

January 6, 2000

NOTICE AO DRAFT COMMENT PROCEDURES

The Commission has approved a revision in its advisory opinion procedures that permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 1999-36 is available for public comments under this procedure. It was requested by Sandler & Reiff on behalf of Campaign Advantage. The draft may be obtained from the Public Disclosure Division of the Commission.

Proposed Advisory Opinion 1999-36 will be on the Commission's agenda for its public meeting of Thursday January 13, 2000.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (EDT) on January 12, 2000.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case by case basis in special circumstances.

4) All comments timely received will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Disclosure Division.

23.04.107.1651

CONTACTS

Press inquiries: Ron Harris (202) 694-1220

Acting Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copy of draft AO 1999-36 contact Public Records Office-
Public Disclosure Division (202) 694-1120, or 800-424-9530.

For questions about comment submission procedure contact
N. Bradley Litchfield, Associate General Counsel, (202) 694-1650.

ADDRESSES

Submit single copy of written comments to:

Commission Secretary
Federal Election Commission
999 E Street NW
Washington, DC 20463

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael G. Marinelli
Staff Attorney

SUBJECT: Draft AO 1999-36

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for January 13, 2000.

Attachment

23.04.107.1653

1 ADVISORY OPINION 1999-36

2
3 Joseph E. Sandler
4 Sandler & Reiff, P.C.
5 6 E Street SE
6 Washington, DC 20003

DRAFT

7
8 Dear Mr. Sandler:

9
10 This refers to your letter dated November 10, 1999, on behalf of Campaign
11 Advantage ("Advantage"), a division of Science Writers, Inc., concerning the application
12 of the Federal Election Campaign Act of 1971, as amended ("the Act"), the Presidential
13 Primary Matching Payment Account Act ("the Matching Act"), 26 U.S.C. §§9031-9042,
14 and Commission regulations to Advantage's proposed methods to assist various political
15 committee and candidate clients in fundraising through the Internet.

16 In general, Advantage asks whether its process for receiving and transmitting
17 contributions by electronic check, online over the Internet, will comply with both the
18 cited Acts and Commission regulations, including the regulations that apply to matchable
19 contributions in a Presidential campaign.

20 **FACTS**

21 You state that Advantage is a division of Science Writers, Inc., a Maryland
22 corporation, which provides web sites, systems publications and technical requirements
23 analysis to a range of government, corporate and non-profit clients. Advantage "designs
24 and provides online solutions for Democratic [Party] candidates and progressive
25 organizations, offering to such campaigns and organizations services including the design
26 and maintenance of web sites; secure online fundraising; electronic voter contact; online
27 volunteer recruitment; and training and seminars."

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1 In addition to offering candidates a system of fundraising online via credit card,
2 Advantage plans to offer candidates, including presidential candidates and other
3 candidates for Federal office, a system for receiving contributions online, over the
4 Internet, via electronic check using electronic funds transfer. Advantage has been
5 retained by the authorized committees of certain candidates for Federal office who wish
6 to solicit contributions online, via the Internet, through the use of on-line checking. The
7 system to be offered by Advantage will work as follows:

8 1. The option of contributing to the campaign via electronic check will be built
9 into the campaign's web site. Prior to offering this option, the campaign will enter an
10 agreement with Advantage and with the electronic payment processing company,
11 eMoney.NET, authorizing use of the system described below.

12 2. The candidate's web site will then offer a potential donor the option of
13 contributing online to the candidate's campaign by credit card or by check.

14 3. If the donor clicks on the "online check" option, a contribution form will
15 appear on the screen. A sample form is included with the request. This form will
16 include, in the case of all Federal candidates, the disclaimer language required by the
17 Commission's rules, including the "best efforts" language prescribed by 11 CFR
18 104.7(b)(1). The form will also notify the prospective donor of the source restrictions
19 and contribution limits of the Act using the language set forth in Advisory Opinions
20 1995-9 and 1999-9.

21 To contribute, the donor will have to complete the form on the web site. The
22 form will require the donor to provide his or her first and last name; address; city, state
23 and zip code; e-mail address; occupation and employer; and either a social security

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1 number or driver's license number. If the donor fails to provide any of the required
2 information, or leaves any of the fields blank, the web site will reject the form and prompt
3 the prospective donor to provide the missing information.

