



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

## DISSENTING OPINION

OF

COMMISSIONER HANS A. von SPAKOVSKY

IN

### ADVISORY OPINION 2007-04

I dissented in this matter because the Commission erred in its response to Question 2.<sup>1</sup> The facts of this matter are set forth in the Advisory Opinion adopted by my colleagues, and need not be repeated here. The Requestor's proposal to permit the payment of processing fees by contributors without the transaction resulting in a contribution to the political committee (the "convenience fee business model") should have been approved. Allowing contributors to assume the transaction processing cost is (i) not prohibited by any provision of the Federal Election Campaign Act (FECA) or by any Commission regulation, (ii) would be consistent with the Commission's historic treatment of other payment methods for contributions, and (iii) would in no way create a "loophole" in the law or otherwise "permit federal political committees to off-load their fundraising expenses to contributors, with the effect of evading federal contribution limits."<sup>2</sup>

#### I. Prior Advisory Opinions

The Advisory Opinion cites five prior opinions as authority for the conclusion reached in Question 2. A closer examination of these opinions, however, shows that they do not address the question presented in the Request.

The earliest of these matters is *Advisory Opinion 1991-01* (Deloitte & Touche), which considered a request from an accounting firm's political action committee to solicit credit card contributions by mail while asking potential contributors to authorize automatically recurring contributions. The Commission agreed to the proposal, and

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<sup>1</sup> I have no disagreement with, and fully support, the Commission's response to Question 1.

<sup>2</sup> See Comments of Democracy 21 and Campaign Legal Center, April 17, 2007 at 3, available at <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=782&START=889131.pdf>.

noted that “[t]he amount of any contribution by credit card is the amount authorized by the contributor. Any deductions or discounts taken by American Express, the credit card issuer, against the proceeds of such contributions should be reported by the Committee as operating expenditures. See 2 U.S.C. §§ 434(b)(4)(A) and (5)(A); 11 CFR 104.3(b)(1)(i) and (3)(i).”

First, it is important to note that the Requestor *did not ask* whether the contributor could pay the processing costs of the transaction. In fact, the Requestor simply assumed that the political committee would bear these costs. See *Advisory Opinion 1991-01* (recitation of facts includes “All costs incurred in connection with the administration and solicitation of contributions to the Committee are defrayed from the contributions received by the Committee.”). Thus, the question presented in the instant matter was never considered by the Commission.

Second, the citations to the Act and Commission regulations noted above are completely unrelated to the legal proposition set forth in the Advisory Opinion. The sections cited merely require that disclosure reports include committee operating expenses, and that those expenses be itemized in certain instances. In other words, no legal authority existed of any kind – positive or negative – for the guidance the Commission issued in 1991.<sup>3</sup>

The other four opinions cited provide no basis for the majority’s opinion. *Advisory Opinion 1994-33* (VITEL International Inc.) simply restates the guidance issued in *Advisory Opinion 1991-01*, without further analysis or citation. See *Advisory Opinion 1994-33* (“The Commission has approved plans by authorized committees and separate segregated funds whereby contributors would charge contributions to their individual credit cards. In the case of contributions to the authorized committee, the amount actually remitted to the committee would be reduced by charges deducted by the card issuer (although this would not reduce the amount of the reportable contribution).) The same is true of *Advisory Opinion 1995-9* (NewtWatch PAC). In *Advisory Opinion 1995-34* (Politechs, Inc.), the Requestor assumed that the political committee would pay all transaction processing costs; again, the question presented here was not addressed. See *Advisory Opinion 1995-34* (recitation of facts includes “If . . . the caller also makes a credit card contribution, the political committee will receive the full amount of that credit card contribution minus the usual and normal service charges of the credit card issuers.”). Finally, *Advisory Opinion 1998-08* (Citizens for Arlen Specter) does not even involve

