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Federal Election Commission
Office of the Secretary
999 E Street, NW
Washington, DC 20046

Dear Madam Secretary:

This letter is a comment to draft Advisory Opinion 2006-08 submitted pursuant to the Commission's procedures by the Requestor, through counsel.

While the draft correctly understands the questions presented, it misapplies precedent in four areas. This is due, in our opinion, to the fact that the Requestor's business model is new, and not like the facts in prior Advisory Opinions. But just as the Commission has seen with the Internet, new businesses and technology can be compatible with settled law. The Requestor does not seek any new exceptions to settled law, just an acknowledgment that it is entitled to receive the same established exemptions other corporations have been given.

1. The Corporation's Principal Business Model Meets the Commercial Vendor Exception.

The draft suggests the Corporation's business model would not qualify it under the commercial vendor exception because the corporation "would not charge *the recipient political committees* anything for the services it is providing." Draft AO 2006-08 page 8, lines 16-17 (emphasis added) discussing AO 2004-19 and 2002-7. With all due respect, this analysis misses the point of Commission precedent and the Corporation's request.

In approving Advisory Opinions 2004-19 (DollarVote) and 2002-7 (Careau) the Commission required the vendors "receive the usual and normal charge for its services, including adequate profit and compensation." 2004-19 at page 2; 2002-7 at page 4. As in all 441b cases, this was done to ensure the corporate vendor did not subsidize federal election activity. In those fact patterns, the corporation had to charge its customer – the political committee – for the cost or value of its service.

In today's request, the Corporation's customers are not political committees, but donors. As stated in the request, the Corporation will charge each individual donor a "service fee" for the fundraising services it is providing. This fee is just like those in Advisory Opinions 2004-19 and 2007-7: it is designed to ensure the vendor is paid adequate compensation and profit by a permissible source to avoid an impermissible facilitation of contributions.[1] The only difference is here it is paid by an individual, whereas in prior cases a political committee paid the fee.

[1] In other words, requestors in prior Advisory Opinions brought forth business plans to assist political committees in raising contributions – and the Commission required those corporations charge their customers for the

If the Commission adopts the counsel's draft as written, it could render unlawful a very common practice today: many people maintain separate individual checking accounts (not commingled with their household accounts or investment accounts) to make political and charitable contributions. This often is done to keep separate track of this money, ensure contribution limits are abided, shield spouses, ensure the proper deductions are taken, and the like. As with most bank accounts, these accounts often bear a monthly service charge and a per-transaction fee when a check or wire is sent, even if sent to a benefiting candidate. Under the counsel's draft, this common arrangement may be unlawful because the bank is not charging the recipient political committee anything for the services it is providing its depositor, the contributor, even though the political committee is receiving a contribution.

The Commission should answer today's request by ensuring the *principle* of 441b is adhered to (corporations cannot subsidize federal election activity), rather than just making sure the facts of prior opinions are adhered to (earlier corporate ventures were approved because they planned to charge political committees). By applying the principles of 441b, the Commission can ensure reasonable and coherent application of pre-existing law to a novel set of facts.

Accordingly, the requestor suggests the Commission revise the analysis on pages 6-9 to approve its principal business model under the commercial vendor exception because a service fee is borne by the donors and will compensate the corporation in the same manner prior corporations were compensated by their political committee customers.

2. The Corporation is also acting as a Commercial Fundraising Firm

The draft suggests the Corporation will not qualify for the "commercial fundraising firm" exception in 11 CFR 110.6(b)(2)(i)(D) unless it "were to be retained by a recipient candidate or authorized committee" as was done in Advisory Opinion 2004-19 (DollarVote). Draft Advisory Opinion 2006-08 at page 11, lines 1-11. Again, the draft is requiring the requesting Corporation to meet the facts of prior Advisory Opinions, not the law.

In Advisory Opinion 2004-19, the Commission conceded that its "rules do not specifically define the term 'commercial fundraising firm'." AO 2004-19 at page 6. Nevertheless, the Commission endeavored to conclude "that DollarVote meets the 'commercial fundraising firm' exception because it is a 'commercial vender,' as described above, retained by candidates to assist in raising funds for their campaigns." *Id.*

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service. Today, the requestor has brought forth a plan to assist individuals in making contributions – and the Commission should similarly require the requesting corporation to charge *its* customers for the service. The Commission should not confuse the facts of prior opinions (who paid for the service) with the law of prior opinions (someone needs to pay for the service).

