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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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MEMORANDUM

TO: The Commission

THROUGH: Robert J. Costa *RC*
Acting Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel

Rosemary C. Smith *RS*
Associate General Counsel

Mai T. Dinh *MTD by JLP*
Assistant General Counsel

Daniel K. Abramson *DKA*
Attorney

Subject: Draft AO 2006-08

AGENDA ITEM
For Meeting of: 4-20-06
SUBMITTED LATE

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for April 20, 2006.

Attachment

1 ADVISORY OPINION 2006-08

2
3 Mr. Craig Engle, Esq.
4 Arent Fox PLLC
5 1050 Connecticut Ave., NW
6 Washington, DC 20036

DRAFT

7
8 Dear Mr. Engle:

9 We are responding to your advisory opinion request on behalf of Matthew Brooks
10 concerning the application of the Federal Election Campaign Act of 1971, as amended
11 (the “Act”), and Commission regulations to an as-yet unnamed corporation (the
12 “Corporation”) to be formed by Mr. Brooks. The Corporation intends to collect and
13 forward contributions from individuals at their request to political committees, Federal
14 candidates, and other entities. The Commission concludes that these proposed activities
15 are permissible, with certain modifications, regarding contributions to unauthorized
16 political committees. However, the Corporation may not collect and forward
17 contributions to Federal candidates or their authorized committees.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letters received on
20 February 17, 2006 and February 21, 2006.

21 Mr. Brooks intends to form a for-profit corporation that would provide
22 commercial services to individuals (“subscribers”) interested in making contributions and
23 donations to Federal and non-Federal candidates, political committees, and non-profit
24 organizations.¹ The Corporation plans to accept funds from subscribers who will, at a
25 later date, direct those funds to be contributed to the candidates or political committees,
26 or donated to other non-profit organizations the subscriber selects. The subscribers will

¹ This advisory opinion is limited to addressing your proposal as it relates to Federal candidates and registered political committees.

1 also pay a service fee that will be deposited into the Corporation's treasury. The money
2 the subscriber allocates for future contributions and donations will be deposited into a
3 separate merchant account, where it will remain until the subscriber designates a
4 candidate, political committee, or other non-profit organization as the recipient of the
5 funds, or asks for the funds to be returned. Once the subscriber indicates to the
6 Corporation that he or she would like to make a contribution or donation, the Corporation
7 will forward the designated amount of funds to the recipient political committee,
8 candidate, or other non-profit organization within ten days.

9 The Corporation will obtain each subscriber's occupation and employer
10 information and provide it to the recipients, whenever necessary. The Corporation will
11 adopt various screening and verification procedures to prevent the making of prohibited
12 contributions, and will forward contributions only insofar as the Corporation deems them
13 permissible. It will disallow subscribers from exceeding contribution limits if that can be
14 determined based on records maintained by the Corporation. Upon registration for the
15 service, subscribers will be informed of the Act's contribution limits and source
16 restrictions, and State laws where applicable, and will be required to attest that they are
17 complying with the Act.² The Corporation will provide up-to-date information to
18 subscribers regarding their remaining contribution limits and account balance.

² 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 to 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.

1 The Corporation will use its best efforts to monitor subscriber contributions made
2 independently of the arrangement with the Corporation to ensure compliance with the
3 Act. If a subscriber makes a contribution using funds not held by the Corporation, the
4 subscriber may report the contribution to the Corporation, and the Corporation will
5 ensure the contribution is recorded in its records and counted towards all relevant
6 contribution limits. The Corporation will not forward any contributions it knows to be in
7 violation of the Act and will notify subscribers when they have reached any applicable
8 contribution limit.

9 The Corporation will not place any limits on how a subscriber disburses his or her
10 money, other than refusing to forward contributions it knows to be in violation of the Act,
11 as described above. The Corporation will not engage in Federal election activity or
12 expressly advocate the election or defeat of any clearly identified candidates or advocate
13 on behalf of any causes. All money in the merchant account will remain the property of
14 the individual subscriber, and the Corporation will provide only an accounting and
15 forwarding service.

16 The Corporation intends to recruit individuals to serve on its Board of Directors
17 who may also be officers of political committees and non-profit organizations.

18 Below are descriptions of different business models with alternative fee structures
19 and various additional services that the Corporation is considering.

[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 rejection of the funds. Additionally, the Corporation plans to inform prospective subscribers that their contributions will be publicly identified on the recipient's disclosure reports.

