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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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August 12, 2004

AGENDA ITEM
For Meeting of: 8-19-04

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Staff Director

FROM: Lawrence H. Norton *LHN (by JAC)*
General Counsel

Rosemary C. Smith *RC*
Associate General Counsel

Mai T. Dinh *MD*
Assistant General Counsel

Margaret Perl *MP*
Staff Attorney

Subject: Draft AO 2004-19

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for August 19, 2004.

Attachment

1 ADVISORY OPINION 2004-19

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Mr. Andrew W. Mitchell
President, DollarVote.org
908 N. Wayne Street
Suite 303
Arlington, Virginia 22201

DRAFT

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Dear Mr. Mitchell:

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This responds to your letter dated May 19, 2004, as supplemented by your June 2 and 7, July 21 and August 3, 2004 letters, requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended (“the Act”), and Commission regulations to your proposed internet-based service.

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Background

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You are the president of DollarVote.org (“DollarVote”), a Virginia C corporation, which plans to provide certain nonpartisan commercial services to both citizens and candidates via a website. You describe the central service as the “DollarVote plan” (“Plan”). You state that in this two-part Plan, DollarVote accepts and forwards contributions from individuals earmarked for candidates in specific upcoming elections.

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Under the Plan, DollarVote would compose and post on its website various position statements on certain political issues, referred to as “DollarBills.” You state that individual citizens may access the website upon paying a proposed \$10 annual subscription fee. Individuals may then view the DollarBills and “vote” by choosing to contribute funds to the candidate or candidates who have posted on the website their “promise” to support that position statement. If there are not yet any actual candidates listed as promising to support that DollarBill at the time of the individual’s “vote,” the contributed funds will go to the

1 first future candidate who registers a promise for that DollarBill. You explain that the
2 individual may also stipulate additional criteria for the candidate who eventually will
3 receive the contribution marked as a “vote” for that DollarBill, such as:

- 4 1. Excluding candidates who have promised for other DollarBills on the same
5 issue;
- 6 2. Excluding particular candidates by name;
- 7 3. Including only candidates representing certain States; and
- 8 4. Including only candidates belonging to a certain political party.

9 Finally, you state that the subscriber also selects an “alternative recipient
10 organization” from a list of available nonprofit entities organized under section 501(c)(3) of
11 the Internal Revenue Code (“501(c)(3) organizations”). DollarVote will forward the
12 contribution to this 501(c)(3) organization if no candidate meeting the individual’s selected
13 criteria promises to support the selected DollarBill by the second Tuesday of October.¹

14 You explain that you will also charge individuals a small processing fee (proposed as 5% of
15 the contribution). When an individual completes the transaction with a credit card,
16 DollarVote will retain the subscription and processing fees in the corporation’s general
17 accounts, but the contributed funds will be routed to a merchant account separate from the
18 corporation’s general accounts.

19 You explain that the second half of the Plan would entail charging candidates a
20 “substantial account fee” once per election for the ability to register promises related to the
21 DollarBills posted on the website. You represent that this fee will be the same for all

¹ You state that these 501(c)(3) organizations will be notified of their selection in the DollarVote process and presented with the opportunity to refuse to participate.

1 participating candidates, and that all candidates will be offered the same terms and
2 conditions for participation in the Plan. You also state that this fee will be set so that
3 DollarVote will receive the usual and normal charge for its services, including adequate
4 profit and compensation. DollarVote will not deny participation to any candidate who
5 meets the basic eligibility requirements (a properly nominated candidate for congressional
6 office with confirmed identity on the website and by fax) and pays both this per-election fee
7 and all subsequent percentage-based transaction fees. You state that all contributions
8 already “voted” for a DollarBill, if any, will be forwarded to the first candidate to promise
9 regarding that DollarBill. You represent that once a candidate has registered a promise, all
10 contributions previously “voted” for that DollarBill, minus transaction charges, would be
11 forwarded to the candidate within 10 days of the promise being registered. Once candidates
12 have promised to support a DollarBill, their names will be visible to the individual
13 subscribers under the DollarBill at the time of voting. If multiple candidates promise on the
14 same DollarBill, then all contributions will be distributed equally between the listed
15 candidates.

16 You represent that DollarVote will not impose any terms or conditions in the
17 contract with candidates that limit the number of candidates promising on a particular
18 DollarBill, or the total amount any one candidate may receive from all promises, or the
19 combination of DollarBills on which a candidate may promise. However, DollarVote will
20 limit candidates to being the “first promiser” on only one DollarBill. You explain that this
21 restriction is to safeguard against excessive individual contributions to particular candidates
22 consistent with the Act.

