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FEDERAL ELECTION COMMISSION
Washington, DC 20463

APR 11 12 56 PM '01

April 11, 2001

MEMORANDUM

AGENDA ITEM
For Meeting of: 4-19-01

TO: The Commission
THROUGH: James A. Pehrkon
Staff Director
FROM: Lois G. Lerner
Acting General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael G. Marinelli
Staff Attorney

SUBJECT: Draft AO 2001-04

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for April 19, 2001.

Attachment

APR 11 12 57 PM '01

DRAFT

1 ADVISORY OPINION 2001-04

2
3 Kenneth A. Gross
4 Skadden, Arps, Slate, Meagher & Flom, LLP
5 1140 New York Avenue, N.W.
6 Washington, DC 20005-2111
7

8 Dear Mr. Gross:
9

10 This refers to your letter dated March 6, 2001, with enclosures, on behalf of the
11 Morgan Stanley Dean Witter & Co. Political Action Committee ("MSDWPAC"),
12 requesting an advisory opinion concerning application of the Federal Election Campaign
13 Act of 1971, as amended ("the Act"), and Commission regulations to the use of electronic
14 signatures by restricted class employees to authorize payroll deductions of contributions.

15 MSDWPAC is the separate segregated fund ("SSF") of Morgan Stanley Dean
16 Witter & Co. ("MSDW"). You state that MSDWPAC currently solicits funds from
17 persons within its restricted class in accordance with the Act and Commission
18 regulations.¹ To solicit and collect such contributions from MSDW's executive and
19 administrative personnel, MSDWPAC employs, among other methods, a payroll
20 deduction plan. You explain that, under this plan, MSDWPAC sends a written
21 solicitation and payroll deduction form by interoffice mail to its restricted class members.
22 Typically, a restricted class member will sign the payroll deduction form to indicate his or
23 her voluntary assent, designate the amount to be deducted, and then return the completed
24 authorization form to MSDWPAC.

¹ As noted below, the "restricted class" personnel of a corporation consists of the corporation's executive and administrative employees and its stockholders. The families of these personnel are also included. See 2 U.S.C. §441b(b)(4)(A)(i); 11 CFR 114.1(c)(1), 114.1(j) and 114.5(g)(1).

1 You further explain that, given the near-ubiquitous use of computer and Internet
2 technology in the workplace today, MSDWPAC would like to solicit its restricted class
3 members via the Internet and accept their payroll deduction authorizations in a form other
4 than the traditional, written signature on a paper document. Specifically, MSDWPAC
5 proposes to establish an Internet website which would enable its restricted class members
6 to authorize payroll deductions via electronic signature.

7 Included with your request are several exhibits illustrating the appearance of each
8 "page" or screen image of the proposed website. *See generally*, Exhibits A1-A8. The
9 first page that a user sees upon typing the correct address to the site contains a login
10 screen that requires the user to enter a personally unique employee identification number.
11 This number will be checked against a database of eligible restricted class members.
12 Only those users whose employee identification numbers are verified as belonging to the
13 eligible restricted class will be permitted access to the website. If the identification
14 number matches, the user can proceed to the next series of webpages where the actual
15 process to authorize the payroll deduction can begin.

16 When the user clicks on the screen option from a menu list to make a "pledge," a
17 further series of screens appears. The user is first asked to type his or her home address
18 and occupation. On a subsequent screen, the user must verify the user's e-mail address.
19 You state that this step ensures that users will be sent e-mails confirming their
20 contributions. As before, all of the above information must be provided and is rechecked
21 against the data base for restricted class employees. It must be correctly matched before
22 access is given to subsequent steps in the authorization process.

1 The next screen that appears gives the user the opportunity to specify the amount
2 the user wishes to contribute. A statement on the screen informs the user that the
3 suggested guideline amount is merely a suggestion and that the contributor is not under
4 any obligation to follow it or to make a contribution, and that no employment advantage
5 or disadvantage occurs from not making the contribution, or not following the guideline.
6 After the user clicks the "next" icon on this screen, the final page appears.

7 This page presents the last step in the deduction authorization process and you
8 offer two different formats, depending on the type of electronic signature the Commission
9 approves. Both versions contain affirmation statements which require users to review a
10 series of Commission required disclaimers.² In your preferred version of the page, the
11 screen contains the final statement: "By entering your full name below you are agreeing
12 to all of the above items" and then provides a space for the user to type his or her name.
13 Once the user clicks on the "submit" icon, this would constitute the electronic signature
14 of the user. In the second version, the final line would read "By entering your full name
15 and Social Security Number below you are agreeing to all of the above items." Again,
16 this would constitute the electronic signature for the second version of the page once the
17 user provides the information and clicks the "submit" icon. At the conclusion of the
18 process, with the sending of confirmatory e-mails to the user, the enrollment process in
19 the payroll deduction program is complete.

