committees and the service providers, and did not result in contributions from the service providers to the political committees. *See* Advisory Opinions 1999-22, 1995-34, 1994-33, and 1990-14. The only

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<sup>4</sup> Unlike the defendant in *FEC v. Malenick*, 310 F.Supp. 2d 230 (D.D.C. 2004), the Corporation will not expressly advocate the election or defeat of any candidate committee or cause. Instead the Corporation intends to merely provide a service to people who are already politically motivated and have their own goals.

difference between this request and those opinions is that this Corporation's customers are individuals, not political committees.

Importantly, the Corporation will also follow the rationale the Commission used when approving the handling of earmarked contributions in Advisory Opinion 2004-19. In this case, the Corporation will retain deposits by customers and later assist them in making contributions to causes and campaigns. Similar to a commercial fundraising firm, the Corporation's business is transferring money to candidates pursuant to agreements with individual donors. In approving a corporation as a commercial fundraising firm, the Commission analyzed whether the corporation exercises any discretion that might influence which candidates would be recipients of the contributions, or the amounts that candidates would receive. The existence of such discretion would militate against a conclusion that the firm is providing a commercial service on an equal basis to anyone registered with the firm. The Corporation will not retain such discretion under its proposed plan. Rather, the individual contributor makes all decisions regarding their contributions.

2. In addition to satisfying the "commercial vendor" exception to the prohibition on corporate facilitation of contributions at 11 CFR 114.2(f)(1), the Corporation's plan fits the "commercial fundraising firm" exception to the definition of "conduit or intermediary" in 11 CFR 110.6(b)(2).

In our opinion, the Corporation meets the "commercial fundraising firm" exception because it is a "commercial vendor" retained by individuals to facilitate their making lawful contributions. The only difference between the requestor corporation and those firms literally exempt under 11 CFR 110.6(b)(2) is the entity bearing the charge for the service provided: in this case the donor and in prior cases, the committees. In our opinion, a commercial vendor should be exempt because a service is being paid by a lawful source, not necessarily on the basis of who is paying it.

3. In executing its planned service, the Corporation will not know the identity of the recipient of funds until such funds are designated by the customer at some future time. Accordingly, we believe the Corporation should be subject to the same timing requirements placed on other entities accepting contributions for as yet undetermined candidates. The Commission decided in Advisory Opinion 2003-23 that the timing requirements of 2 U.S.C. 432(b)(2) and 11 CFR 102.8(a) were not triggered until the presumptive nominee was chosen by the method described in that request. Similarly, the timing requirements of 2 U.S.C. 432(b)(2) and 11 CFR 102.8(a) should not be triggered in this case until the donee candidate is determined by the method described in this request. In all instances, the funds designated for a particular candidate will be forwarded within 10 days of the candidate's identification by the customer according to the process described in this request.<sup>5</sup>

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<sup>5</sup> In the event several subscribers direct a contribution to the same recipient at the same time, the Corporation will clearly indicate in the check or wire the amounts attributable to each customer.

4. As has been described, the Corporation's planned activity does not involve any activity whereby the Corporation solicits, or makes its own, political contributions of any kind. The Corporation does not maintain a separate segregated fund and will not engage in any PAC-related activities or solicitations. Instead the Corporation will market its services to prospective customers. Such marketing will not constitute a solicitation for any clearly identified federal or state candidate, cause, or committee. And as the Commission ruled in Advisory Opinion 1999-22, and reinforced in Advisory Opinions 2002-07 and 2004-19, it is a commercially permissible activity to market services to enable customers to contribute.

#### QUESTIONS PRESENTED

Organizers of the Corporation have had discussions with several individuals who have expressed an interest in subscribing to this contribution management service. Before the entity is incorporated and marketing materials sent (and most importantly before any donations are forwarded) the Corporation obviously wants to ensure its business model is that of a permissible commercial vendor, and not of a political committee. Accordingly, this request presents the following questions:

- May the Corporation engage in the activity described above as a commercial vendor and/or a commercial fundraising firm and not be considered a political committee under the Act?
- May the Corporation maintain two accounts: one for its corporate treasury, and one for its subscribers, for use in making the directed contributions?
- May political committees and non-profit organizations make donation suggestions to the subscribers, through the Corporation?
- May the Corporation recruit individuals to serve on its Board who may also be officers of non-profit organizations and political committees?

Please call with any questions regarding this letter if you need further information.

