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**From: Duke Williams
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Subject: Draft AO 2007-04 Comment

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I appreciate the opportunity to use the Comment process to attempt to further clarify the role in which Simply Easier Payments resides as relates to credit card processing services for political contributions.

I will be attempting to speak to the specific Advisory Opinions referenced in Draft A relating to the second question in the following categories.

1. Clarification of Simply Easier Payments role by comparison to "a financial service provider that processes credit card contributions" and/or a "credit card company or other processors".
2. Business model differences.

Clarification of Simply Easier Payments Role

Simply Easier Payments is not a card processor. Referring to my 2-26-2007 letter to Tony Buckley at the FEC, here are the parties involved in the process:

"In an online card transaction there are always these parties:

- The card holder.
- The party being paid.
- The card issuing bank – Wachovia, Harris Bank, BankOne, etc.
- The card association – Visa, MasterCard, etc.
- The card processor – in our case Moneris.
- The card network.
- The payment Gateway – us, or VeriSign, etc.”

Simply Easier Payments is a Gateway. Technically this is not a financial service. This is a physical requirement for card payments transacted only online. If you accept card payments with a swipe card device there is no function for a Gateway as the card device has a built in hardware connection to the card network. As a Gateway, Simply Easier Payments is more appropriately considered an internet service or software service. That is how we are classified for tax purposes.

Moneris is the actual card processor in our structure. Moneris has a direct contract with Simply Easier Payments. Moneris does not have a direct contract with any recipient of contributions.

Business Model Difference

The true changes enabled by the Internet are changes to business models.

Our business model is what makes our question about processing fees different than any question the FEC has been asked in any of the referenced Advisory Opinions. I have also reviewed all of the Advisory Opinions that are referenced in any of the referenced Advisory Opinions and I can not find a similar question. Finally, I have reviewed every Advisory Opinion the FEC.com Advisory Opinion Search Engine returned for the query “credit card” and I did not find a similar question.

While I can not find the question being asked, the actual practice of charging a fee directly to the contributor and not counting that fee as a part of the contribution is happening today and has been a reality for many years. The ability to transact contributions on the Internet has brought the issue forward and to your attention.

Examples of contribution payment methods where the contributor pays a fee to a third party include money orders, certified checks, official checks or wire transfers such as through Western Union.

I have found reference to money orders being acceptable as contributions in both Advisory Opinion 1999-9 (Bradley) “a check written on a personal account, escrow or trust account representing or containing the contributor’s personal funds; a money order; or any similar negotiable instrument” and Advisory Opinion 1999-19 (Ellis) that “Absent evidence to the contrary, any contribution made by check, money order, or other written instrument shall be reported as a contribution by the last person signing the instrument

prior to delivery to the candidate or committee." Neither Advisory Opinion speaks to the issue of the cost to the contributor of a money order or to the reduction of the contribution amount as a result of this cost.

I have not found any reference resulting from searches on the FEC.com Advisory Opinion Search Engine to certified checks, official checks or wire transfers. Each of these methods of payment of contribution also creates a cost to the contributor. If no Opinion exists to the contrary, and no method of accounting for those costs has been implemented, then it is reasonable to assume these costs also do not reduce the contribution amount.

If we were a card processor and we offered political committees a 1% processing fee instead of a 1.5% processing fee, and that was our standard business practice, you would never consider making the contribution include the .5% difference.

The service we offer is the equivalent of a 0% fee. Yet the business model change creates the initial impression that you must require a fee which is never actually charged to be treated as an expense. This line of reasoning, if applied in the previous paragraph would lead you to require the phantom .5% processing fee to be applied to the contribution.

The "convenience fee" business model was not in existence at the time of any of the referenced Advisory Opinions. Naturally, the questions this model raises have not been asked as a part of these Opinions.

The convenience fee business model for accepting card payments came into existence in the year 2000. A small software company, Infinet, developed this process jointly with the Card Association and the Higher Education community. The Higher Education community felt the costs of accepting payments by credit card were so high compared to other methods of payments that the expense represented an unjustifiable use of public funds. The convenience fee model allowed the University to let the payor, who desired the convenience of paying by card, absorb the cost of the convenience. No University shows any reduction in the amount of the payment made by the convenience fee method for the amount of the convenience fee. No University shows the convenience fee amount as an expense because no expense is ever incurred by the University.

Since the initial application in 2000 of the convenience fee model, other industries have adopted this method of transferring the high cost of accepting card payments to the payor. These include the Internal Revenue Service for payment of income taxes, many state and municipal governments for payment of taxes and fees, electric utility companies, other utilities such as gas and water, and the insurance industry. In all cases the convenience fee never reduces the amount of the payment being made and is never treated as an expense to the party receiving the payment.

In the Advisory Opinions 1995-34 (Politechs) and 1994-33 (VITEL), both Politechs and VITEL operated phone banks and passed the cost of the transaction through to the committee. Neither Politechs nor VITEL ever asked for an Opinion on not passing the cost through.

In the Advisory Opinion 1995-9 (NewtWatch) the question of passing the cost of the transaction through to the committee was not asked.

All three of these Opinions were requested and responded to prior to 2000 and the existence of the convenience fee business model.