1 1. Principal Business Model

2 Under the principal business model the Corporation will be funded entirely by
3 service fees paid by individual subscribers. The Federal and non-Federal candidates,
4 political committees, and non-profit organizations that receive forwarded contributions
5 and donations will not pay the Corporation for its services, and the Corporation will not
6 enter into a contractual relationship with these entities.

7 2. Alternative Business Model

8 The Corporation is also considering an alternative business model that includes
9 charging the recipient entity a “shipping and handling” fee. This fee would be in addition
10 to any fees charged to the individual subscribers of the Corporation. In all other respects,
11 the Corporation would operate identically under the principal and the alternative business
12 models.

13 3. Forwarding Solicitations to Subscribers

14 The Corporation expects that it may receive solicitations directly from candidates,
15 political committees, and non-profit organizations. The Corporation intends to ask its
16 subscribers to fill out a questionnaire that will be used to develop a “donor profile” for
17 each of them. Solicitations matching a subscriber’s donor profile will be forwarded to
18 the subscriber. While the Corporation will accept solicitations from any candidate,
19 political party, political committee, or non-profit organization, some solicitations may not
20 be forwarded to the subscriber due to screening based on the subscriber’s donor profile.
21 The Corporation does not propose to charge any fee to candidates or political committees
22 for this service.

1 4. Commentary and Analysis Service

2 The Corporation is considering providing commentary and analysis of various
3 State and Federal officeholders, non-profit organizations, campaigns, and events as an
4 additional service to its individual subscribers. This may include providing biographical
5 information, voting records of a candidate on particular issues, ratings of a candidate
6 given by various organizations, reelection percentages, the candidate's campaign
7 contribution position, the strength of the candidate's party loyalty, and any relevant
8 media articles.

9 ***Questions Presented***

- 10 1. *May the Corporation collect and forward contributions to political committees as a*
11 *commercial vendor and/or as a commercial fundraising firm?*
- 12 2. *May the Corporation maintain two accounts: one for its corporate treasury, and one*
13 *for funds held for subscribers to be used to make donations and contributions?*
- 14 3. *May the Corporation receive and forward contribution suggestions from political*
15 *committees to its subscribers?*
- 16 4. *May the Corporation recruit individuals to serve on its Board of Directors who may*
17 *also be officers of political committees?*

18 ***Legal Analysis and Conclusions***

- 19 1. *May the Corporation collect and forward contributions to political committees as a*
20 *commercial vendor and/or as a commercial fundraising firm?*

21 Yes, the Corporation may collect and forward contributions to unauthorized
22 committees as a "commercial vendor" under 11 CFR 114.2(f)(1) pursuant to the proposed
23 alternative business model. The Corporation, however, does not qualify as a

1 “commercial fundraising firm” under 11 CFR 110.6 and therefore may not forward
2 contributions to candidates or their authorized committees under either business model.
3 unless, in addition to the subscriber agreement, each candidate or his authorized
4 committee that is to receive a contribution from a subscriber also retains the Corporation
5 as a “commercial fundraising firm.”

6 A. Commercial Vendor Exception

7 Corporations are prohibited from making any “contribution or expenditure” in
8 connection with a Federal election. 2 U.S.C. 441b(a); 11 CFR 114.2(b). The definition
9 of “contribution” includes “anything of value made by any person for the purpose of
10 influencing any election for Federal office.” 2 U.S.C. 441b(b)(2), 431(8)(A)(i); 11 CFR
11 100.52(a). Commission regulations further define “anything of value” to include “the
12 provision of any goods or services without charge or at a charge that is less than the usual
13 and normal charge for such goods or services.” 11 CFR 100.52(d)(1).

14 As part of the prohibition on corporate contributions and expenditures,
15 corporations are prohibited from facilitating the making of contributions to candidates or
16 political committees. *See* 11 CFR 114.2(f)(1). Facilitation means using “corporate or
17 labor organization resources or facilities to engage in fundraising activities in connection
18 with any Federal election.” *Id.* However, a corporation does not facilitate the making of
19 a contribution to a candidate if it provides goods or services in the ordinary course of
20 business as a “commercial vendor” at the usual and normal charge. *Id.* Therefore, your
21 proposal to forward contributions to candidates and political committees would be
22 impermissible under the Act and Commission regulations unless the Corporation meets
23 this “commercial vendor” exception.

1 In Advisory Opinions 2004-19 (DollarVote) and 2002-07 (Careau), the
2 Commission determined that corporations could collect and forward contributions to
3 candidates as commercial vendors. The Commission determined that corporations
4 qualified as “commercial vendors” under 11 CFR 114.2(f)(1) because (1) their services
5 were rendered in the ordinary course of business for the usual and normal charge paid by
6 authorized committees; (2) they forwarded earmarked contributions to candidates through
7 separate merchant accounts; and (3) their websites incorporated adequate screening
8 procedures to ensure that they did not forward illegal contributions.