² These include an acknowledgment that the user is a U.S. citizen, or permanent resident alien, and the recognition of the political purpose of the PAC and the uses of contributions to the PAC. The affirmation statements also attest to the user's willing decision to make the contribution and that the contribution is not made with corporate treasury funds or through use of a business credit card.

1 You state that MSDWPAC seeks the Commission's guidance as to whether the
2 alternative forms of electronic signature proposed above would constitute proper
3 authorization by the restricted class members under the Act.

4 ***ACT AND COMMISSION REGULATIONS***

5 An exception to the Act's general prohibition on corporate contributions provides
6 that a corporation may solicit contributions to its SSF from its "restricted class," which
7 includes the corporation's executive and administrative employees and stockholders.³ 2
8 U.S.C. §441b(b)(4)(A)(i); 11 CFR 114.1(c), 114.1(j) and 114.5(g)(1). Commission
9 regulations permit the use of a payroll deduction plan for soliciting and collecting
10 voluntary contributions from restricted class employees to a corporation's SSF. 11 CFR
11 114.1(f), 114.5(k)(1). The permissibility of such a plan is dependent upon compliance by
12 the corporation and the SSF with the requirements of voluntariness set out in 2 U.S.C.
13 §441b(b)(3) and 11 CFR 114.5(a)(1)--(5). These include, but are not limited to, requiring
14 that a corporate solicitation inform the employee of the political purposes of the SSF, and
15 of his or her right to refuse to contribute without any reprisal. Moreover, when the
16 solicitation suggests a guideline for contributions, it must make clear that the guidelines
17 are merely suggestions, that the individual may contribute more or less than the
18 guidelines suggest, and that the corporation will not favor or disfavor anyone for the
19 amount of their contribution or the decision not to contribute. 11 CFR 114.5(a)(2)--(5).

³ Corporation employees (even if they fall outside the executive or administrative personnel class) who participate in company stock ownership programs may, under certain circumstances, qualify as company stockholders. If so qualified, they may participate in the use of a payroll deduction plan for collecting contributions for the corporation's SSF. See Advisory Opinions 1998-12, 1996-10 and 1983-17.

1 When a payroll deduction or other check-off process is used for an SSF, there
2 must be an affirmative authorization by the contributor in order to permit the deduction.
3 *See, Federal Election Commission v. National Education Association ("NEA"), 457*
4 *F.Supp. 1102 (D.D.C. 1978).*⁴ The specific and voluntary donative intent of the solicited
5 employee needs to be manifested in a written authorization by him prior to the actual
6 deduction of any contributions. *See Advisory Opinion 1997-25.* This is often
7 accomplished through the sending of a solicitation and payroll deduction (paper) form to
8 the employee who, if she desires to contribute in this way, designates the amount to be
9 deducted during the pay period and then indicates her assent via signature. This signature
10 is necessary as a unique identifier of the employee.

11 In addition to denoting to the corporation and the SSF that a particular employee
12 has authorized the deduction from his salary, the signature also indicates that fact to the
13 Commission. Commission regulations provide that each political committee required to
14 file any report or statement with the Commission shall:

15 [m]aintain records, including bank records, with respect to the matters
16 required to be reported, including vouchers, worksheets, receipts, bills and
17 accounts, which shall provide in sufficient detail the necessary information
18 and data from which the filed reports and statements may be verified,
19 explained, clarified, and checked for accuracy and completeness.

20
21 11 CFR 104.14(b)(1). The committee must preserve such records for audit or inspection
22 by the Commission for a period of at least three years after the related report or statement

⁴ In *NEA*, the court determined that a union's use of a reverse check-off procedure to collect contributions to its SSF results in involuntary contributions. The court concluded that the reverse check-off violated the Act because it "require[d] the dissenter to act to prevent a contribution rather than requiring his affirmative assent to make one." *NEA*, at 1106.

1 is filed. See 11 CFR 104.14(b)(3) and 102.9(c). A payroll deduction authorization form,
2 signed by the contributor, is a record supporting each report disclosing a contribution
3 made pursuant to that authorization.⁵ The contributor's signature indicates to the
4 Commission that the particular employee authorized his contribution.

