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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM
For Meeting of: 5-20-99

May 13, 1999

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 1999-09

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for May 20, 1999.

Attachment

1
2 **ADVISORY OPINION 1999-9**

3
4 **Robert F. Bauer, Attorney**
5 **Perkins Coie LLP**
6 **607 14th Street, N.W. Suite 800**
7 **Washington, DC 20005-2011**

DRAFT

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9
10 **Dear Mr. Bauer:**

11
12 **This refers to your letters dated March 18, and April 12, 1999, which request an**
13 **advisory opinion on behalf of Bill Bradley for President, Inc. ("the Committee"),**
14 **concerning application of the Presidential Primary Matching Payment Account Act ("the**
15 **Matching Act"), 26 U.S.C. §§9031-9042, and Commission regulations to the matching of**
16 **credit card contributions made through the Internet. Your request also includes reference**
17 **to the Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA").**

18 **FACTUAL DISCUSSION**

19 ***Solicitation Proposal***

20 **You state that Bill Bradley has filed the candidate agreements and certifications**
21 **and threshold submissions to receive Federal matching funds under the Matching Act.**
22 **His principal campaign committee for the 2000 presidential election cycle is Bill Bradley**
23 **for President Inc. You explain that "[Mr. Bradley] is raising funds for his campaign from**
24 **the broadest possible base of Americans consistent with the intent of Congress when it**
25 **passed the Act." As part of this, the Committee plans to solicit and accept contributions**
26 **from supporters through its World Wide Web site. Prospective donors visiting the**
27 **Committee's web site will be able to contribute by filling out an electronic form and**
28 **transmitting it to the Committee.**

1 The donor will then directly provide credit card, debit card or other electronic
2 fund transfer information to the Committee through the electronic form. The Committee
3 will send a confirmation of the contribution to the donor via electronic mail, and will
4 submit the information for payment through the appropriate card issuer. To avoid the
5 receipt of corporate contributions, the Committee will pay all the applicable processing
6 fees.

7 The Committee, you affirm, will observe disclaimer and best efforts requirements
8 and will screen for prohibited contributions. (See discussion below.) The Committee
9 will also retain all information related to the contributions, as required by Commission
10 regulations.

11 The Committee wishes to submit contributions collected in this manner for
12 matching under the Matching Act. You state that the Committee will submit, to the
13 Commission, copies of the electronic forms submitted by the donors both in hard copy
14 and electronic form, along with documentation which indicates that the contribution was
15 deposited into a designated depository.

16 *Screening Procedures*

17 The Committee intends to use the services of an Internet credit card processing
18 vendor which has the capability to compare the contributor information submitted to the
19 Committee with the name, address and other billing information on file with the issuer of
20 the contributing credit or debit card. (Hereinafter use of the term "credit card" by itself
21 should be read to include "debit card" as well as other similar electronic fund transfer
22 methods.) This capability will allow the Committee to verify the identity of those who
23 contribute via credit card with the same degree of confidence that political committees

1 generally accept checks via direct mail and other forms of solicitation that are consistent
2 with Commission regulations, while not necessarily involving direct personal contact
3 between Committee staff and donors. Your request provides specific detail regarding the
4 screening procedures.

5 The Committee intends to screen for impermissible or nonmatchable contributions
6 by taking a series of sequential measures. First, on the web page that contains the
7 contribution solicitation form, the Committee will post language in a clear and
8 conspicuous manner informing prospective donors of the Act's source restrictions and
9 contribution limits. This language is derived from the Commission's guidance in
10 Advisory Opinion 1995-9, and will consist of the following:

11 *We may accept contributions from an individual totaling up to \$1,000.*
12 *Federal law prohibits contributions to the campaign from:*

- 13
14 *· the general treasury funds of corporations, labor organizations or*
15 *national banks (including corporate or other business entity credit cards);*
16
17 *· any person contributing another person's funds;*
18
19 *· foreign nationals who lack permanent resident status; and*
20
21 *· government contractors.*

22
23 *We may accept contributions from minor children (i.e., persons under 18*
24 *years of age) if the minor makes the decision to contribute knowingly and*
25 *voluntarily, and the child contributes his or her own funds, and the*
26 *contribution is not controlled by another individual or made from the*
27 *proceeds of a gift given to provide funds to be contributed.*

28
29 Second, to contribute to the Committee, a donor will have to successfully
30 complete an electronic form on the Committee's web site, and decide to transmit that
31 form to the Committee for further processing. The form will require a prospective donor
32 to provide detailed information including, among other things:

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- the contributor's name
- the contributor's name as it appears on the card;
- the billing address on record with the issuer of the credit or debit card;
- the credit or debit card number;
- the expiration date of the card;
- the contributor's residential address; and
- the amount of the contribution,¹

16 In the event a prospective donor fails to provide any of the required information, or leaves
17 one of these fields blank, the Committee's web site will reject the form and prompt the
18 prospective donor to provide the missing information.