4 4. In a series of instant steps not visible to the donor, the donor's web browser is
5 then redirected to the encrypted web site of eMoney.NET, an Internet payments
6 processing company. The donor is then asked to "proceed" with payment.

7 5. The site informs the donor that he or she is receiving a digital signature
8 authentication code via the e-mail address the donor submitted. This digital signature
9 authentication code is received within a few seconds via e-mail. The site displays a check
10 form in which the donor can enter his or her check number (i.e., the next check number
11 from his or her checkbook). The donor should also, for the sake of good recordkeeping,
12 write "void" on the paper check bearing this check number. The donor is also asked to
13 enter the uniform bank routing (ABA) number; account number; bank name; and the
14 digital signature authentication code.

15 6. The donor then enters this information on the form, including the digital
16 signature authentication code.

17 7. The form will ask the donor to check a series of boxes attesting that his or her
18 contribution is made with funds within the source restrictions and contribution limits of
19 the Act, using the language set forth in Advisory Opinions 1995-9 and 1999-9.
20 Specifically, the contributor will be required to attest that he or she is a U.S. citizen or
21 legal permanent resident residing in the U.S.; that he or she is contributing his or her own
22 personal funds; that he or she is not a minor; that the funds do not come from the general
23 treasury funds of a corporation, labor organization or national bank; and that the donor is

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1 not a Federal contractor. You state that, as in Advisory Opinions 1995-9 and 1999-9, the
2 failure to check any of the attestation boxes will cause the web site to reject the form, and
3 display a message noting the applicable source restriction. The web site will then prompt
4 the donor to answer the question. If any question is answered in a way that disqualifies
5 the contribution, the web site will inform the donor that he or she is ineligible to
6 contribute. The web site will then prompt the donor to correct any missing or inaccurate
7 information, or to cancel the transaction.

8 8. The donor is then asked to "submit contribution." When the donor clicks this
9 button, if the contribution is excessive, the site will so inform the donor and request that
10 an amount within the limit be entered into the check form.

11 9. At the option of the candidate, an additional screening process may be
12 imposed, through transmission of the checking information to a check authorization
13 system. This check authorization system uses a series of databases to determine whether
14 the drawer of the check matches a list of bad check-writers on file, whether the checking
15 account is open, and, in many cases, whether the checking account belongs to the person
16 whose name is being given and whether the driver's license number or social security
17 number matches. This verification not only provides the candidate with some assurance
18 that the electronic check will be honored, but will also serve as an additional screen to
19 help ensure that the contribution is being made with the donor's own funds and otherwise
20 meets the prohibitions of the Act. If the checking account cannot be verified through the
21 check authorization system, or does not pass the system's verification screen, the web site
22 will display to the donor, and an e-mail will also be sent to the donor with, a declined
23 transaction number and a toll-free number to contact for further information.

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1 10. If this additional screening option is used and the verification is successful, or
2 if the additional screening option is not used but all of the information entered by the
3 donor is in good order, then an Automated Clearing House ("ACH") debit entry is
4 automatically and securely submitted through the system of a third party processor to a
5 bank offering electronic funds transfer services. This "originating financial institution,"
6 you explain, has its own Federal Reserve System line account, allowing it to clear
7 transactions with other banks over the "fed wire," which is the system banks use to settle
8 with each other for items drawn on a bank and presented to that drawee bank for
9 payment. The originating financial institution directly debits the bank account of the
10 donor. Thereafter, after allowing for the typical 72-hour "Hold in Lieu of Returns," the
11 originating financial institution directly credits the bank account of the campaign.¹

12 11. A confirmation of the transaction is generated to the donor, instantly, on the
13 screen and via e-mail. The donor's web browser is then transferred back to the candidate's
14 web site.

15 12. The entire transaction, from the time the donor submits the contribution
16 payment order form to the time confirmation of the payment transaction is received,
17 takes on average only 8 to 15 seconds. You also emphasize that all of the checking
18 account and other information submitted by the donor on the payment order form is
19 transmitted at all times over the Internet in encrypted form.

