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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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October 4, 2007

AGENDA ITEM
For Meeting of: 10-11-07

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Amy L. Rothstein *AR*
Assistant General Counsel

Eric C. Hallstrom *ECH*
Attorney

Subject: Draft AO 2007-17

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for October 11, 2007.

Attachment

1 ADVISORY OPINION 2007-17

2 Marc E. Elias, Esq.
3 Perkins Coie LLP
4 607 Fourteenth Street, NW
5 Washington, DC 20005-2011

DRAFT

6 Dear Mr. Elias:

7 We are responding to your advisory opinion request on behalf of the Democratic
8 Senatorial Campaign Committee (“DSCC”) concerning the application of the Federal
9 Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to
10 contributions in the form of physical checks from individuals using online banking
11 services.

12 The Commission concludes that 11 CFR 104.8(c) does not require additional
13 clarification from the individual or the bank as to whom the contribution is from, as long
14 as the check was executed by a bank official pursuant to the individual account holder’s
15 instructions and clearly indicates the personal account from which the check is drawn.

16 ***Background***

17 The facts presented in this advisory opinion are based on your letter received on
18 July 20, 2007, your telephone conversations with Commission staff on July 27 and 31,
19 2007, and your email received on August 20, 2007.

20 The DSCC is receiving a growing number of contributions from individuals who
21 use online banking services. Typically, a bank’s customer will register his or her account
22 online and then access the account over a secure line with a unique user name and
23 password. Customers who access their accounts online may schedule payments to any
24 person or entity they wish to pay by transmitting this information to the bank over the
25 Internet. The bank will then either issue payment by means of an electronic payment or

1 by producing a paper check that is subsequently sent to the recipient. A check produced
2 pursuant to this system contains the account holder's name, checking account number,
3 and typically the account holder's address and other additional identifying information
4 that the account holder has instructed the bank to include.

5 The checks issued through online banking services about which you seek
6 guidance differ from a personal check in at least one fundamental respect: they are signed
7 by a bank official rather than the account holder. Currently, when it receives a check
8 issued through an online banking service, the DSCC sends a follow-up letter to the
9 contributor to obtain a written signature. The DSCC would like to cease this follow-up
10 procedure in cases where it has all of the necessary contributor information. Where the
11 check does not include all necessary contributor information and the DSCC does not have
12 that information on file, the DSCC will continue to contact the contributor to obtain such
13 information.

14 ***Question Presented***

15 *When the DSCC receives a contribution from an individual using an online*
16 *banking service that generates a physical check signed only by a bank official, does 11*
17 *CFR 104.8(c) require additional clarification from the bank or the contributor as to*
18 *whom the contribution is from?*

19 ***Legal Analysis and Conclusions***

20 No, 11 CFR 104.8(c) does not require additional clarification from the individual
21 or the bank as to whom the contribution is from, as long as the check was executed by a
22 bank official pursuant to the individual account holder's instructions and clearly indicates
23 the personal account from which the check is drawn.

1 Commission regulations require that all contributions be properly attributed to the
2 actual contributor. *See* 11 CFR 104.8(c) and (d)(1), and 110.1(k). This requirement is
3 designed, in part, “to assure compliance with another provision of the Act and
4 Commission regulations that prohibits contributions by one person in the name of another
5 person.” Advisory Opinion 1989-26 (Bond for Congress). Accordingly, 11 CFR
6 104.8(c) requires any contribution made by check, money order, or other written
7 instrument to be reported as a contribution by the last person signing the instrument prior
8 to delivery to the candidate or committee, “[a]bsent evidence to the contrary.”

9 You have described situations in which the DSCC receives contributions in the
10 form of physical checks generated by online banking services that are the functional
11 equivalent of a traditional personal check written by the contributor. Unlike a traditional
12 check, however, the checks at issue in your request are delivered by a bank and bear the
13 signature of an authorized bank official after the individual account holder, using the
14 Internet, has authorized the issuance of the check. If such a check was drawn on an
15 individual account holder’s account and was executed by a bank official at the direction
16 of the account holder, then the check itself would provide evidence sufficient to
17 overcome the presumption in 11 CFR 104.8(c) that the last person who signed it is the
18 contributor and must therefore be reported as such.¹

19 Thus, the DSCC is not required to send a follow-up letter to each contributor who
20 makes a contribution in the form of a check issued by an online banking service in order
21 to obtain a written signature when all of the necessary contributor information is included

¹ The Commission assumes that the DSCC will apply the necessary screening procedures to each check received to ensure that it is not from a prohibited source (such as a foreign national or a corporation) and does not exceed the amount limitations when aggregated with any other contributions received from the account holder. *See* Advisory Opinions 2002-07 (Careau) and 1999-09 (Bradley for President).