19 To screen further for corporate or business entity cards, the Committee intends to
20 take advantage of the fact that corporate or business entity credit cards are generally
21 billed directly to the entity's offices, rather than to an individual's home. If the billing and
22 residential addresses provided by the prospective donor are different, the Committee's
23 web site will display the following message:

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We've noticed that the billing address on your card is different from your home address, please remember that we cannot accept corporate or business entity credit cards, and that your contribution must be made on a card that represents your own personal funds.

¹ The Committee will also request the donor's name of employer and occupation. If the amount to be contributed exceeds \$200 and such information is not provided, the Committee's web site will reject the form and prompt the donor to provide the missing information. In addition, if an amount over \$1,000 is entered, the web site will reject the form.

1 The donor will then be prompted either to continue with the transaction or cancel it
2 altogether.

3 The Committee also intends to require the donor to check a series of boxes within
4 the contribution form attesting that their contribution is made with funds within the
5 source restrictions and contribution limits of the Act. Specifically, the donor will be
6 asked to attest to the legality of their contribution by checking the following boxes:

- 7
- 8 *1. This contribution is made from my own funds, and not those of*
9 *another.*
 - 10
 - 11 *2. This contribution is not made from the general treasury funds of a*
12 *corporation, labor organization or national bank.*
 - 13
 - 14 *3. I am not a Federal government contractor, nor am I a foreign national*
15 *who lacks permanent resident status in the United States.*
 - 16
 - 17 *4. This contribution is made on a personal credit or debit card for which*
18 *I have the legal obligation to pay, and is made neither on a corporate*
19 *or business entity card nor on the card of another.*
 - 20

21 The failure to check any of the attestation boxes will cause the Committee's web
22 site to reject the form, and display a message noting the applicable source restriction, for
23 example: "*We're sorry. Federal law prohibits contributions from the general treasury*
24 *funds of corporations, labor organizations or national banks.*" It will then prompt the
25 donor either to correct any missing or inaccurate information, or to cancel the transaction.

26 When the form has been successfully completed, the donor transmits it to the
27 Committee for "real time" processing. The credit card data will be sent directly to the
28 credit card processing company. The company will cross-check the contributor
29 information submitted with its own information on the name, billing address, account
30 number and expiration date of the card, and process the transaction.

1 In the event the contribution is rejected by the processing company, the campaign
2 will then send a message to the prospective donor that the contribution has been rejected.

3 In the event the credit card submission is approved, the Committee will send a
4 confirming message to the donor expressing appreciation for the contribution, will note
5 the contribution in its database, and will then receive the contribution, less the processing
6 fee, into the campaign depository. The Committee also will request that the donor
7 contact the Committee promptly either by phone or by e-mail with any questions or
8 concerns about the contribution, or about the process through which it was made.

9 In addition to these screening and notification procedures, the Committee intends
10 to employ the same practices it would follow if a donor would write checks through
11 different or multiple checking accounts. Upon receipt of a contribution, it will enter the
12 donor's name into a database of contributors, checking as an initial matter to see if the
13 donor had given before. If the contribution appeared to be excessive, the Committee will
14 either seek a timely reattribution, or refund the excessive portion.

15 **MATCHING ACT AND COMMISSION REGULATIONS**

16 For purposes of entitlement to Federal matching payments, the term contribution
17 "means a gift of money made by a written instrument which identifies the person making
18 the contribution by full name and mailing address, but does not include a subscription,
19 loan, advance, or deposit of money, or anything of value or anything described in
20 subparagraph (B), (C), or (D) of section 9032(4)." 26 U.S.C. §9034(a); see also 11 CFR
21 9034.2. Commission regulations define written instrument to mean "a check written on a
22 personal, escrow or trust account representing or containing the contributor's personal

1 funds; a money order; or any similar negotiable instrument.” 11 CFR 9034.2(b).
2 Finally, Commission regulations delineate a category of contributions that cannot be
3 matched. This list currently includes contributions made through: “A contract, promise,
4 or agreement, whether or not legally enforceable, such as a pledge card or credit card
5 transaction, to make a contribution for any such purposes (but a gift of money by written
6 instrument is not rendered unmatchable solely because the contribution was preceded by
7 a promise or pledge).” 11 CFR 9034.3(c).