In Draft A "The Commission concludes that, for FECA purposes, there is no distinction between a contributor paying processing fees through a deduction from the amount of the contribution authorized by that contributor and paying such processing fees in a separate transaction. Both are contributions because by paying the "convenience fee," contributors would relieve recipient political committees of a financial obligation that political committees would otherwise have to pay for themselves, thereby providing something of value to these committees."

Following this line of reasoning, contributors would also be "providing something of value to these committees" when they pay by check, money order, payroll deduction, etc. These methods of payment also allow the committee to avoid the card processing fee. I present our convenience fee method as simply another legitimate form of payment. The financial arrangement between Atlal and any committee is exactly the same as the arrangement we have with any other legal entity who chooses to use our service for card payment acceptance.

Advisory Opinion 1999-8 (Specter) is not a question about the charging of credit card transaction fees, but the Response uses the reference to credit card payments as a distinguishable difference between the expense incurred by an investment fund and a chargeable expense. However, the finding in this Opinion, I believe, actually supports Atlal's position. In our service we normally charge a flat dollar fee regardless of the contribution amount. We are required to do this by Visa if the committee accepts Visa card payments. Therefore we believe the contributor is, as stated in Advisory Opinion 1999-8 (Specter), "paying these expenses before the determination is made as to the amount of income credited to the Committee" – in our case the amount of the contribution.

I will attempt to illustrate the flat dollar fee in practice.

Atlal determines to charge a \$2.49 flat fee and we receive the following three contributions for a committee.

	Contribution	Our Fee	Card Processor Charge to us
1 -	\$50.00	\$2.49	\$ 1.50
2 -	\$200.00	\$2.49	\$ 4.45
3 -	\$500.00	\$2.49	\$10.05
Total	\$750.00	\$7.47	\$16.00

This shows how the fee we charge is the same regardless of the contributions made. It also shows how we incur expenses which differ from the fee we charge. Hopefully we make a better estimate and make money.

We also believe that since we have the contract with the card processor (as opposed to the committee having a contract with the card processor) and we pay the card processor's fee's, and that expense is one of our many expenses, that the conclusion in Advisory Opinion 1999-8 (Specter) "to treat the allocable share of the fund's expenses as a Committee expenditure would, in essence, double the amount of the expenses" applies to our service as an independent third party commercially available service. In this case Atlatl - who actually incurs the expense - would be claiming the expense, and the Committee - who does not incur the expense - would also be claiming the expense for a transaction that it never paid for and that it did not owe because, as you have stated previously in this Draft, "the "convenience fee" would constitute the usual and normal charge because it would compensate the Corporation for the costs it incurs in processing and forwarding contributions to the political committees".

There are other examples of such expenses not being treated as reductions to the contributions. Specifically there are a number of Advisory Opinions related to payroll deduction and also Separate Segregated Funds which allow the cost of accepting credit card transactions to not be treated as an expense to the committees. While I absolutely understand that we are not working in conjunction with any specific Separate Segregated Fund, I feel the logic of how the expenses are treated flows through to our service.

Among other Advisory Opinions on this issue are Advisory Opinion 1984-45 (KFC Corporation) "the Commission concludes that KFC Corporation may pay the credit card service charges mentioned in your request as an expense of solicitation". In Advisory Opinion 1990-4 (AVMA) "Such payments by a collecting agent are permitted under 11 CFR 102.(c)(2)(i) as costs incurred in soliciting and transmitting contributions". Let me state again, I am not claiming that we are a collecting agent or a political action committee ourselves. We clearly are not. I am attempting to point out that the mere existence of credit card payments has not been seen in the past as sufficient to cause the Commission to determine transaction charges for card processing to be always treated as a reduction to the contribution or as a committee expense.

In the Advisory Opinion 1991-1 (Deloitte & Touche) the committee has a direct contract with a card processor for payment transactions. I agree under these circumstances the transaction charge is an expense after the amount of the contribution is determined and is correctly charged as an expense. Our service differs in that we are not a "card processor". We are a Gateway. We contract directly with one card processor for all transactions through our Gateway. Those using our service to accept card payments do not directly contract with any card processor for those payments. One direct effect of this is that the funds for the contribution take one day longer to reach the committee's depository account through our service than they do through a direct contract with a processor.

This is very similar to the original Advisory Opinion relating to credit card contributions, Advisory Opinion 1978-68 (Seith). This opinion states "The amount of any contribution made by credit card is the amount authorized by the contributor and may not be reduced by any discounts or services charges deducted by the credit card issuer when remitting contribution proceed to the committee." In our business model the card issuer makes no deduction or set offs against the proceeds of the contribution. This exactly follows our "usual and normal collection procedures" and we are rendering our services in the ordinary course of our business and the standard convenience fee business model as implemented and practiced for over seven years by thousands of separate entities.

To recap:

- We are not a card processor.
- We contract with a card processor instead of the Committee contracting directly with a card processor.
- Our Fee amount is determined separately from any individual contribution amount.
- Our business model differentiates us from previous requests for opinions.
- The convenience fee model is well established and we are requesting the Commission treat it in the same manner as it has been treated by all other applications.
- No other application of the convenience fee payment method reduces the payment amount by any portion of the convenience fee.

This concludes this Public Comment to AO 2007-04 (Atlantl).

Sincerely,


T. Duke Williams, III
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