Just as in DollarVote, today's requestor is a commercial vendor: the only difference is that we are retained and paid by donors whereas DollarVote was retained and paid by recipients.[2] The regulations do not forbid corporations retained by donors from being commercial fundraising firms – in fact; the regulations do not address this at all. Accordingly, all the Commission is being asked to do today is fit new facts into the principles of existing law. We are not asking for new law to be made or precedent to be overturned.

3. Providing Commentary and Analysis does not Constitute "Direction or Control."

The draft concludes that if the Corporation provides commentary and analysis about federal candidates it will be impermissibly exercising "direction or control" prohibited by 11 CFR 110.6(d)(1) and (2), because it would necessarily make a series of subjective judgments in determining what material to pass onto subscribers. Draft Advisory Opinion 2006-08 at page 12, lines 7-12. This conclusion is belied by the facts of the request and stretches "direction or control" beyond any reasonable interpretation.

Three important facts should lead the Commission to the opposite conclusion made in the draft. First, the Corporation's customers are being asked if they want this information and will pay for it as part of the service fee. Second, the Corporation is not writing its own commentary and analysis: it is providing others' published analysis such as from issue groups or from the public record.[3] Third, and as clearly stated in the Request and relied upon by the Commission in approving the DollarVote Advisory Opinion: the Corporation will not censor any donor's choice on the disbursement of their money. The Corporation will not retain any discretion under its proposed plan, rather the individual contributor makes all decisions regarding their contributions. Advisory Opinion Request 2006-08 at pages 3, 5; Advisory Opinion 2014-19 at pages 6-7.

As a legal matter, the Requestor knows the Commission has struggled with the definition of "direction or control." With all due respect, whatever the definition may be it certainly cannot be what is stated in the current draft. Under the draft's language, nearly every fundraising appeal would constitute some kind of "direction or control." The draft even states that providing information "that may well have a significant 'influence' on the decisions of subscribers to contribute at all to particular candidates, as well as the amounts of their contributions," would be unlawful. Draft Advisory Opinion 2006-08, page 12 lines 13-16. This standard cannot possibly

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[2] Many other factual similarities abound between DollarVote and the requesting Corporation. Both are in the business of transferring money to candidates pursuant to written agreements; individual contributors make all decisions regarding contributions, define the parameters of their contributions and earmark their contributions in the future; both firms are bound to forward contributions as directed; and both will have procedures to ensure candidates do not receive excessive contributions. *Compare* AO 2004-19 at pages 6-7 *with* AO 2006-08 at pages 1-3.

[3] To the extent these two facts were not adequately developed in the Request or answers to the General Counsel's questions, the Requestor wants to assure the Commission it will ask its customers what kind of information they want, will charge them for it, and will only provide the commentary of other groups and not create its own.

be right,[4] especially in this case where donors are requesting the information and paying to receive it.

Accordingly, the Requestor requests the Commission reject the draft's conclusion on pages 11-12 as unprecedented, unfair, and unworkable and replace it with language that approves this practice subject to the protections proffered.

4. It is Permissible to Forward Contribution Solicitations.

The draft states the Corporation will make a prohibited contribution if it provides political committees free access to its members. That is not what the Corporation intends to do.

Instead, the Corporation's customers are paying for a service that collects contribution solicitations from a variety of sources and funnels them in an organized fashion. The Corporation is specifically not turning its membership list over to candidates or political committees. The Corporation will, instead, follow the donor's wishes in forwarding contribution information as requested and for a fee. This cannot constitute impermissible corporate facilitation because individuals, and not a corporation, are paying for the information. More importantly, the Corporation is specifically in the business of helping donors make political contributions.

In conclusion, the Corporation requests the Commission allow it to engage in the service its potential customers have requested. As stated in the request, the Corporation admits it business plan is novel — but that is no reason for the Commission to deny entrepreneurship. Instead, the Commission needs to view this entity as a new kind of fundraising firm, who's ordinary course of business is helping its paying clients make lawful contributions.

Sincerely,

Craig Engle

cc: General Counsel
Commissioners

[4] The requestor suggests the Commission review the concurring opinion of Commissioner Josefiak in Advisory Opinion 1991-29 for the best explanation on the law of "direction or control."