20 13. After the electronic check "clears," that is, the campaign's account is credited,
21 the campaign will receive, on a timely basis, in electronic form or on paper, all necessary

¹ You explain that this transaction works in essentially the same way as customer-authorized electronic funds transfers used by checking account customers to allow a mortgage company to withdraw the mortgage payment automatically from their account each month, or to authorize, e.g., a utility company to take the

1 information about the donation, including all required contributor information, date,
2 amount, etc., for inclusion (electronically if possible) in the campaign's database used to
3 generate its reports to the Commission. Confirmation that the electronic check has
4 "cleared" is also received by the campaign directly from eMoney.NET via e-mail.²

5 14. For purposes of the itemized reporting of contributions pursuant to 11 CFR
6 104.8, the campaign will report the date of the credit to its account as the date of receipt
7 of the contribution, in accordance with the Commission's guidance in Advisory Opinion
8 1989-26.

9 15. For the use of this system, each participating campaign will pay certain fees to
10 Advantage. For purposes of this request, you ask the Commission to assume that these
11 are the usual and normal charges for electronic checking transactions of this nature.

12 ACT AND COMMISSION REGULATIONS

13 The Act defines the term "contribution" to include, *inter alia*, a gift or "deposit of
14 money" by any person for the purpose of influencing any election for Federal office. 2
15 U.S.C. §431(8)(A)(i). While the Act prohibits contributions of currency which, in the
16 aggregate, exceed \$100, it does not require that contributions be made only by check or
17 similar paper draft. See 2 U.S.C. §441g.

18 For purposes of entitlement to Federal matching payments, the term contribution
19 "means a gift of money made by a written instrument which identifies the person making
20 the contribution by full name and mailing address, but does not include a subscription,
21 loan, advance, or deposit of money, or anything of value or anything described in

amount of the customer's utility bill out of the customer's checking account each month.

² The campaign also receives confirmation of the credit entry on its bank account statement, so that the electronic check contribution can be included in the reconciliation of the campaign's bank account, for

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1 subparagraph (B), (C), or (D) of section 9032(4)." 26 U.S.C. §9034(a); see also 11 CFR
2 9034.2.

3 With regards to a contribution made by credit card or debit card, recently revised
4 Commission regulations define "written instrument" to mean either a transaction slip or
5 other writing signed by the cardholder, or in the case of such a contribution made over the
6 Internet, an electronic record of the transaction created and transmitted by the cardholder,
7 and including the name of the cardholder and the card number, which can be maintained
8 electronically and reproduced in a written form by the recipient candidate or candidate's
9 committee. 11 CFR 9034.2(b); the text of these recently revised regulations is at 64 *Fed.*
10 *Reg.* 32397 (June 17, 1999).

11 The written instrument shall be: payable on demand; and to the order of, or
12 specifically endorsed without qualification to, the Presidential candidate, or his or her
13 authorized committee. The written instrument shall contain: the full name and signature
14 of the contributor(s); the amount and date of the contribution; and the mailing address of
15 the contributor(s). For purposes of this section, the term signature means, in the case of a
16 contribution by a credit card or debit card, either an actual signature by the cardholder
17 who is the donor on a transaction slip or other writing, or in the case of such a
18 contribution made over the Internet, the full name and card number of the cardholder who
19 is the donor, entered and transmitted by the cardholder. 11 CFR 9034.2(b) and (c).
20 Contributions by credit or debit card are matchable contributions provided that evidence
21 is submitted by the committee that the contributor has affirmed that the contribution is
22 from personal funds and not from funds otherwise prohibited by law. 11 CFR

purposes of determining cash on hand, just like the clearing and crediting of any paper check.

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1 9034.2(c)(8)(ii).

2 **APPLICATION TO PROPOSAL**

3

4 Within the context of Federal candidates who do not propose to receive matchable
5 contributions, the Commission has previously sanctioned the use of the Internet to make
6 contributions "using credit cards, electronic fund transfers and potentially other electronic
7 means." See Advisory Opinion 1995-9. Your on-line check process is a form of
8 electronic fund transfer and, therefore, is permissible for Federal candidates not seeking
9 matching funds.

10 The Commission notes that this opinion considers directly, for the first time, the
11 use of electronic checks through the Internet to make matchable contributions to
12 Presidential candidates.³ Recently revised Commission regulations describe the
13 matchability of credit card contributions or those made by debit card. However, in
14 Advisory Opinion 1999-9, which first discussed the permissibility of credit card
15 contributions, the Commission used the term "credit card" to include the use of a "debit
16 card," as well as "other similar electronic fund transfer methods." The Commission,
17 therefore, concludes that its regulations on the matchability of credit card contributions
18 are applicable to contributions made by the online electronic check system, as described
19 in your proposal.

