



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission
FROM: Commission Secretary's Office *peg*
DATE: September 11, 2013
SUBJECT: Comment on Draft AO 2013-12
(SEIU and SEIU COPE)

Attached is a timely submitted comment from Thomas J. Josefiak and Michael Bayes. This matter is on the September 12, 2013 Open Meeting Agenda.

Attachment

HOLTZMAN VOGEL JOSEFIK PLLC

FEDERAL ELECTION COMMISSION
CC
SECRET

Attorneys at Law

2013 SEP 11 A 10:20

45 North Hill Drive
Suite 100
Warrenton, VA 20186
P/540-341-8808
F/540-341-8809

September 11, 2013

Chair Ellen L. Weintraub
Vice Chairman Donald F. McGahn II
Commissioner Caroline C. Hunter
Commissioner Matthew S. Petersen
Commissioner Steven T. Walker
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Draft Advisory Opinion 2013-12 (SEIU and SEIU COPE) (Agenda Doc. No. 13-38)

Dear Commissioners,

The following comments are submitted in response to Draft Advisory Opinion 2013-12 (SEIU and SEIU COPE) (Agenda Doc. No. 13-38). These comments are submitted in our personal capacities, and not on behalf of any client. We urge the Commission to reject this Draft Advisory Opinion on the grounds that the Requestor's proposal – which involves creating a recording of an oral agreement – is not consistent with the Commission's regulatory requirement that payroll deduction authorizations be "in writing." Even if Commissioners are sympathetic to the Requestor's proposal, or view it as good or beneficial policy, the Commission must still apply and enforce its adopted regulations until such time as those regulations are modified through the formal rulemaking process. Legal requirements that are established by regulation cannot simply be altered through the advisory opinion process.

In Advisory Opinion Request 2013-12, the Requestor proposes to obtain the "affirmative authorization" of members to contribute to a separate segregated fund via payroll deduction by contacting those members by telephone and recording the conversation. A copy of the recorded conversation would then be maintained by the Requestor as evidence of the contributor's consent to contribute by payroll deduction. Presently, the Requestor represents that it "obtains the required affirmative authorization by the contributor for these payroll deduction[s] either through a traditional hand-written authorization, or through electronic signature obtained through e-mail

or web-based transactions as set out in 11 CFR § 114.5 and a series of Advisory Opinions from the Commission.” Advisory Opinion Request 2013-12 (footnote omitted). In support of its proposal, the Requestor cites a series of Advisory Opinions issued from 1996-2001.

Subsequent to the Requestor’s cited authority, the Commission specified in a 2005 rulemaking that:

[C]ontributions made via payroll deduction or check-off system trigger special recordkeeping obligations for the recipient SSF. Each contributor must affirmatively authorize the deduction in writing, in advance, and the authorization must manifest the contributor’s “specific and voluntary donative intent.” See Federal Election Commission v. National Education Association, 457 F.Supp. 1102 (D.D.C. 1978); AOs 2001-4 and 1997-25.

Payroll Deductions by Member Corporations for Contributions to a Trade Association’s Separate Segregated Fund, 70 Fed. Reg. 41,939, 41,942 (July 21, 2005) (emphasis added).¹

Draft Advisory Opinion 2013-12 mischaracterizes this language as “articulat[ing] a *general* rule that written authorization was required to verify an individual’s enrollment in a payroll-deduction plan for contributions to a SSF” (emphasis added). “General rules” are not described with an unqualified “must.” The Commission’s 2005 rulemaking sets forth a *mandatory* rule that applies with respect to all payroll deduction authorizations. This rule contains two exceedingly clear requirements: (1) the authorization must be in writing; *and* (2) the authorization must manifest the contributor’s “specific and voluntary donative intent.” The Draft Advisory Opinion, however, treats this dual requirement as an “either/or” proposition, and rewrites the 2005 rulemaking in the process.

Next, the Draft Advisory Opinion incorrectly asserts that “[i]n 2006, the Commission issued a policy statement clarifying its application of the Act’s *authorization and* recordkeeping requirements for payroll deduction” (emphasis added). The 2006 policy statement addressed only the recordkeeping requirements, while presuming that organizations will obtain “signed payroll deduction authorization forms.” Whether they retain these signed forms is a separate matter. Rather than modifying the written authorization requirement, the policy specifies that a connected organization’s or PAC’s separate recordkeeping requirement can be satisfied by certain records other than the “original signed payroll deduction authorization (‘PDA’) forms.” Statement of Policy; Recordkeeping Requirements for Payroll Deduction Authorizations, 71 Fed. Reg. 38,513 (July 7, 2006). The recordkeeping requirement addressed in the policy statement

¹ The rules set forth in this rulemaking apply equally to corporations and labor unions under the “equal access for labor organizations” provisions. *See id.* at 41,492-41,493; 2 U.S.C. 441b(b)(6).

has nothing to do with securing the contributor's written consent to contribute to the SSF via payroll deduction. The recordkeeping requirement simply "enable[s] the Commission to verify that the source and amount of contributions received by the committee are accurately and completely reported." *Id.* The Commission's 2006 policy statement did not, nor was it intended to, alter the written authorization requirement. We urge the Commission not to establish a precedent whereby it may reinterpret a policy statement via an Advisory Opinion for the purpose of modifying a legal requirement set forth in a rulemaking.