8 **APPLICATION TO COMMITTEE PROPOSAL**

9 The Commission notes the rising popularity of the use of the Internet, both as a
10 form of information gathering and as a vehicle for financial transactions. As you note in
11 this request, approximately half of U.S. adult consumers have access to the Internet, and
12 studies during the 1998 holiday season had projected that 10% of Americans would shop
13 for at least one item over the Internet. The vast majority of this spending was expected to
14 be done with credit cards. Several nonprofit organizations currently accept credit card
15 donations over the Internet, including the American Red Cross, UNICEF and the Sierra
16 Club.

17 The Commission has not previously considered the matchability of credit card
18 contributions made through the Internet. In previous opinions the Commission has
19 concluded that contributions, otherwise permissible under the Act, could be solicited
20 through the Internet. See Advisory Opinions 1995-35 and 1995-9.²

² Advisory Opinion 1995-35 concerned the use of the Internet by Alexander for President Committee to solicit contributions for the presidential nomination campaign of Lamar Alexander. However, in that opinion the committee stated that it would not accept contributions made by credit card and this issue was therefore explicitly reserved by the Commission. In Advisory Opinion 1995-9, the Commission did not

1 In the first instance, your proposal entails the matchability of contributions which
2 are not made through a traditional written instrument, as provided in 26 U.S.C. §9034(a).
3 Where possible, the Commission has interpreted the Act and its regulations in a manner
4 consistent with contemporary technological innovations, including the maintenance of
5 records in non-paper form and the performance of committee transactions, where the use
6 of the technology would not compromise the intent of the Act or regulations. See
7 Advisory Opinions 1999-3, 1995-35, 1995-9, 1994-40 and 1993-4.³

8 In this regard, the Commission's resolution of Advisory Opinion 1999-3 is
9 relevant to your request. In that opinion a corporation wished to use a payroll deduction
10 system to facilitate contributions to its PAC from the corporation's executive and
11 administrative personnel. As part of this system, it was proposed that these employees
12 would authorize payroll deductions by either digital electronic signature or traditional
13 written signature before the deductions would be made. Prior Commission precedent and
14 case law had required that such authorizations be made in writing.⁴ The opinion
15 examined whether the use of an electronic signature by a restricted class employee would
16 constitute a valid written authorization for the deductions to be made. The Commission

address the application of the Matching Act to contributions made over Internet either by credit cards or other means.

³ As noted above, in Advisory Opinion 1995-9, the Commission permitted a committee, that used its web site to solicit contributions, to accept contributions using electronic means. This arrangement was permissible so long as complete and reliable records for recordkeeping, disclosure and audit purposes were maintained and contributor data in a computer file were backed up in a way that permitted the committee to maintain either machine readable or paper copies for three years after the date on which it reported the contributions. In Advisory Opinion 1994-40, the Commission permitted a political committee to maintain its records on microfilm, rather than paper, so long as the necessary documentation of committee transactions was preserved and the microfilm records were legible and retrievable. In Advisory Opinion 1993-4, the Commission permitted a committee to pay its bills electronically through a computer driven billpayer service so long as adequate documentation, including receipts and invoices, was preserved.

⁴ See *Federal Election Commission v. National Education Association*, 457 F.Supp. 1102 (D.D.C. 1978) and Advisory Opinion 1997-25.

1 determined that this was permissible since the safeguards and procedures required for the
2 use of the signature allowed it to function as a “unique identifier of the authorizing
3 employees” and it did not run contrary to any specific rule.

4 The Commission notes that while there are important distinctions between your
5 proposal and that considered in Advisory Opinion 1999-3,⁵ the analysis therein is
6 applicable to your situation. The Commission observes the numerous safeguards built
7 into your proposal, both as to the identification of contributors and the related issues of
8 screening for impermissible contributions. The consistent and full implementation of all
9 these procedures would offer substantial assurance that your proposal to solicit and accept
10 contributions through the Internet, by the submission of an electronic form and use of
11 credit card, would comply with the Matching Act. Your proposed screening procedures
12 are central to the Commission’s observations, since they would “allow the Committee to
13 verify the identity of those who contribute via credit card with the same degree of
14 confidence that political committees generally accept checks via direct mail and other
15 forms of solicitation that are consistent with Commission regulations.” In such
16 circumstances, the electronic contributor form with the “checking off” of the appropriate
17 boxes could be the functional equivalent of a written instrument described in 26 U.S.C.
18 §9034(a). These procedures will produce the electronic signature uniquely identified
19 with each contributor form and would be tantamount to a written signature on that form.⁶

⁵ There was no regulatory or statutory bar to the proposal reviewed in Advisory Opinion 1999-3, while in this situation, current Commission regulations expressly address the matching of credit card contributions. See discussion below.

