



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

**TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE**

FROM: COMMISSION SECRETARY

MWD

DATE: July 21, 2004

SUBJECT: COMMENT: PROPOSED AO 2004-19

Transmitted herewith is a timely submitted comment by Andrew W. Mitchell, President of DollarVote.org. regarding the above-captioned matter.

Proposed Advisory Opinion 2004-19 is on the agenda for Thursday, July 22, 2004.

Attachment

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July 21, 2004

Secretary of the Commission
cc: General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

2004 JUL 21 A 8:03

RECEIVED
FEDERAL ELECTION
COMMISSION
WASHINGTON
D.C. 20543

RE: Comment re: Draft Advisory Opinion

Dear Mr. Norton:

I am submitting this Comment on behalf of DollarVote.org, Inc. ("DollarVote.org" or "DollarVote" or "the Corporation") in response to the Commission's Draft Advisory Opinion with respect to DollarVote.org's service, the DollarVote.

I have defended the permissibility of the DollarVote in general terms in the letters constituting the Advisory Opinion Request, so I will limit myself here to addressing only the points explicitly mentioned in the Commission's Draft Advisory Opinion.

In the draft opinion, the Commission concludes that DollarVote.org, Inc. may not conduct its planned contribution forwarding activity because the corporation neither qualifies as a conduit, nor meets the "commercial fundraising firm" exception that permits conduit-like activities by certain corporations. The Commission elucidates this conclusion with the following supporting points. First, corporations may not generally act as conduits. Second, DollarVote is not a commercial fundraising firm because, in the eyes of the Commission, it exercises control over the contributions it forwards and additionally it does not act as an "agent" on behalf of a candidate in the fashion of a commercial fundraising firm.

DollarVote.org is a corporation, and thus not a conduit. However, it is deserving of the "commercial fundraising firm" exception on the same grounds that actual commercial fundraising firms are. The DollarVote will constitute a commercially reasonable relationship with candidates—and this condition, independent of "agency" or "retainership," has been identified by the Commission's precedent as warranting the

commercial exception. Moreover, any "direction and control" exerted by DollarVote.org over earmarked contributions is less than control exhibited by entities in cases deemed permissible by the Commission.

I. Rule Proof Satisfied; Agency Defined by "Commercially Reasonable Relationship"

The Commission's first supporting argument to disqualify DollarVote.org from the commercial exception states that DollarVote.org does not plan to act as an "agent" on behalf of a candidate. However, the Commission has granted the commercial fundraising firm exception in the past not with reference to acting as an "agent" on behalf of a candidate. Rather, the Commission has granted the commercial exception on the basis of a firm's "commercially reasonable relationship" with a candidate. Since the DollarVote will constitute a commercially reasonable relationship, the Commission should reverse its judgment on this point.

The Commission's "commercial fundraising firm exception" states that a corporation may meet the commercial firm exception to the conduit rule if that corporation acts on behalf of a candidate. The rule is stated in 11 CFR 110.6(b)(2)(i)(D) and in Final Rules and Explanation and Justification of Regulations on Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution Limitations and Earmarked Contributions, 54 Fed. Reg. 34098, 34106 (Aug. 17, 1989). As expressed in the draft opinion pertaining to DollarVote, the commercial exception is limited to an "agent acting at the instruction of the candidates or candidate committees" (page 8, line 16).

In fact, the Commission has granted the commercial exception to corporations that do not serve as "agents acting at the instruction of the candidates or candidate committees." In particular, the Commission permitted Aristotle Publishing's service, which was "agnostic" to the candidate it benefited (AO 1999-22).

Aristotle's proposed service was an Internet-oriented platform enabling candidates to set up online contribution portals. As the Commission's opinion describes, "A candidate utilizing Aristotle's Internet contributions service will download the software from Aristotle's web site and install it at his or her own campaign web site, all at the candidate's own expense." Aristotle's service was oriented to any candidate who wished to download the software and pay for its usage. Aristotle was not an agent acting at the instruction of the candidates or candidate committees. Similarly, DollarVote's service is oriented to any candidate who wishes to make a "promise" and pay for DollarVote's services.

The Commission addresses Aristotle's case with the following language:

The general contractual arrangements Aristotle proposes for its political committee and candidate clients also meet the requirements of sections 100.7(a)(1)(iii)(A) and 100.8(a)(1)(iv)(A). Aristotle's proposal would provide for adequate compensation and its procedures would seem to be in the normal course of business for a vendor within its industry dealing with a similarly situated non-political client. These arrangements avoid creating a situation where the vendor provides services to a political committee either without charge, or at less than the usual and normal charge, and thereby makes a corporate contribution prohibited by 2 U.S.C. 441b(b)(2).9 [AO 1999-22; emphasis mine]

Note that there is no mention of "acting at the instruction of a candidate." Rather, the entire substance of the paragraph is that Aristotle's service is permissible because it receives "adequate compensation" via "general contractual arrangements."