Draft Advisory Opinion 2013-12 also misrepresents the holdings of several past Advisory Opinions. For instance, Advisory Opinion 1999-03 (Microsoft PAC) is cited for the proposition that "payroll deductions require advance showing of contributor's 'specific and voluntary donative intent.'" As noted above, that is one of the two requirements. Properly read, though, Advisory Opinion 1999-03 is considerably more specific:

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. Federal Election Commission v. National Education Association ("NEA"), 457 F.Supp. 1102 (D.D.C. 1978). 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 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 her signature. This signature is necessary as a unique identifier of the employee.

Advisory Opinion 1999-03 (Microsoft PAC) (emphasis added). Contrary to the suggestion in the Draft Advisory Opinion, Advisory Opinion 1999-03 did not dispense with the "written authorization/signature" requirement. Rather, the Commission held that a certain type of electronic signature was legally equivalent to a written signature. Before electronic signature laws became widespread, the Commission correctly recognized that an "electronic signature, like a written signature, is designed and functions as a unique identifier of the authorizing employee." Advisory Opinion 1999-03.

As noted in the Draft Advisory Opinion, the Commission subsequently reaffirmed the written authorization requirement in the context of another electronic signature request. See Advisory Opinion 2001-04 (MSDW PAC). In this opinion, the Commission referenced the recently enacted Electronic Signatures in Global and National Commerce Act and indicated in a footnote that the "approach here is similar to that prescribed in the E-Signatures Act." Advisory Opinion 2001-04 n.7.

The Requestor also cites Advisory Opinion 1999-06 for the proposition that the Commission has approved "telephonic authorizations" in the past. Beyond the basic fact that a telephone is involved, the Requestor's proposal bears very little resemblance to what was approved in Advisory Opinion 1999-06. In Advisory Opinion 1999-06, the Commission approved the use of a fully-automated, computer-based system that is accessed by a contributor who, at his or her own initiative, calls the service (by telephone) and authorizes a contribution to a SSF by entering "their personal, civil service seven digit annuity number, known as a CSA number." While the Commission did not approach the proposal in these terms, entering one's "personal, civil service seven digit annuity number" into a computer-based system for the purpose of authorizing and initiating a financial transaction likely constitutes the use of a digital or electronic signature.² An audio recording of a conversation, which includes an oral agreement between the parties, as is proposed in Advisory Opinion 2012-13, does not.

Nevertheless, in each of the cited cases, at the time they were adopted, the proposals set forth did not directly conflict with Commission-approved language found in a rulemaking. In 2005, the Commission conducted a rulemaking specifically on the use of payroll deduction systems and expressly required that "[e]ach contributor must affirmatively authorize the deduction *in writing*, in advance...." Payroll Deductions by Member Corporations for Contributions to a Trade Association's Separate Segregated Fund, 70 Fed. Reg. 41,939, 41,942 (July 21, 2005) (emphasis added). In support of this sentence, the Commission cited Advisory Opinion 2001-04, which suggests that the Commission concluded at the time that the use of a proper digital or electronic signature satisfied the requirement that the authorization be "in writing." *See id.*

Accordingly, the Commission's most recent *binding* determination on the subject requires that payroll deduction authorizations be made "in writing," and that term presumably includes a proper digital or electronic signature. To the extent that the Draft Advisory Opinion reads the Commission's precedent differently (namely, that the Commission simply requires an "explicit authorization" coupled with certain safeguards), we believe the Commission must reject that reading as inconsistent with the 2005 rulemaking.

² The Electronic Signatures in Global and National Commerce Act, Pub.L. 109-229 (June 30, 2000), defines the term "electronic signature" as "an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record." 15 U.S.C. § 7006(5). The Uniform Electronic Transactions Act, which has been adopted by virtually every state, uses the same definition. *See* Uniform Law Commission, Electronic Transaction Act, <http://uniformlaws.org/Act.aspx?title=Electronic%20Transactions%20Act>. Section 7(d) of the Uniform Electronic Transactions Act specifies that "[i]f a law requires a signature, an electronic signature satisfies the law." These laws are not necessarily binding on the Commission for present purposes, but they do reflect current commercial practices.

The relevant question in the present matter is whether the Requestor's proposal satisfies the "in writing" requirement found in the 2005 payroll deduction rulemaking. In our view, it does not. What the Requestor proposes is to create a recording of an *oral* agreement.

Perhaps as a policy matter the Commission should allow the Requestor's proposal. It certainly may do so through the rulemaking process, because the Act itself does not address the subject. On the other hand, the Commission might determine that requiring a payroll deduction authorization to be "in writing" serves as an important protection against coerced contributions. The Commission cannot, however, revise its regulations, or its written justifications for those regulations, in an Advisory Opinion. See 2 U.S.C. §437f(b) ("Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title.").

We appreciate the opportunity to submit comments in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "T. Josefiak", with a long horizontal flourish extending to the right.

Thomas J. Josefiak
Michael Bayes

cc: Commission Secretary