1 Your request describes additional screening and processing measures you propose to
2 include in your service to prevent excessive contributions and contributions from prohibited
3 sources under the Act. You state that these procedures are modeled after relevant past
4 advisory opinions regarding contributions through the Internet. You also describe
5 additional details of the Plan, and include sample web pages regarding the voting and
6 contribution processes, and sample DollarBills. You also provide detailed descriptions of
7 the processing of contributions through merchant accounts to the final candidate(s) or
8 501(c)(3) organization. You also state that DollarVote plans to provide a number of other
9 “informative and interactive” services that will not involve contributions to candidates.

10 ***Question Presented***

11 *May DollarVote receive earmarked contributions from individuals and forward*
12 *those contributions to Federal candidates or to certain 501(c)(3) organizations under the*
13 *proposed Plan?*

14 ***Legal Analysis and Conclusions***

15 Yes, DollarVote may receive and forward earmarked contributions to Federal
16 candidates because DollarVote would satisfy both the “commercial vendor” exception to
17 the prohibition on corporate facilitation of contributions at 11 CFR 114.2(f)(1), and the
18 “commercial fundraising firm” exception to the definition of “conduit or intermediary” in
19 11 CFR 110.6(b)(2).

20 *1. Commercial Vendor Exception*

21 Corporations are prohibited from making any “contribution or expenditure” in
22 connection with a Federal election. 2 U.S.C. 441b(a); 11 CFR 114.2(b). Because
23 DollarVote is a corporation, your proposal would only be permissible under the Act and

1 Commission regulations if it does not constitute a “contribution or expenditure.” The
2 definition of “contribution” includes “anything of value made by any person for the purpose
3 of influencing any election for Federal office.” 2 U.S.C. 441b(b)(2), 431(8)(A)(i); 11 CFR
4 100.52(a). Commission regulations further define “anything of value” to include “the
5 provision of any goods or services without charge or at a charge that is less than the usual
6 and normal charge for such goods or services.” 11 CFR 100.52(d)(1).

7 In addition to this general prohibition on corporate contributions, corporations are
8 prohibited from facilitating the making of contributions to candidates or political
9 committees. *See* 11 CFR 114.2(f)(1). Facilitation means using corporate resources to
10 engage in fundraising activities in connection with any Federal election. *Id.* However, a
11 corporation does not facilitate the making of a contribution to a candidate if it provides
12 goods or services in the ordinary course of business as a commercial vendor at the usual
13 and normal charge. *Id.* Therefore, DollarVote’s proposal to transfer contributions to
14 candidates would be impermissible under the Act and Commission regulations unless it
15 meets this “commercial vendor” exception.

16 In Advisory Opinion 2002-07 the Commission determined that a corporation could
17 collect and forward contributions to political committees as a commercial venture in
18 somewhat similar circumstances. The Commission concluded that although the requestor
19 was providing something of value to the political committees and facilitating the making of
20 individual contributions, its proposal was permissible as a “commercial vendor” based on
21 an analysis of the corporation’s compensation, handling of earmarked contributions, and
22 screening procedures. *See* Advisory Opinion 2002-07. Similarly, DollarVote would be
23 operating permissibly as a “commercial vendor” under 11 CFR 114.2(f)(1) if (1) its services

1 are rendered for the usual and normal charge paid by authorized candidate committees; (2)
2 DollarVote forwards earmarked contributions to candidates through separate merchant
3 accounts; and (3) DollarVote's website incorporates adequate screening procedures to
4 ensure it is not forwarding illegal contributions.

5 First, your request states that candidates will pay DollarVote both a fixed per-
6 election fee, and a variable fee charged per transaction based on the amount of funds in that
7 transaction. You assert that this arrangement will constitute the "usual and normal charge"
8 for such services. *See* Advisory Opinion 2002-07. You also state that DollarVote will
9 receive payment for these services in advance of, or concurrently with, the transfer of
10 contributions to the candidates, and will not forward any contributions to candidates
11 without assurance of payment. You represent that all candidates will be charged the same
12 fees by DollarVote subject to these same conditions.

13 Second, DollarVote's Plan ensures that contributions earmarked for specific
14 candidates through individual votes on "DollarBills" would not become corporate funds
15 that are improperly contributed to the candidate committees. *See* Advisory Opinion 2002-
16 07. All contributions (minus certain pre-disclosed transaction costs) would be processed
17 through a separate merchant account and would not be commingled with corporate treasury
18 accounts. Finally, based on your representations, DollarVote's screening and verification
19 procedures for electronic payments meet the standards established in previous advisory
20 opinions. *See* Advisory Opinions 1999-09 and 1999-22.

21 DollarVote's activities are somewhat novel and the Commission makes no finding
22 with regard to what comparable marketplace activities would provide a measure for "usual
23 and normal charge," including an adequate profit and compensation. Nevertheless, it

1 appears from your representations that DollarVote would be in a commercially reasonable
2 relationship with the candidate committees, if it receives the usual and normal charge for
3 such services as you represent. If DollarVote would be providing its services in the
4 ordinary course of business as a “commercial vendor,” the Commission concludes that its
5 proposal would not constitute a prohibited facilitation of contributions under 11 CFR
6 114.2(f)(1).