20 In this regard, the Commission notes that the screening procedures in your
21 proposal for credit card contributions raised over the Internet are well within the "safe

³ In Advisory Opinion 1989-26, the Commission approved the use of automatic fund transfer from a contributor's bank account to a candidate committee as a means to facilitate the making of contributions. And again, in Advisory Opinion 1995-9 with respect to contributions that were not to be matched, the Commission approved the making of contributions through the Internet "using credit cards, electronic fund transfers and potentially other electronic means."

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1 harbor" discussed in Advisory Opinion 1999-9 for matchable contributions. See
2 Advisory Opinion 1999-9 and the Explanation and Justification for the Commission's
3 revised regulations permitting credit card contributions at 64 *Fed. Reg.* 32394 (June 17,
4 1999), see also Advisory Opinion 1999-22. They would permit an authorized committee
5 of a Presidential candidate, relying on Advantage 's services, to submit evidence that "the
6 contributor has affirmed that the contribution is from personal funds and not from funds
7 otherwise prohibited by law." 11 CFR 9034.2(c)(8)(ii).⁴ Therefore, with some
8 modifications your proposal is permissible under the Matching Act and Commission
9 regulations.

10 Since the Commission has determined that the new regulations, which cover the
11 use of credit and debit cards, are applicable to the on-line electronic check system
12 described in your proposal, the Commission also concludes that the documentation
13 requirements developed for credit cards and debit cards, as discussed in the
14 Commission's Guideline for Presentation in Good Order, would apply as well (with some
15 modifications) to the on-line check system. See 11 CFR 9033.1(b)(9).⁵ For example, any

⁴ The Commission stated in its Explanation and Justification that:

A committee should take steps to insure that controls and procedures are in place to minimize the possibility of contributions by foreign nationals, by Federal Government contractors, and by labor organizations, or by an individual using corporate or other business entity credit accounts. Such controls and procedures should also help the recipient committee identify contributions made by the same individual using different or multiple credit card accounts; and contributions by two or more individuals who are each authorized to use the same account, but where the legal obligation to pay the account only extends to one (or more) of the card holders, and not to all of them. 64 *Fed. Reg.* 32396.

⁵ Not all of these requirements, however, would be applicable to your situation. The Commission notes, for example, that the on-line check process discussed in this request differs from the credit card system for making Internet contributions discussed in Advisory Opinion 1999-22. The on-line check process, since it directly transfers funds from the contributor's bank account to the account of the campaign, does not require the services of a vendor to clear a credit card contribution or hold the contribution funds in the vendor's own accounts. Therefore, the need for a separate vendor merchant account number (for matchable contributions), or for the segregation of all contributions (matchable or not) from the vendor's corporate accounts, does not arise in this situation.

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1 information from the third party processors, documenting the transmission of funds in a
2 credit card or debit card situation, would likewise be required where an electronic check
3 transaction is transmitted through any third party processor, as described in your request.

4 Another provision in the Commission's Guidelines, in particular, requires the
5 documentation and verification of a donor's address. Advantage must, therefore,
6 incorporate a reliable address verification system in its proposal as it relates to
7 Presidential committees seeking matching funds. The Commission notes that the
8 additional screening option described in your request provides address verification
9 through use of a social security number or driver's license number. Making this option
10 mandatory in the on-line check system offered to Presidential committees would be one
11 reliable "safe harbor." However, the Commission is not requiring that Advantage
12 incorporate this particular verification process; it could provide other mandatory
13 verification systems if they are equally reliable.

14 The Commission notes your statement that "the campaign will receive, on a
15 timely basis, in electronic form or on paper, all necessary information about the donation,
16 including all required contribution information, date, amount, etc., for inclusion
17 (electronically if possible) in the campaign's data base... ." The Commission notes that as
18 an agent of the political committee it assists, Advantage is required to furnish, to any
19 client Presidential committee receiving matching funds, all documents and records that
20 may be necessary for the Commission to conduct its audit of that committee. See 26
21 U.S.C. §9033(a)(1),(2),(3); see also 11 CFR 9033.1(b), 9033.11, and 9033.12.

