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May 27, 2011

BY HAND DELIVERY

Christopher Hughey, Esq.
Acting General Counsel
Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463

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FEDERAL ELECTION
COMMISSION
2011 MAY 27 AM 10: 36
OFFICE OF GENERAL
COUNSEL

Re: Advisory Opinion Request

Dear Mr. Hughey:

Pursuant to 2 U.S.C. § 437f, we seek an advisory opinion on behalf of the Democratic Senatorial Campaign Committee ("DSCC"). The DSCC seeks confirmation that the proposed revisions to its fundraising solicitation webpage comply with the requirements of the Federal Election Campaign Act ("FECA") and the Commission's regulations. Specifically, the DSCC asks:

1. Whether the DSCC may make these proposed revisions to the version of the webpage that appears on smartphones, personal digital assistants, and other mobile devices ("mobile solicitation webpage").
2. Whether the DSCC may make these proposed revisions to the version of the webpage that appears on other devices with Internet access (e.g. desktop and laptop computers) ("standard solicitation webpage").

I. BACKGROUND

A. Current fundraising solicitation page featured on DSCC website.

The DSCC solicits credit card contributions on its website, <https://dsc.org/donate?track=DPW-HomePageRightBox>. On its current solicitation webpage, in order to comply with the "best efforts" requirements set forth at 2 U.S.C. § 432(i), the DSCC asks donors to provide the following identifying information:

04005-0001/LEGAL20907240.2

ANCHORAGE · BEIJING · BELLEVUE · BOISE · CHICAGO · DALLAS · DENVER · LOS ANGELES · MADISON · PALO ALTO
PHOENIX · PORTLAND · SAN DIEGO · SAN FRANCISCO · SEATTLE · SHANGHAI · WASHINGTON, D.C.

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- First Name
- Last Name
- Address
- City
- State
- Zip
- E-mail
- Employer
- Occupation

In order to process the credit card payments, the DSCC also asks donors for the following:

- Card Type
- Card Number
- Expiration Date
- Security Code

To comply with the IRS disclaimer requirements at 26 C.F.R. § 6113(a) and the "best efforts" disclaimer requirement at 11 C.F.R. § 104.7(b), the DSCC includes a disclaimer on its website stating that:

Contributions or gifts to DSCC are not tax deductible as charitable contributions. Federal law requires us to use our best efforts to collect and report the name, mailing address, occupation and name of employer of individuals whose contributions exceed \$200 in a calendar year.

Pursuant to 11 C.F.R. § 110.11, the DSCC also includes the following disclaimer on the bottom of the page:

Paid for by the Democratic Senatorial Campaign Committee, <http://www.dsc.org>, and not authorized by any candidate or candidate's committee.

The DSCC also includes the following disclaimer language:

The DSCC does not accept contributions earmarked for a particular candidate. Contributions will be spent for DSCC activities and programs as the Committee determines within its sole discretion.

This information and these disclaimers are required by law. Although it is not required by law, the DSCC currently asks donors to check a box "to confirm that the following is true":

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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 foreign national who lacks permanent resident status in the United States. 4) This contribution is not made from the treasury of an entity or person who is a federal contractor (does not apply to personal contributions by subcontractors, employees, partners, shareholders or officers of federal contractors). 5) This contribution is made on a personal credit or debit card for which I have legal obligation to pay, and is made neither on a corporate or business entity card nor on the card of another. 6) I am at least 18 years old.

The donor then clicks on the button entitled "Support Democrats." If the donor failed to include any of the identifying or credit card information, the donor is prompted to provide that information. Likewise, if the donor fails to check the box certifying her or his eligibility, the donor is asked to check the box. Finally, the vendor used by the DSCC to process online credit card information accepts information input by the donor. If a transaction is entered with an invalid account number, expiration date, or security code, the transaction will not settle.

The DSCC's mobile solicitation webpage is different than its standard solicitation webpage. However, both the mobile solicitation webpage and the standard solicitation webpage currently contain all of the language and boxes described above.

B. Proposed revisions to solicitation webpage.

The DSCC wishes to make revisions to its solicitation webpage. If permitted by the Commission, the DSCC would make these revisions to its standard solicitation webpage and mobile solicitation webpage.