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<sup>3</sup> The Commission first indicated that a political committee must pay the transaction costs associated with credit card contributions in 1978. See *Advisory Opinion 1978-68* (Seith for Senate Committee) (“The amount of any contribution made by credit card is the amount authorized by the contributor and may not be reduced by any discounts or service charges deducted by the credit card issuer when remitting contribution proceed [sic] to the committee. See SS 100.4(a)(2) of Commission regulations. Any deductions or set offs by the credit card issuer against the proceeds of contributions made by credit card are considered expenditures of the Committee and must be reported as expenditures as of the date the Committee receives notice that the deduction or set-off it being taken.”). There is no section 100.4(a)(2), but this citation was presumably intended to be to section 100.4(a)(1)(ii), which was the definition of “money” that remains in the regulations today at 11 CFR § 100.52(c). As is the case with *Advisory Opinion 1991-01*, no authority was cited for the legal proposition.

credit card contributions. Rather, the issue was the placement of the political committee's excess funds in mutual and bond funds. The Commission agreed that payment of the mutual and bond funds' operating expenses from gross returns was proper, and

distinguishable from a situation where a contribution by credit card is made and expenses are deducted by the credit card company or other processors. In those circumstances, the entire amount of the cardholder's transaction is a contribution even though the amount that the committee receives is reduced by the deducted expenses, and those expenses are reportable as operating expenses of the committee. See Advisory Opinions 1995-34 and 1991-1. In the situation here, to treat the allocable share of the fund's expenses as a Committee expenditure would, in essence, double the amount of the expenses.

*Advisory Opinion 1998-08.* The Commission did not even contemplate the question at issue here, but only mentioned two past opinions as part of an inapt analogy.

In sum, the prior authority cited for my colleagues' response to Question 2 amounts to nothing more than a series of Advisory Opinions that assumed a certain state of affairs as a result of questions not asked. If the Commission ever considered this question on its merits,<sup>4</sup> its reasoning is lost and more recent advisory opinions reflect no such analysis. Now that the question has been asked, though, we should take a closer look at exactly what the response means.

## **II. Political Committee Payment of Processing/Transaction Costs is the Exception, Not the Rule**

There are several payment methods available to the individual who wishes to make a contribution to a political committee, including cash (up to \$100)<sup>5</sup>, check<sup>6</sup>, money order<sup>7</sup>, wire transfer<sup>8</sup>, and credit card<sup>9</sup>.<sup>10</sup> There are "processing costs" involved regardless of which payment method is chosen.

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<sup>4</sup> *Advisory Opinion 1978-68* presents the possibility that the Commission considered the credit card processing fee question in its early days. The Requestor did not specifically raise the issue, see *Request for Advisory Opinion of John J. Mustes*, August 20, 1978, asking only how to satisfy the "recording and/or reporting requirements" when accepting credit card contributions. Thus, the Commission raised the processing fee issue *sua sponte*. However, as noted in footnote 3, there was no analysis or citation to authority for the conclusion.

<sup>5</sup> See 2 U.S.C. § 441g; 11 CFR 110.4(c).

<sup>6</sup> See 11 CFR 100.54(c) (the term "money" includes currency . . . , checks, money orders, or any other negotiable instruments payable on demand).

<sup>7</sup> See 11 CFR 100.54(c) (the term "money" includes currency . . . , checks, money orders, or any other negotiable instruments payable on demand); see also *Advisory Opinion 1979-57* (VFW-Political Action Committee) (authorizing political committee to accept contributions via money order).

- Cash is the least expensive method of contributing. The only transactional cost is the arguably unrelated cost of transportation to the place where the contribution is made. No third party is required to process the transfer of funds.
- More substantial costs are involved when a contributor contributes by check. Most checking account holders pay a monthly "maintenance fee," or other similar fees, to their bank. This fee is payment for the cost involved in processing the check and moving the corresponding funds to the correct location. In other words, it is absolutely no different than the processing costs involved in a credit card transaction. Additionally, checks are most often mailed to the political committee, which requires the contributor to supply an envelope and stamp.<sup>11</sup> The Commission has never in its 30+ years so much as contemplated treating an individual's checking account, envelope, and postage costs as contributions to a political committee.
- Similar costs are involved when a contribution is made by money order. Rather than checking account fees, though, the contributor pays the bank or post office (or other entity) a one-time fee to "purchase" the money order. The fee is in addition to the amount shown on the money order.<sup>12</sup> Again, the contributor pays this fee, and it is not treated as a contribution to the political committee.