⁶ By comparison to other areas of law and despite the absence of any tangible, physical product in the sale and transmission of types of software via the Internet, courts have been willing to apply the provisions of the Uniform Commercial Code even where those provisions would require the presence of physical goods. See *Micro Data Base Sys., Inc. v. Dharma Sys., Inc.* 148 F.3d 649, 654 (7th Cir. 1998). Courts have also

1 An important aspect of this approach would be retaining the electronic records in a form
2 which would allow the electronic record to be printed in hard (paper) form, as needed.

3 The difficulty in your proposal, however, is that the current Commission
4 regulations at 11 CFR 9034.3, which interpret 26 U.S.C. §9034(a), explicitly state that
5 contributions made by means of credit card transactions cannot be matched. This
6 regulation, promulgated by the Commission in 1979, has governed the interpretation of
7 the Matching Act and the definition of matchable contributions for the past six
8 presidential election cycles.⁷ Therefore, under the current regulatory regime, your
9 proposal appears contrary to the regulations.

10 However, after careful consideration of the legal and policy issues involved in
11 your proposal, the Commission has approved revisions to the above cited regulations that
12 would allow Federal matching payments for credit card contributions in the
13 circumstances and under the conditions set forth in your proposal. These regulations
14 have been submitted [*will very soon be submitted*] to Congress, but are subject to the 30
15 day legislative review period at 26 U.S.C. §9039(c) before they may be promulgated as
16 final regulations.

17 Assuming they are issued by the Commission as final regulations, they will have
18 retroactive application to otherwise qualified credit card contributions made on January 1,
19 1999, and thereafter, unless Congress and the President disapprove the regulations.
20 Having determined in the proposed regulations that credit and debit card contributions

applied contract law, despite the absence of a written agreement, to software licensing agreements. See *Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670, 675-76 (3rd Cir. 1991) and *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451-52 (7th Cir. 1996).

⁷ In 1983, when revising the regulations interpreting the Matching Act, the Commission declined to amend 11 CFR 9034.3 to permit the matching of credit card contributions. The Commission noted then that these contributions, if made by phone, "would lack the contributor's signature." It also noted the problem addressed in your proposal of identifying credit cards that are personal accounts paid by an incorporated business. See *48 Fed.Reg. 5228* (February 4, 1983). Several advisory opinions have restated the regulatory prohibition regarding the matching of credit card contributions. See *Advisory Opinions 1979-17 and 1984-27*. In *Advisory Opinion 1984-27*, the Commission permitted a presidential campaign

1 may be matched, the Commission believes it is appropriate to retroactively match such
2 contributions, since many presidential campaigns will have engaged in substantial
3 fundraising by the time the rules take effect. Because Federal matching funds will not be
4 disbursed until after the start of the matching payment period on January 1, 2000, this
5 provides ample notice to those campaigns that wish to utilize this fundraising approach.⁸

6 On the foregoing provisional basis, the Commission approves your proposal to
7 accept lawful and matchable contributions by credit card, subject to the conditions set
8 forth in this opinion. However, this approval will be of no-effect if Congress and the
9 President disapprove the cited regulation revisions within the 30 legislative day review
10 period set forth in 26 U.S.C. §9039(c).

11 This response constitutes an advisory opinion concerning application of the
12 Matching Act, the FECA and Commission regulations to the specific transaction or
13 activity set forth in your request. 2 U.S.C. §437f.

14 Sincerely,

15
16 Scott E. Thomas
17 Chairman

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19 Enclosures (AOs 1999-3, 1997-25, 1995-35, 1995-9, 1994-40, 1993-4, 1984-27 and
20 1979-17)
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committee to request contributors, who had made credit card contributions by phone, to accept a refund of those contributions and remake them by check so they could be matched.

⁸ Under 26 U.S.C §9032(6), the matching payment period for contributions begins on January 1 of the calendar year in which a presidential general election will be held. However, under 26 U.S.C. §9034(a), a matchable contribution can also be made during the year preceding the presidential election year.