5 ***APPLICATION TO PROPOSAL***

6
7 As noted in the request, the Commission has previously considered, in Advisory
8 Opinion 1999-3, the use of electronic signatures by a restricted class to authorize payroll
9 deductions of contributions to an SSF. In that opinion, the Commission approved the use
10 of digital electronic signatures by Microsoft employees to facilitate the making of the
11 contributions to Microsoft's separate segregated fund. The protocols adopted by
12 Microsoft, to ensure that only authorized employees could submit the payroll deduction
13 authorizations, included the use of individual passwords for each employee and the use of
14 confirmatory e-mail messages sent after the submission of the deduction authorization.
15 See Advisory Opinion 1999-3. These elements, central to the Commission's conclusions,
16 are included in your proposal as well.⁶ You also affirm that qualified contributors to
17 MSDWPAC will have the same ability as the contributors in Advisory Opinion 1999-3 to
18 modify or revoke their authorizations and that such authorizations will be maintained in a
19 retrievable manner in the event of a Commission audit or investigation. Again, this
20 aspect was also important in the Commission's approval of Microsoft's proposal.

⁵ This means that the payroll deduction authorization, whether in paper document or electronic record format, must be retained for three years from the filing date of each PAC report on which a contribution pursuant to that authorization is disclosed. See 11 CFR 104.14(b)(3).

⁶ In the exhibits, which illustrate the different screens a contributor will view when accessing MSDW's web site, you note that the information provided by the viewer at each stage of the process will be compared to the data base that encompasses the restricted class members. At all stages, the information provided must fit into that database and match with a specific individual in the restricted class for the process to continue.

1 The main distinction between your situation and Advisory Opinion 1999-3 is that
2 MSDWPAC will use a different form of electronic signature to activate the payroll
3 deduction than was approved in the prior opinion. Microsoft used a digital signature,
4 while MSDWPAC proposes to use the standard "click through" process which forms the
5 basis for much of Internet commercial transactional activity. However, the Commission
6 concludes that this distinction is not significant. While the Commission has not
7 previously considered the "click through" process for contributions made by a restricted
8 class to an SSF, it has previously approved situations where this method was used to
9 make contributions to Presidential candidate committees (Advisory Opinions 1999-9 and
10 1999-22). Furthermore, while past opinions on Internet contributions have provided a
11 safe harbor as to the security measures political committees may adopt, once basic
12 security and verification concerns (as identified in Advisory Opinions 1999-9 and 1999-
13 3) were addressed, these opinions did not purport to restrict or delineate the specific type
14 of technology that must be utilized. See Advisory Opinion 1999-9. Therefore, the
15 Commission concludes that the first method you propose to accept payroll deduction
16 authorization for contributions by the restricted class to MSDWPAC is permissible.⁷ The
17 alternative proposal, which uses social security numbers to verify the identity of the

⁷ The request cites the recent Electronic Signatures in Global and National Commerce Act ("E-Signatures Act"), Pub. L. 106-229 (June 30, 2000), in support of MSDWPAC's proposal to obtain voluntary contributions by means of electronic, payroll deduction authorizations and refers to Advisory Opinion 2000-22. In that opinion, the Commission concluded that it was unnecessary to determine whether the E-Signatures Act could apply to certain transactions by a trade association SSF, which were regulated by the FECA, since the transactions "are not denied legal effect due to the use of an electronic signature or record." The Commission reiterates that view here where an electronic payroll deduction process would be used to make contributions to the SSF of a business corporation. As explained above, the Commission's approach here is similar to that prescribed in the E-Signatures Act in that, once the basic policy concerns underlying the FECA and Commission regulations are met, the result is technologically neutral. For a discussion of the policy basis of the E-Signatures Act, see Dorothy J. Glancy, *Electronic Signature Statute Blazes Uniform Trail for Electronic Commerce*, 69 U.S. Law Week 2467 (2001).

1 contributor, is substantially similar to the preferred method. Therefore, it also would be
2 permissible.

3 This response constitutes an advisory opinion concerning the application of the
4 Act, or regulations prescribed by the Commission, to the specific transaction or activity
5 set forth in your request. *See* 2 U.S.C. §437f.

6 Sincerely,

7

8 Danny L. McDonald
9 Chairman

10
11 Enclosures (AOs 2000-22, 1999-22, 1999-9, 1999-3, 1998-12, 1997-25, 1996-10, 1995-9
12 and 1983-17)
13