Sincerely,



Craig Engle



**FEDERAL ELECTION COMMISSION**

Washington, DC 20463

February 7, 2006

Craig Engle, Esq.  
Arent Fox  
1050 Connecticut Avenue, NW  
Washington, DC 20036-5339

Dear Mr. Engle:

This refers to your letter received on January 27, 2006, on behalf of an unnamed for-profit corporation (the "Corporation"), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the Corporation's business model of providing donation management services to individuals for a fee.

The Corporation intends to enter into contracts with individuals pursuant to which the individual customers would pay the Corporation a fee of either a fixed amount or an amount that varies with the amount of each transaction. In exchange, the Corporation would collect deposited funds from the customers, maintain those funds in a merchant account, and transmit those funds as directed by the customer to either non-profit organizations or political organizations. Additionally, the Corporation will advise the recipients of all required information about the customer, and it will advise its customers on any applicable contribution limits. The Corporation is also considering providing another service for an additional fee that would provide customers with the Corporation's "commentary and analysis of state and federal officeholders, non-profits, campaigns and events." You ask generally if the Corporation's business model is that of a commercial vendor, and not of a political committee under the Act. You also pose several questions about specific aspects of the business model.

The Act authorizes the Commission to issue an advisory opinion in response to a "complete written request" from any person with respect to a specific transaction or activity by the requesting person. 2 U.S.C. §437f(a). Commission regulations explain that a request must set forth a specific transaction or activity that the requesting person plans to undertake or is presently undertaking and intends to undertake in the future. 11 CFR 112.1(b). The regulations also explain that such an authorized agent may submit a request, but "the agent shall disclose the identity of his or her principal." 11 CFR

112.1(a). The regulations further explain that this Office shall determine if a request is incomplete or otherwise not qualified as an advisory opinion request. 11 CFR 112.1(d).

In view of the above requirements, this Office will need further detail regarding the activities you describe. Specifically, you will need to disclose the identity of the organizers of the corporation, indicating the positions they anticipate filling within the Corporation, once it is established. In addition, please respond to the following questions:

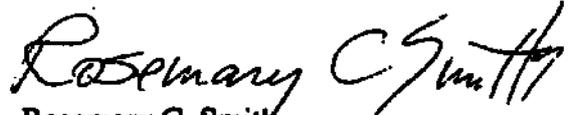
- 1) Please explain whether the additional contemplated service of the Corporation providing "commentary and analysis of state and federal officeholders, non-profits, campaigns and events" is subject to your assurances that the Corporation will not "electioneer, engage in federal election activity, or expressly advocate the election or defeat of candidates or causes." Please provide an example of the type of commentary and analysis the Corporation anticipates offering.
- 2) Please explain whether customers' contributions made independently of the arrangement with the Corporation would be monitored for compliance with the limitations in 2 U.S.C. 441a, including particularly the biennial limitations in 2 U.S.C. 441a(a)(3). Please explain what the Corporation will do if it determines that an individual has reached his or her biennial limit, or the limit on the contributions to a specific candidate or committee.
- 3) Please explain how political committees and non-profit organizations would "make donation suggestions to the [customers] through the Corporation." Specifically, would this activity be limited to the Corporation "pass[ing] on to its customers" contribution solicitations from candidates, parties and causes? For example, will the Corporation permit any political committee or non-profit organization whatsoever to make these suggestions? If not, how will the committees or non-profits be chosen, and will they be charged for this service?
- 4) Your request states, "Customers may indicate to the corporation what solicitations they are, and are not, interested in receiving." Please describe further how this aspect of the business plan would function.
- 5) Your request asks if the Corporation may recruit individuals to serve on its Board who may also be officers of non-profit organizations and political committees. Please explain how the Corporation will ensure that it is not directly or indirectly established, financed, maintained or controlled by any Federal candidate, officeholder, or political committee, as defined in 11 CFR 300.2(c).

Upon receiving your responses to the above questions, this Office and the Commission will give further consideration to your inquiry as an advisory opinion

Letter to Craig Engle, Esq.  
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request. If you have any questions about the advisory opinion process or this letter, please contact Duane Pugh, a senior attorney in this Office, at 202-694-1607.

