

Supplement to AOR 2012-17

From: Theodore Lutz/FEC/US
To: "Engle, Craig" <Engle.Craig@ARENTFOX.COM>
Cc: Kevin Dealey/FEC/US@FEC, Amy Rothstein/FEC/US@FEC
Date: 05/16/2012 05:21 PM
Subject: Request for Additional Information

Dear Mr. Engle:

Several Commissioners have requested additional information pertaining to your request, AOR 2012-17 (Red Blue T, ArmourMedia, and m-Qube).

In your request (at 7), you note, "In Advisory Opinion 2010-23 . . . the opinion said the possibility that contributions from one source could total more than \$50 to one committee in one billing cycle meant the requester could not rely on the recordkeeping exemptions from 2 U.S.C. 432(c)(2). Accordingly, if the aggregator places a cap on the allowed mobile contributions per month that each phone number may contribute to a political committee, then the political committee can reliably consider the contributions anonymous."

Several commissioners would like to ask how your clients would address the issue of family and group plans. As AO 2010-23 also noted, "within the context of family and group plans, several users could each pledge to make a contribution."

Your request proposes to apply a \$50 limit on contributions per mobile phone number per billing cycle. If multiple users in a group account each pledge to make contributions that, in the aggregate, exceed the \$50 limit during a given billing cycle, how would such contributions be treated by your clients?

In short, in a group plan, could the proposed \$50 contribution limit per telephone number still result in the payer of the plan making a contribution that exceeds the \$50 limit for anonymous contributions?

Please respond by email. Your response may be treated as a supplement to the advisory opinion request; as such, it may be placed on the public record along with your letter dated April 5, 2012, and your email dated April 10, 2012.

Theodore M. Lutz
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From: "Engle, Craig" <Engle.Craig@ARENTFOX.COM>
To: "TLutz@fec.gov" <TLutz@fec.gov>,
Date: 05/21/2012 05:56 PM
Subject: revised per the comments of the last requestor - please consider this the public comment

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marketing or recommending to another party any transaction or matter addressed herein. FEC response 5 21 (3).docx

You asked us to respond to the following hypothetical: Five separate people are on the same plan, and each person pledges \$20 in the same month to the same candidate, so that the total amount pledged is \$100, and that month's phone bill is paid by one person.

In our opinion the confluence of these five facts would be extremely rare, such that they do not represent a systemic threat to campaign finance law, much less one that could be purposefully exploited by wrongdoers. We respectfully submit two comments –

- 1) As a matter of law, when a committee obtains the required attestations from a contributor that their donation is less than \$50, it is permitted to rely on that—whether the donation is made by cash, credit card or mobile phone; and
- 2) The exact same confluence of facts already exists today with small, anonymous, credit card donations. For example, five family members may have separate credit cards on the same credit card account, and each person could pledge \$20 during the same month to the same candidate, so that the total amount pledged is \$100, and that month's credit card bill is paid by one person. There is no indication the Commission would preclude these credit card donations even if they face the same hypothetical posed for texted contributions.

Attestation Safe harbor

A potential contributor must answer YES that the contribution she is about to make is from her own funds. Without that attestation the donation cannot be made. This front-end attestation is not required under the FECA but has, for decades and as recently as last year, been legally considered a sufficient safeguard against a committee receiving an impermissible donation. Simply put, we are allowed to assume as a matter of law that the pledge she and the four others made will be from their own funds, thereby negating an assumption that one person later pays for each plan member's donation.

The hypothetical also suggests an illegal contribution in the name of another may be occurring. If an individual makes a pledge, but someone else pays for it: the payer may be viewed as fulfilling someone else's contribution in his own name. We believe the Commission can presume that contributions are very rarely made in the name of another; certainly not ones for \$10.

Factual Presumptions and Credit Card Contributions

As a matter of fact, there is no reason to presume that one person will be paying an entire phone bill versus everyone paying their own share of a group's phone bill. And even if one person is paying the phone bill, it is equally valid to assume the individual users are paying for their own political donations. In fact, we cannot imagine a more compelling situation when a person who may be regularly paying the entire phone bill would insist that each individual texter pay for their own political contributions.

Just as one person can pay an entire family's mobile phone bill, so too can one individual pay a multiple credit card account – even when the bill includes safe harbored small anonymous political donations by the individual cardholders. Just like with a family phone plan, a credit card account may have five users, each with their own card but sharing the same card account and the same overall limit. All five card holders' charges roll up into one itemized combined monthly statement. And as far as we know, the Commission has never called into question that a single person – most likely the primary applicant of the

credit card to whom the bill is addressed – could actually be paying for other card holders' contributions (maybe even all of their charges) at the end of each month.

(A single-payer of a credit card even further implicates possible contributions in the name of another because a person's credit card contribution is made at the point of charge, while the payment was made by the other person much later: essentially reimbursing the card holder for their donation. Again, the Commission should be able to assume that contributions are not made in the name of another.)

We respectfully submit that when it comes to permitting small anonymous contributions, there is no reason for the Commission to treat phone company-issued cellular numbers any more harshly than bank-issued credit card numbers. The safe harbor should not be out of reach just because the contribution is made by mobile phone rather than by credit card. Were the Commission now to find that the safe harbor does not apply to mobile phone donations due to the existence of shared plans, then it would be forced to also find the safe harbor also does not exist for multi-card credit card accounts due to the exact same factual circumstances.

Requestors respectfully suggest the remote possibility of the five hypothetical facts occurring at the same time does not present a system-wide threat to campaign finance regulations. Common sense, the facts, limiting donations to \$10 and the attestation's safe harbor compel an answer that the proposed plan is in compliance with the Federal Election Campaign Act.