9 The Corporation’s principal business model does not meet the first of these three
10 requirements. Under the principal business model, the Corporation would be funded
11 solely by payments from individual subscribers, rather than from the recipient candidates
12 and political committees. Under this arrangement the Corporation would be providing its
13 services at no cost to the recipient candidates and political committees.

14 The services that would be provided by the Corporation share several key
15 characteristics with the services provided by DollarVote.org in Advisory Opinion 2004-
16 19 (DollarVote), but also present some important distinctions. DollarVote.org intended
17 to collect individual contributions, hold them in a merchant account, and forward them to
18 political committees. DollarVote.org planned to charge individual subscribers a fee for
19 the corporation’s services. In addition, DollarVote.org proposed charging recipient
20 political committees a “substantial account fee” that represented the usual and normal
21 charge for its services, including adequate profit and compensation.

22 The Corporation’s proposed business model is also similar to the business model
23 proposed by Careau & Co (“Careau”) in Advisory Opinion 2002-07 (Careau). Careau

1 proposed allowing individuals to make monthly contributions to political committees
2 through the corporation. Careau was to be compensated by the political committees for
3 “arranging these processing services and creating a website that facilitates contributions
4 to the individual Federal political committees.”

5 The Commission concluded in Advisory Opinions 2004-19 (DollarVote) and
6 2002-7 (Careau) that both DollarVote.org and Careau were “providing something of
7 value” to the recipient political committees. Thus, the Commission concluded in both
8 cases that the corporations were required to receive compensation in the amount of the
9 usual and normal charge for the services provided from the recipient political committees
10 in order to avoid making prohibited contributions under 2 U.S.C. 441b(a) and 11 CFR
11 114.2(b) and to qualify as a commercial vendor under 11 CFR 114.2(f)(1).

12 The Corporation in this case proposes two business models that are similar in
13 some respects to the business models of DollarVote.org and Careau. As in those cases,
14 the Corporation here is providing “something of value” to the political committees when
15 it facilitates contributions to those political committees. However, unlike DollarVote.org
16 and Careau, the Corporation’s principal business model would not charge the recipient
17 political committees anything for the services it is providing. This would result in the
18 Corporation making prohibited contributions to the recipient political committees under 2
19 U.S.C. 441b(a) and 11 CFR 114.2(b). Under the principal business model, the
20 Corporation would not qualify as a “commercial vendor” and its activity would thus be
21 an impermissible facilitation of contributions.

22 Under the alternative business model, the Corporation will charge a “shipping and
23 handling” fee to the recipient candidates and political committees. The Commission

1 concludes that if this fee represents the usual and normal charge for the cost of
2 forwarding contributions (not including services provided solely to subscribers, such as
3 financial advice), then the first requirement would be satisfied. *See* 11 CFR 114.2(f)(1).
4 The Corporation must receive the fee either in advance or concurrently with the
5 forwarding of contributions to the political committees. This fee must include more than
6 the cost of the shipping and handling of the physical check or wire transfer, but rather
7 include the entire usual and normal charge for the Corporation's services that are related
8 to the facilitation of the contribution.³

9 The Corporation's alternative business model also satisfies the other two
10 requirements of 11 CFR 114.2(f)(1) discussed in Advisory Opinion 2004-19. The
11 Corporation's plan ensures that funds earmarked for contributions would not become
12 corporate funds. All contributions (minus any pre-disclosed service fees) would be
13 processed through a separate merchant account and would not be commingled with
14 corporate treasury funds. Finally, based on your representations, the proposed screening
15 and verification procedures for electronic payments are consistent with those the
16 Commission has found acceptable in previous advisory opinions. *See* Advisory Opinions
17 2004-19 (DollarVote), 1999-22 (Aristotle Publishing), and 1999-09 (Bradley for
18 President).

19 Therefore, use of the alternative business model would qualify the Corporation as
20 a "commercial vendor." Accordingly, it may collect and forward contributions to

³ The Commission notes that in the alternative, it would be permissible to deduct the costs of the facilitation from the subscriber's funds sent to the recipient committee and transfer those funds to the Corporation's general treasury. Under this model, the subscriber would be considered to have made an in-kind contribution in the amount that was deducted and would be required to count both the cash contribution to the recipient committee or candidate and the in-kind contribution towards any applicable contribution limits. Similarly, the Corporation would be required to inform the committee about the in-kind contribution and the committee would be required to report receiving both the monetary and the in-kind contributions.