1 on the check.² However, where the check does not include all of the necessary
2 contributor information and the DSCC does not have accurate and up-to-date contributor
3 information on file for the individual on whose account the check is drawn, the DSCC
4 must employ “best efforts” to obtain such information. 11 CFR 102.9(d).³

5 This conclusion is consistent with the Commission’s practice of “interpret[ing]
6 the Act and its regulations in a manner consistent with contemporary technological
7 innovations . . . where the use of the technology would not compromise the intent of the
8 Act or regulations.” Advisory Opinion 1999-09 (Bradley for President) (approving
9 Federal matching funds for contributions received over the Internet through the use of a
10 credit card). *See, e.g.*, Advisory Opinions 1999-36 (Campaign Advantage) (determining
11 that contributions received through an electronic check system are eligible for Federal
12 matching funds); 1999-03 (Microsoft PAC) (permitting use of “electronic signatures” by
13 restricted class employees to make contributions through payroll deduction); 1995-09
14 (NewtWatch) (permitting use of credit cards to make contributions through the Internet);
15 1990-01 (Digital Corrections) (permitting use of 900 line services to make contributions
16 through telephone calls); 1989-26 (Bond for Congress) (permitting automatic funds
17 transfers from contributors’ bank accounts to a committee account); 1978-68 (Seith for
18 Senate) (permitting use of credit cards to make contributions); *see also* Matching Credit

² For individual contributions of more than \$200 in the aggregate, this information includes the contributor’s name, mailing address, occupation, and employer. *See* 11 CFR 104.7 and 104.8.

³ The use of information on file to report necessary contributor information without undertaking procedures outlined in 11 CFR 104.7(b) would not entitle the requestor to the “best efforts” defense in the event that the information reported turns out to be inaccurate. 11 CFR 104.7(b); *see generally*, Statement of Policy Regarding Treasurers’ Best Efforts To Obtain, Maintain, and Submit Information as Required by the Federal Election Campaign Act, 72 FR 31438, 31438-40 (June 7, 2007).

1 Card and Debit Card Contributions in Presidential Campaigns, 64 FR 32394 (June 17,
2 1999).

3 Online checks from joint accounts merit special consideration. Pursuant to 11
4 CFR 110.1(k)(1), contributions from more than one person, other than those made by a
5 partnership, must “include the signature of each contributor on the check, money order,
6 or other negotiable instrument or in a separate writing.”⁴ Accordingly, when the DSCC
7 receives a check generated by an online banking service that appears to be drawn on a
8 joint account but that does not indicate which account holder is making the contribution,
9 the DSCC must contact the account holders to ascertain their intent. In doing so, the
10 DSCC should follow the procedures for reattribution set forth at 11 CFR
11 110.1(k)(3)(ii)(A). If there is only one way to attribute the contribution consistent with
12 the prohibitions and limitations of the Act, however, the DSCC may attribute the
13 contribution by following the rules governing presumptive reattribution set forth at 11
14 CFR 110.1(k)(3)(ii)(B), and need not obtain a written attribution of the contribution
15 signed by each contributor.

16 For example, if the DSCC were to receive a check for \$28,500 generated by an
17 online banking service that is drawn on the joint account of a married couple and the
18 check does not indicate which account holder is making the contribution, the DSCC must
19 contact the account holders to ascertain their intent unless one of the account holders had
20 already contributed the annual maximum amount of \$28,500 to the DSCC for that

⁴ Commission regulations governing the Presidential Primary Matching Payment Account also require the contributor’s signature on the check, money order, or any similar negotiable instrument. *See* 11 CFR 9034.2(c); *see also* Advisory Opinion 1999-36 (Campaign Advantage) (considering in detail the use of other types of online electronic checks to make matchable contributions to Presidential candidates). You do not ask, and the Commission does not address, whether the checks described in your request would constitute matchable contributions to Presidential candidates.

1 calendar year. In that situation, because there is only one way to attribute the
2 contribution between the two individuals in a manner that does not result in a
3 contribution by one of the individuals that exceeds the limitations set forth in 2 U.S.C.
4 441a(a)(1)(B) and 11 CFR 110.1(c), the DSCC would not need to obtain written
5 instructions from the contributor. The DSCC would be required to notify the contributor
6 within 60 days of how the contribution was attributed and inform the contributor that he
7 or she may request a refund if such a contribution was not intended. *See* 11 CFR
8 110.1(k)(3)(ii)(B)(2) and (3).

9 In reaching its conclusion, the Commission assumes that the banks administering
10 the online banking services are issuing the checks at issue here pursuant to their usual and
11 normal procedures in the ordinary course of business and are receiving the usual and
12 normal charge for their services.

13 This response constitutes an advisory opinion concerning the application of the
14 Act and Commission regulations to the specific transaction or activity set forth in your
15 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
16 of the facts or assumptions presented and such facts or assumptions are material to a
17 conclusion presented in this advisory opinion, then the requester may not rely on that
18 conclusion as support for its proposed activity. All cited advisory opinions are available
19 on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

20 Sincerely,
21
22
23

24 Robert D. Lenhard
25 Chairman