The DSCC believes that its current solicitation webpage contains too much text and that the excess text clutters the page. The current page contains 15 different information fields, 4 different disclaimers, 6 different certifications of eligibility, a box to affirm eligibility, and a button to submit the donation. It is common knowledge among web marketing experts that a cluttered website reduces the conversion rate, that is, the number of users who complete the desired action (which, in this case, is the making of a political contribution).¹ The DSCC's internal data suggest that the requirement that donors check a separate box affirming eligibility leads to a significant amount of "drop off" (e.g. the donor starts filling out the donation form, but decides not to proceed).

¹ See, e.g. Charles Nicholls, BUSINESS INSIDER WAR ROOM, Want People To Make Purchases On Your Website? Then Do This..., available at <http://www.businessinsider.com/landing-page-optimization-checklist-less-is-more-should-be-the-new-approach-2010-9>; Joan O'C. Hamilton, BUSINESS WEEK, Clearing Up Website Clutter, available at http://www.businessweek.com/1999/99_39/b3648083.htm (last accessed on May 26, 2011).

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The problem is significantly worse on smartphones, personal digital assistants, and other mobile devices. The screens on these devices are significantly smaller than a typical laptop or desktop monitor, which exacerbates the clutter problem and drives away even more donors. In addition, donors using smartphones often find it difficult to read the text of the affirmation message and to navigate the screen to check the box.

To rectify these problems – while still protecting against the receipt of impermissible contributions – the DSCC would like to modify its solicitation webpage. The DSCC would like to eliminate the requirement that donors check a box affirming their eligibility before making a contribution. To replace the box, the DSCC would add language below the "Support Democrats" button, which reads:

By clicking this button, I certify that I am at least 18 years old and am making this contribution on a personal credit or debit card with my own personal funds – not those of another person or entity – and that I meet the eligibility requirements set forth below:

- I am not a foreign national.
- I am not a federal contractor.

The DSCC would also include a "click for more info" link next to each of the bulleted statements. The link would direct voters to the bottom of the same page, where a more comprehensive definition for each term would be included.

II. LEGAL ARGUMENT

A. DSCC's proposal complies with 11 C.F.R. § 110.11.

Section 110.11 of the Commission's regulations requires the DSCC to include on all "Internet websites of political committees available to the general public" the following disclaimer: "Paid for by the Democratic Senatorial Campaign Committee, <http://www.dsc.org>, and not authorized by any candidate or candidate's committee." 11 C.F.R. §§ 110.11(a)(1), (b)(3). Under the DSCC's proposal, its solicitation webpage will continue to include this disclaimer. Consistent with the regulations, the disclaimer will continue to be "presented in a clear and conspicuous manner, to give the reader ... adequate notice of the identity of the person or political committee that paid for ... the communication." *Id.* § 110.11(c)(1).

B. DSCC's proposal complies with 11 C.F.R. § 104.7(b).

Section 104.7(b) of the Commission's regulations requires that "[a]ll written solicitations for contributions include a clear request for the contributor's full name, mailing address, occupation and name of employer of individuals whose contributions exceed \$200 in a calendar year." *Id.* §

104.7(b)(1)(i). Under the DSCC's proposal, its solicitation webpage will continue to include the following disclaimer: "Federal law requires us to use our best efforts to collect and report the name, mailing address, occupation and name of employer of individuals whose contributions exceed \$200 in a calendar year." *Id.* § 104.7(b)(1)(i)(A). Consistent with the regulations, the disclaimer will continue to "appear in a clear and conspicuous manner." *Id.* § 104.7(b)(1)(ii).

C. DSCC's proposal complies with IRS disclaimer requirement.

Section 6113 of the IRS' regulations requires that "fundraising solicitation by (or on behalf of) an organization to which this section applies shall contain an express statement (in a conspicuous and easily recognizable format) that contributions or gifts to such organization are not deductible as charitable contributions for Federal income tax purposes." 26 C.F.R. § 6113(a). Under the DSCC's proposal, its solicitation webpage will continue to include the following disclaimer: "Contributions or gifts to DSCC are not tax deductible as charitable contributions."