1 unauthorized committees under 11 CFR 114.2(f)(1). However, it may not do so for
2 candidates and their authorized committees for the reasons discussed below.

3 B. Commercial Fundraising Firm Exception

4 The Corporation's plan to collect and forward contributions earmarked, or
5 otherwise directed to, Federal candidates or their authorized committees also requires the
6 Corporation to be a "commercial fundraising firm." *See* 11 CFR 110.6(b)(2)(i)(D). Your
7 proposal includes two types of services that the Corporation might offer to individual
8 subscribers: (1) forwarding earmarked contributions to candidates and (2) providing
9 additional "commentary and analysis" to individuals regarding candidates.

10 1. Forwarding earmarked contributions

11 The Act and Commission regulations permit a "conduit or intermediary" to
12 collect and forward contributions from individuals that have been earmarked for a
13 specific candidate, subject to certain limitations and reporting requirements. 2 U.S.C.
14 441a(a)(8); 11 CFR 110.6. However, any person who is prohibited from making
15 contributions or expenditures (such as a corporation under 2 U.S.C. 441b(a)) is also
16 prohibited from acting as a conduit or intermediary for contributions earmarked to
17 candidates. 11 CFR 110.6(b)(2)(ii). Corporations are thus prohibited from collecting and
18 forwarding contributions to candidates. *See* Advisory Opinion 2004-19 (DollarVote).

19 There is, however, an exception for a corporation that qualifies as "a commercial
20 fundraising firm retained by the candidate or the candidate's authorized committee to
21 assist in fundraising." 11 CFR 110.6(b)(2)(i)(D). *See e.g.* Advisory Opinion 2004-19
22 (DollarVote) (DollarVote satisfied the "commercial fundraising firm" exception from the
23 definition of "conduit or intermediary" because "it is a 'commercial vendor'... retained

1 by candidates to assist in raising funds for their campaigns.”). In contrast to
2 DollarVote.org, the Corporation will be retained only by individual contributors and not
3 by candidates or their authorized committees. Therefore, the Corporation does not
4 qualify for the “commercial fundraising firm” exception in 11 CFR 110.6(b)(2)(i)(D).⁴
5 Consequently, the Corporation may not receive and forward any earmarked contributions
6 to Federal candidates or their authorized committees under either proposed business
7 model.

8 However, the Commission notes that if the Corporation were to be retained by a
9 recipient candidate or authorized committee then it may qualify as a “commercial
10 fundraising firm” under 11 CFR 110.6(b)(2)(i)(D) and could then receive and forward
11 earmarked contributions to those candidates or authorized committees.

12 2. Providing commentary and analysis

13 The Corporation intends to provide commentary and analysis of Federal
14 candidates as an additional service to its subscribers. This service would include
15 providing biographical information, voting records, ratings by select organizations, select
16 media articles, information on party loyalty, and other information the Corporation deems
17 relevant.

18 Under 11 CFR 110.6(d)(2), if a conduit or intermediary exercises any direction or
19 control over the choice of the recipient candidate, the earmarked contribution shall be
20 considered a contribution by both the original contributor and the conduit or
21 intermediary. The Commission stated in Advisory Opinion 2004-19 (DollarVote) that it
22 would analyze whether a corporation exercised “any discretion that might influence

⁴ The Commission also concludes that the Corporation does not fit within any of the other exceptions set forth in 11 CFR 110.6(b)(2)(i).

1 which candidates would be recipients of the contributions, or the amounts that candidates
2 would receive.” The Commission further noted that “the existence of such discretion
3 would militate against a conclusion that the firm is providing a commercial service on an
4 equal basis to all candidates registered with the firm.” Because any contribution from the
5 Corporation would be prohibited, the Corporation may not engage in any activity that
6 would constitute “direction or control.”

7 The proposed commentary and analysis service would constitute direction or
8 control, and is therefore prohibited by 11 CFR 110.6(d)(1) and (2). The Corporation
9 would necessarily make a series of subjective judgments in determining the pertinent
10 media articles, compilations of legislative voting records, candidate ratings by various
11 issue organizations, rankings of “party loyalty,” and any other information the
12 Corporation deems appropriate to pass on to subscribers. Only this information would be
13 furnished to subscribers to assist them in making contributions. These judgments would
14 allow the Corporation to exercise “direction or control” that may well have a significant
15 “influence” on the decisions of subscribers to contribute at all to particular candidates, as
16 well as the amounts of their contributions. This activity is more analogous to the role an
17 SSF takes with regard to encouraging its restricted class to contribute to particular
18 candidates or other political committees. Therefore, even if the Corporation were to be
19 properly retained by candidates to forward earmarked contributions as a “commercial
20 fundraising firm,” it may not offer this additional commentary and analysis regarding
21 Federal candidates as a part of its service to subscribers.