7 *2. Commercial Fundraising Firm Exception*

8 While DollarVote appears to satisfy the “commercial vendor” exception under the
9 facts you present, it must also satisfy the more narrow exception for a “commercial
10 fundraising firm” under the earmarking regulations in 11 CFR 110.6. The Act and
11 Commission regulations permit a conduit or intermediary to collect and forward
12 contributions from individuals that have been earmarked for a specific candidate, subject to
13 certain limitations and reporting requirements. 2 U.S.C. 441a(a)(8); 11 CFR 110.6.
14 However, Commission regulations state that any person who is prohibited from making
15 contributions or expenditures is also prohibited from acting as a conduit or intermediary for
16 contributions earmarked to candidates. 11 CFR 110.6(b)(2)(ii). Because DollarVote is a
17 corporation prohibited from making contributions, it may not use the proposed Plan to
18 collect and forward earmarked contributions under 11 CFR 110.6 unless it meets a
19 regulatory exception to the definition of “conduit or intermediary.”² See also 2 U.S.C.
20 441b(a); 11 CFR 110.6(b)(2)(ii) and 114.2(b)(1). Commission regulations establish an
21 exception to this definition for “a commercial fundraising firm retained by the candidate or

² Your situation is materially different from Advisory Opinion 2003-23, in which the requestor (WE LEAD) was a federal political committee permitted to make contributions and expenditures under the Act.

1 the candidate's authorized committee to assist in fundraising." 11 CFR 110.6(b)(2)(i)(D).

2 The rules do not specifically define the term "commercial fundraising firm."

3 The Commission concludes that DollarVote meets the "commercial fundraising
4 firm" exception because it is a "commercial vendor," as described above, retained by
5 candidates to assist in raising funds for their campaigns. As a commercial fundraising firm,
6 DollarVote's business is transferring money to candidates pursuant to its agreements with
7 candidate committees. In determining whether DollarVote is a commercial fundraising
8 firm, the Commission analyzed whether DollarVote exercises any discretion that might
9 influence which candidates would be recipients of the contributions, or the amounts that
10 candidates would receive. The existence of such discretion would militate against a
11 conclusion that the firm is providing a commercial service on an equal basis to all
12 candidates registered with the firm.

13 DollarVote would not retain such discretion under its proposed Plan. Rather, the
14 individual contributor makes all decisions regarding the contribution. Individual
15 contributors decide to contribute to candidates who promise regarding a particular
16 DollarBill.³ If candidates have already promised for that DollarBill, then the individual
17 contributor contributes to the named candidates listed. If no candidate has already
18 promised for the DollarBill, the individual contributor is presented with the opportunity to
19 specify certain criteria, including party affiliation and State race to specify where the
20 contribution may be forwarded when future candidates promise for that DollarBill. The

³ Although DollarVote is solely responsible for writing and posting the various DollarBills on each issue, it appears from the sample web pages submitted to the Commission that DollarVote would have more than one position statement representing different points of view on each issue. Therefore, it does not appear that DollarVote is directing the contributions towards any particular position on the issues posted.

1 individual contributor may also exclude certain candidates by name or based on promises
2 for other DollarBills on the same issue from receiving any portion of the contributed
3 amount. Under these conditions, individual contributors completely define the parameters
4 of their contributions and earmark their contributions for certain candidates in the future.

5 The only restrictions that DollarVote imposes relate to procedures to ensure that
6 candidates do not receive excessive contributions. For example, a single candidate cannot
7 be the “first promiser” on more than one DollarBill. You explain that if a single candidate
8 was first on more than one DollarBill, the committee could receive excessive contributions,
9 since an individual is allowed to contribute up to \$2000 per DollarBill and the first
10 promiser receives all previous contributions made to that DollarBill. These restrictions are
11 limited and aimed at ensuring compliance with the Act. Otherwise, DollarVote is bound to
12 forward contributions as earmarked and directed by the individual contributor. Therefore,
13 DollarVote meets the exception in 11 CFR 110.6(b)(2)(i)(D) and is properly acting as an
14 impartial “commercial fundraising firm” that forwards and processes contributions pursuant
15 to its contracts with candidates.

16 Based on your representations, the Commission concludes that DollarVote qualifies
17 under both the “commercial vendor” exception in 11 CFR 114.2(f)(1) and the “commercial
18 fundraising firm” exception in section 110.6(b)(2)(i)(D). *See* Advisory Opinion 2002-07.
19 DollarVote may proceed with the proposed Plan subject to your representations regarding
20 the terms and conditions allowing individuals to select the criteria for contributions, and the
21 represented screening procedures and contribution processing restrictions. The
22 Commission notes that DollarVote must also comply with all timing and information