D. DSCC's proposal complies with 11 C.F.R. § 103.3(b).

The DSCC's proposal also complies with 11 C.F.R. § 103.3(b). Section 103.3(b) stipulates that "[t]he treasurer shall be responsible for examining all contributions received for evidence of illegality and for ascertaining whether contributions received, when aggregated with other contributions from the same contributor, exceed the contribution limitations of 11 CFR 110.1 or 110.2." 11 C.F.R. § 103.3(b)(1). Where contributions "present genuine questions as to whether they were made by corporations, labor organizations, foreign nationals, or Federal contractor," they must either be returned to the donor within 10 days or, if deposited, the treasurer must "make his or her best efforts to determine the legality of the contribution." *Id.* The treasurer "shall make at least one written or oral request for evidence of the legality of the contribution." *Id.* Such evidence "includes, but is not limited to, a written statement from the contributor explaining why the contribution is legal. If the contribution cannot be determined to be legal, the treasurer shall, within thirty days of the treasurer's receipt of the contribution, refund the contribution to the contributor." *Id.*

While the Commission's regulations expressly require political committees to include the "paid for by" and "best efforts" disclaimers on all solicitations, they do not require committees *that* raise only Federal funds to advise prospective donors of the limitations and prohibitions of the Act.² In Advisory Opinion 1995-35 (Alexander), the Commission noted approvingly of the committee's proposal to include a "standard disclaimer that the Committee cannot accept corporate contributions" and "a statement that the Committee will accept no contributions from 'foreign nationals' as defined at 2 U.S.C. 441e." *Id.* But the Commission also made clear that "*the FECA does not require the Committee to include this notice.*" *Id.* (emphasis added).

² The DSCC accepts only Federal funds. See 11 C.F.R. § 300.10(a).

Compare 11 C.F.R. § 102.5(a)(2)(ii) (barring unauthorized committees that raise non-Federal funds to deposit contributions into Federal account unless they result from solicitation "which expressly states that the contribution will be used in connection with a Federal election."). Likewise, the Commission does not require Internet solicitations to feature additional disclaimers. *See* Advisory Opinion 1995-35 (citing approvingly that "the Internet solicitations will not differ in any material way from the Committee's direct mail solicitations.").

If the Commission's regulations do not require committees to include a disclaimer notifying donors about the source prohibitions and amount limitations of the Act, they certainly do not require committees to ask donors to check a box certifying their eligibility under the Act. The box check-off practice arose out of a series of advisory opinions principally involving publicly funded presidential campaigns. In Advisory Opinion 1999-9 (Bradley), the Bradley for President campaign asked the Commission whether it could receive matching funds for credit card contributions raised on the Internet. At the time, there was a Commission regulation "explicitly stat[ing] that contributions made by means of credit card transactions cannot be matched." Advisory Opinion 1999-9. To alleviate the Commission's concerns, the Bradley campaign proffered that it would require donors to check a series of boxes certifying their eligibility to make a contribution. In a concurrent rulemaking, the Commission adopted a regulation permitting the matching of credit card contributions – both off and on the Internet³ – if "[e]vidence is submitted by the committee that the contributor has affirmed that the contribution is from personal funds and not from funds otherwise prohibited by law." 26 C.F.R. § 9034.2(o)(8)(ii). Notably, even this regulation did not mandate the use of "all of the[] procedures" adopted by the Bradley campaign; instead, the Commission required campaign seeking matching funds "to make reasonable efforts to prevent receipt of prohibited or excessive contributions." Explanation and Justification, Matching Credit Card and Debit Card Contributions in Presidential Campaigns, 64 F.R. 32394, 32396 (June 17, 1999). *See also* Advisory Opinion 2001-4 (MSDWPAC) ("[W]hile 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 ... were addressed, these opinions did not purport to restrict or delineate the specific type of technology that must be utilized.").

Significantly, the Commission did not adopt a similar regulation for committees *not* seeking matching funds. *See* Advisory Opinion 2006-34 (Working Assets) (approving a proposed solicitation that did not include box check-off requirement). This is consistent with the Commission's historical practice. More than twenty years before the Commission allowed presidential campaigns to seek matching funds for credit card contributions, it permitted committees *not* seeking matching funds to accept credit card contributions. *See* Advisory Opinion 1978-68 (Seith) (concluding that contributions by credit card are permitted under the Act). As it noted in a 1999 Explanation and Justification, the Commission "has always held

³ The rules are identical for Internet and non-Internet credit card fundraising. *See* 64 F.R. at 32396.