22 *2. May the Corporation maintain two accounts: one for its corporate treasury, and one*
23 *for funds held for subscribers to be used to make donations and contributions?*

1 Yes, the Corporation is required to maintain two accounts under the proposal that
2 has been submitted. The Commission stated in Advisory Opinion 2004-19 (DollarVote)
3 that for a Corporation to qualify for the commercial vendor exception (see question 1,
4 above) it must use a separate merchant account for funds to be dispersed as contributions.
5 This account must be entirely segregated from the Corporation's general treasury to
6 ensure that the funds are not commingled.

7 3. *May the Corporation receive and forward contribution suggestions from political*
8 *committees to its subscribers?*

9 No, the Corporation would be making prohibited corporate contributions to
10 political committees if it provides them with the equivalent of free access to potential
11 contributors by forwarding solicitations to the Corporation's subscribers.

12 As discussed above, it is impermissible for a corporation to make a contribution to
13 a political committee. 2 U.S.C. 441b(a); 11 CFR 114.2(b). A membership list or mailing
14 list is specifically included as an example of an item that must be provided at the usual or
15 normal charge to avoid making a contribution. 11 CFR 100.52(d)(1). Here, the
16 Corporation intends to allow political committees the equivalent of free access to its
17 membership and mailing lists by passing along solicitations to its subscribers at no charge
18 to the political committees. This would result in impermissible contributions by the
19 Corporation to the political committees.

20 The proposal to pass along solicitations to its individual subscribers would also
21 constitute impermissible corporate facilitation of contributions. *See* 11 CFR 114.2(f)(1).
22 Under 11 CFR 114.2(f)(2)(C), providing access to the Corporation's subscribers at no
23 charge to political committees for solicitations would be facilitation. However, as

1 discussed above, a Corporation does not facilitate the making of a contribution if it
2 provides goods or services in the ordinary course of business as a commercial vendor for
3 the usual and normal charge. *Id.* Therefore, the Corporation's proposal to forward
4 solicitations must be modified to include charging the political committees the usual and
5 normal charge for access to the membership and mailing lists to in order to satisfy the
6 "commercial vendor" exception. *See* Advisory Opinion 2004-19 (DollarVote).

7 4. *May the Corporation recruit individuals to serve on its Board of Directors who may*
8 *also be officers of political committees?*

9 Yes, the Corporation may recruit individuals to serve on its Board of Directors
10 who may also be officers of political committees. However, if these individuals are
11 acting on behalf of a Federal candidate or political party committee while participating on
12 the Corporation's Board of Directors, the Corporation might be directly or indirectly
13 established, financed, maintained, or controlled by a Federal candidate, officeholder, or
14 political party committee, and thus subject to the applicable limitations and prohibitions
15 in 2 U.S.C. 441i(a), 441i(b), and 441i(e)(1)(A) and (B). *See* Advisory Opinion 2005-02
16 (Corzine) (organization directly or indirectly established, financed, maintained or
17 controlled by Federal candidate may only solicit funds that comply with the limits and
18 prohibitions of the Act, even in connection with a non-Federal election). If the
19 individuals are not acting on behalf of any Federal candidate or officeholder or any
20 political party committee while participating on the Board of Directors, then the
21 Corporation would not be considered to be directly or indirectly established, financed,
22 maintained, or controlled by the Federal candidate or officeholder or political party
23 committee. *See* Advisory Opinion 2003-10 (Reid) (the activities of an individual who

1 acts in his own capacity and not on behalf of a Federal candidate or officeholder will not
2 be attributed to that Federal candidate or officeholder despite an existing agency
3 relationship).

4 This response constitutes an advisory opinion concerning the application of the
5 Act and Commission regulations to the specific transaction or activity set forth in your
6 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
7 of the facts or assumptions presented, and such facts or assumptions are material to a
8 conclusion presented in this advisory opinion, then the requestor may not rely on that
9 conclusion as support for its proposed activity.

10
11 Sincerely,

12
13
14
15 Michael E. Toner
16 Chairman
17

18 Enclosures (AOs 2005-02, 2004-19, 2003-10, 2002-07, 1999-22, and 1999-09)