More complete rule proof shows that the Commission has applied the criterion of "commercial reasonableness"—and not action at the instruction of a candidate—as the primary criterion for the commercial exception. In multiple cases, the Commission has grounded the commercial exception on the following conditions:

- (1) The vendor (in this case, DollarVote.org) receives adequate profit for its activity; and
- (2) The services or contribution proceeds are not advanced without assurance of adequate compensation (AO 1994-33)

In the eyes of the Commission, these conditions constitute a "a commercially reasonable relationship" between a corporation and a candidate. In such a case, as in the case of DollarVote, the corporation "receives the usual and normal charge for its services, including an adequate profit and compensation" (AO 2002-07).

It is important to note that the Commission has applied the criterion of the "commercially reasonable relationship" independently from the "agency at the instruction of a candidate" criterion. The Commission has expressly deemed "affinity marketing programs," which have acted as agents of candidates, impermissible on the grounds that they did not receive commercially reasonable compensation (see AO 1992-40, AO 1988-12, AO 1979-17).

It would be inconsistent with precedent to judge DollarVote's eligibility for the commercial exception solely based on whether it acts as agent on behalf of a candidate. The Commission has previously deemed "nonretainer" firms eligible based on the commercial reasonableness of their relationships with candidates, and this criterion is the one applicable to the case of DollarVote.org.

2. Less "Direction or Control" than Previously Approved Activities

The Commission's second observation on DollarVote's activity stated that DollarVote.org would exhibit "direction" over earmarked funds. This argument by the Commission is based on the following points, which I will address in turn:

- (1) DollarVote.org chooses and words DollarBills (page 5, line 19- page 6, line 1);
- (2) DollarVote.org can limit the number of candidates who "promise" and hence receive funds for a particular DollarBill (page 6, line 6-9);
- (3) DollarVote.org limits the total amount of funds that a candidate may receive DollarBills (page 6, line 9-11);
- (4) DollarVote.org prevents any candidate from being the first promiser on more than one bill (page 6, line 12-16);

Addressed as follows:

(1) By offering multiple DollarBills on multiple issues, DollarVote.org exerts less control, not more, than previously permitted activities forwarding earmarked campaign contributions to unnamed candidates. Consider the case of WE LEAD (AO 2003-23). WE LEAD enabled earmarked contributions only to the future Democratic Presidential nominee (an individual not chosen by WE LEAD).¹ DollarVote.org enables earmarked contributions to any Senatorial candidates who promise (individuals not chosen by DollarVote.org). Furthermore, by enabling earmarked contributions with respect to multiple position statements, DollarVote would exercise less control over the direction of funds than analogous approved activities, which generally have forwarded funds with respect to only one set of "parameters."

But the observation regarding WE LEAD, sufficient as it may be, is unnecessary in light of the plain observation that "commercial fundraising firms" often forward funds for one candidate predesignated by that firm, thus exercising "control" over the recipient orders of magnitude greater than DollarVote.org.

And if this fact were somehow not considered independently fully sufficient, one might note that WE LEAD was considered to exercise no "control" over individual contributions, despite carrying out an activity that benefited exactly one candidate in a two-candidate race. Why? Because it was judged immaterial by the Commission in this case whether one candidate benefited more from WE LEAD's service than another. Rather, the lack of "direction or control" in this case was attributed to the following fact: individual contributions were directed according to a logical formula that was predetermined at the time of giving, and which WE LEAD had no control over from that point on. Such a "contract" or set of "logical terms" is the case with a DollarVote: just as WE LEAD cannot choose who will win the nomination, DollarVote.org cannot control which candidates will make promises.

(2) and (3) These limits are immaterial to the Corporation, and were included in our Advisory Opinion Request only in an attempt to cooperate with the Commission. The Corporation would be willing to discard these limits.

However, it is worth noting that these limits would constitute less direction and control than the Commission-approved activity summarized in (1) above. It is more controlling to disbar completely a candidate's participation in a service than to fix it within guidelines.

(4) This limitation is in place to prevent the violation of Commission contribution limits. The only way to ensure that individual limits are not exceeded is to place a \$2,000 individual limit on contributions to a particular DollarBill and to limit candidates to a maximum of one "first promise."

For example, a customer contributing \$2,000 to each of two DollarBills would exceed the Commission's individual contribution limits if a candidate were to cast the first "promise" against both of them. DollarVote.org has established the "first promise" limitation only to guard against this case, in the interests of the Commission.

¹ From the standpoint of direction and control, WE LEAD's status as a 501(c)3 is not relevant here. Presumably the same actions do or do not constitute "control" regardless of whether the entity in question is a 501(c)3 or a corporation.

In light of these considerations, it is untenable to conclude that DollarVote would control the recipients and amounts of earmarked contributions to unnamed candidates. The recipients and amounts are determined by the "dollarvotes" by customers and the "DollarPromises" by candidates, which the Corporation has no control over.

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In light of these observations, the Commission should grant DollarVote.org the commercial exception to the conduit rule. Only in doing so will the Commission judge in consistency with its rule proof.

Respectfully,



Andrew W. Mitchell
President
DollarVote.org