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contributions submitted for matching to a higher documentation standard because the matching fund program involves the disbursement of millions of dollars in taxpayer funds." Explanation and Justification, Matching Credit Card and Debit Card Contributions in Presidential Campaigns, 64 F.R. 42584 (Aug. 5, 1999). *See also* Advisory Opinion 2007-17, n. 4 (DSCC) (noting that online checks approved by Commission for use by DSCC would not necessarily qualify for matching). Therefore, to the extent that the Commission's regulations require the use of the box check-off to *match* credit card contributions, these regulations are inapplicable to committees not seeking matching funds.

Furthermore, to the extent that the Commission has imposed additional requirements on third-party vendors that raise money for political committees, those requirements do not apply to political committees that raise funds for themselves. In several advisory opinions, "the Commission has approved a number of arrangements designed to ensure that corporations do not forward illegal contributions to political committees and thereby enable treasurers to comply with the Commission's regulations." Advisory Opinion 2010-23 (CTIA). In these opinions, the Commission wanted to ensure that third-party vendors provided committees with sufficient information in order to comply with 11 C.F.R. § 103.3(b). Because the committees relied on the vendors to provide accurate information to avoid violating the law, the Commission held them to a higher standard. *See id.* (rejecting aspect of CTIA proposal because it did not "provide any safeguard against the prohibitions on contributions from foreign nationals and corporations, despite the fact that the wireless service providers will know that particular wireless subscribers have foreign addresses or are corporations."). But that concern is not present here, because the DSCC fully controls the process for obtaining and verifying contributor information and does not have to rely on a third party to provide it with the correct information.

Consequently, a committee raising credit card contributions on its own website is not obligated to include a disclaimer notifying donors about the source prohibitions and amount limitations of the Act. Nor is it obligated to require donors to check a box certifying eligibility before accepting their contributions. Despite this, the DSCC's revised solicitation webpage goes well beyond what the law requires and offers significant safeguards to protect against the receipt of impermissible contributions.

First, under the DSCC's proposal, donors clicking the "Support Democrats" button are asked to certify that "I am at least 18 years old and am making this contribution on a personal credit or debit card with my own personal funds – not those of another person or entity" A donor who contributes on a personal credit or debit card with her own personal funds, by definition, is not making a contribution from a prohibited source in violation of 2 U.S.C. § 441b or a contribution in the name of another in violation of 2 U.S.C. § 441f.

Second, to comply with 2 U.S.C. § 441e, donors clicking the "Support Democrats" button are asked to certify that they are not "foreign nationals." Donors will also be able to click on a link that takes them to the bottom of the same page, where a more comprehensive definition of

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"foreign national" will be provided. The DSCC further protects against the receipt of foreign national contributions by refusing all contributions made by donors whose billing address is outside the United States. *See* 11 C.F.R. §§ 110.20(a)(4), (5) (citing the provision of a foreign address as a "fact[] that would lead a reasonable person to inquire whether the source of the funds solicited, accepted or received is a foreign national.").

Third, to comply with 2 U.S.C. § 441c, donors clicking the "Support Democrats" button are asked to certify that they are not "federal contractors." Donors will also be able to click on a link that takes them to the bottom of the same page, where a more comprehensive definition of "federal contractor" will be provided.

Fourth, in accordance with the practice cited approvingly in Advisory Opinion 1999-9, the vendor used by the DSCC to process online credit card information accepts information input by the donor. If a transaction is entered with an invalid account number, expiration date, or security code, the transaction will not settle.⁴

Fifth, as it has always done, the DSCC will comply fully with the procedures set forth at 11 C.F.R. § 103.3(b).

In tandem, these prophylactic measures – which far exceed the DSCC's legal obligations – protect against the receipt of impermissible contributions.

E. The proposed changes are permissible, regardless of the device.

Although the limitations of the current solicitation page are magnified on mobile devices, the DSCC should be permitted to make the revisions to its standard solicitation webpage as well. For the reasons set forth above, the DSCC's proposed revisions comply with the requirements of the Act and the Commission's regulations. Consequently, there is no legal basis to restrict the DSCC from making the revisions to its standard solicitation webpage, in addition to its mobile solicitation webpage.

III. CONCLUSION

We respectfully request that you confirm that the DSCC's proposed revisions to its fundraising solicitation webpage with the Act and the Commission's regulations.

⁴ *See also* Advisory Opinion 2007-30 (Dodd) (finding that use of security number provides even more assurances that donor is using her own credit card to make contribution).

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Very truly yours,

A handwritten signature in black ink, appearing to read "Marc E. Elias". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

Marc E. Elias
Jonathan S. Berkon
Counsel to DSCC