Sincerely,

  
Rosemary C. Smith  
Associate General Counsel

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**Arent Fox**  
ATTORNEYS AT LAW

February 17, 2006

**Craig Engle**  
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engle.craig@arentfox.com

Rosemary C. Smith  
Associate General Counsel  
Federal Election Commission  
Office of General Counsel  
999 E Street, NW  
Washington, DC 20463

Re: Request for Further Information

Dear Ms. Smith:

This letter responds to yours of February 7, 2006, requesting additional information regarding my January 27, 2006, request for an Advisory Opinion. Your office has requested additional information about the organizers of the Corporation and posed five questions about the planned activities of the Corporation. I will address each of these in turn.

This request for an Advisory Opinion is submitted on behalf of Matthew Brooks. Craig Engle, Esq. and Jeff Altman, Esq. are providing legal and organizational advice to the effort. If the Corporate mission and structure is approved by the Commission, Mr. Brooks will determine (with advice of counsel) who will fill positions within the corporation, subject to the assurances provided in response to Question 5 below.

"1) Please explain whether the additional contemplated service of the Corporation providing 'commentary and analysis of state and federal officeholders, non-profits, campaigns and events' is subject to your assurances that the Corporation will not 'electioneer, engage in federal election activity, or expressly advocate the election or defeat of candidates or causes.' Please provide an example of the type of commentary and analysis the Corporation anticipates offering."

Answer: Yes, the additional contemplated service will be bound by those assurances. For candidates, the commentary and analysis may include: biographical information; the candidate's voting record on particular issues; the voting record(s) of any opponent(s); the ratings various organizations have given to the candidate and his opponent; re-election percentages; the candidate's campaign contribution position; the strength of the candidate's party loyalty; and any relevant media articles. For non-profits, the commentary and analysis may include the goals and objectives of the group; membership information; large/key contributors or supporters; past and anticipated expenditures; and leadership profiles.

"2) Please explain whether customers' contributions made independently of the arrangement with the Corporation would be monitored for compliance with the limitations in 2 U.S.C. 441a, including particularly the biennial limitations in 2 U.S.C. 441a(a)(3). Please explain what the

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Corporation will do if it determines that an individual has reached his or her biennial limit, or the limit on the contributions to a specific candidate or committee.”

**Answer:** Yes, the Corporation will use its best efforts to monitor customer contributions made independently of the arrangement with the Corporation for compliance with applicable limitations. The Corporation will not process any contributions it knows to be in violation of applicable limitations. If the Corporation determines an individual has reached any applicable limit, the Corporation will inform the individual by email and explain why future contributions can not be processed.

“3) Please explain how political committees and non-profit organizations would ‘make donation suggestions to the [customers] through the Corporation.’ Specifically, would this activity be limited to the Corporation ‘pass[ing] on to its customers’ contribution solicitations from candidates, parties and causes? For example, will the Corporation permit any political committee or non-profit organization whatsoever to make these suggestions? If not, how will the committees or non-profits be chosen, and will they be charged for this service?”

**Answer:** The Corporation’s activity in this regard will be limited to passing on contribution solicitations from candidates, parties and causes. The Corporation will permit any candidate, party, political committee or non-profit organization to make such contribution suggestions. At this time, the Corporation does not plan to charge for this service. The requests may be screened as described in response to Question 4.

“4) Your request states ‘Customers may indicate to the corporation what solicitations they are, and are not, interested in receiving.’ Please describe further how this aspect of the business plan would function.”

**Answer:** At the time individual customers engage the services of the Corporation, each may be given an interest questionnaire to develop a donor profile for the individual. Solicitations matching a customer’s donor profile will be forwarded to the customer.

“5) Your request asks if the Corporation may recruit individuals to serve on its Board who may also be officers of non-profit organizations and political committees. Please explain how the Corporation will ensure that it is not directly or indirectly established, financed, maintained or controlled by any Federal candidate, officeholder, or political committee, as defined in 11 CFR 300.2(c).”

**Answer:** In order to be successful, the Corporation needs to recruit a broad base of individuals to serve as its officers and on its board. Because of the nature of the services the Corporation plans to provide, it is likely board members will include politically motivated persons, people with fundraising experience, people familiar with non-profits, and certainly people with business acumen. Importantly, neither a majority of the board nor a majority of officers will be individuals who are connected to any one federal candidate, officeholder or

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political committee. And as previously stated, the Corporation will be financed by the on-going fees of its customers.

I appreciate the opportunity to address the Commission's questions regarding the planned Corporation.

Sincerely,



Craig Engle