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<sup>8</sup> See *Advisory Opinion 1982-25* (Sigmund for Congress Committee) (authorizing political committee to pay campaign expenses via wire transfer); see also *Advisory Opinion 1989-26* (Bond for Congress) (authorizing automatic direct transfers from contributor's bank account to political committee).

<sup>9</sup> See *Advisory Opinion 1978-68* (authorizing contributions by credit card).

<sup>10</sup> Contributions are also made via payroll deduction systems. Such systems, however, are materially indistinguishable from the automatically recurring credit card payment system proposed in *Advisory Opinion 1991-01*, and both methods raise the same basic question of which party bears the processing costs in an electronic transaction. I see no reason why a contributor should not be able to pay the processing costs of his political committee's payroll deduction system without making an additional contribution to the committee, for the same reasons set forth herein.

The Commission has also authorized political committees to accept contributions in the form of shares of stock, see *Advisory Opinion 1989-06* (Friends of Sherwood Boehlert), and barter credit units, see *Advisory Opinion 1982-08* (International Association of Trade Exchanges).

<sup>11</sup> If the political committee includes a postage-paid business reply envelope with its solicitation, then it has chosen to assume a portion of the total transaction costs involved. In this situation, the cost of postage and the envelope is appropriately borne by the political committee (in fact, it is part of the committee's overall fundraising strategy), and is treated as an operating expense.

<sup>12</sup> The United States Postal Service sells money orders for amounts up to \$1,000 each. For money orders up to \$500, a fee of \$0.95 is charged. For money orders between \$500.01 and \$1,000, a fee of \$1.30 is charged. See <http://www.usps.com/money/sendingmoney/moneyorders/welcome.htm> (last visited April 19, 2007).

- Contributors also have the option of wiring funds to a political committee, but they must pay a wire transfer fee to an entity such as Western Union. This fee is substantially more than the amount involved in a check, money order or credit card transaction.<sup>13</sup> Once again, the contributor pays the transaction cost (the wire transfer fee) without that amount being treated as a contribution to the political committee.
- Finally, contributions may be made by credit card. A credit card transaction must be sent through a processing agent. Of course, this middleman charges a fee – typically a percentage of the transaction. Today, however, the Commission holds that political committees may not allow their contributors to pay the related processing/transactional costs, as they do with every other form of payment. Rather, credit card costs – and only credit card costs – *must* (for some unknown reason) be treated differently, be paid by the political committee, and treated as operating expenses, a totally inconsistent approach.

With this Advisory Opinion, the Commission falls behind the times. An erroneous argument advanced in support of this outcome was that the party receiving funds *always* pays the related credit card transaction costs. Thus, these costs are properly treated as little more than a cost of doing business, and to allow a political committee to shed these costs would allow it to avoid a solicitation cost that it would otherwise have to pay. And this avoidance of costs is a contribution. It is true that merchants more or less uniformly pay all credit card transaction costs involved in its business. However, they only pay these fees after adjusting their prices upward to account for the additional cost, *i.e.*, only after shifting the credit card processing cost to the consumer. Entities that are not able to engage in this sort of hidden cost shifting are instead trending toward the “convenience fee” business model in which the payor has the option of paying with a credit card, but only for an additional fee.

One commenter provided the Commission with a list of examples of entities that employ this “convenience fee” model. The list includes the Internal Revenue Service, a municipality’s website for the online payment of traffic citations, a vehicle registration website in Kansas, and county tax assessors in Virginia, Florida, and California. What do these entities have in common? They all charge a “convenience fee” to enable their customers to pay online using a credit card while not reducing the total amount received in taxes.<sup>14</sup>

Thus, across the entire rest of the economy, standard business practice is to shift the costs of the financial transaction onto the consumer or paying party. But political

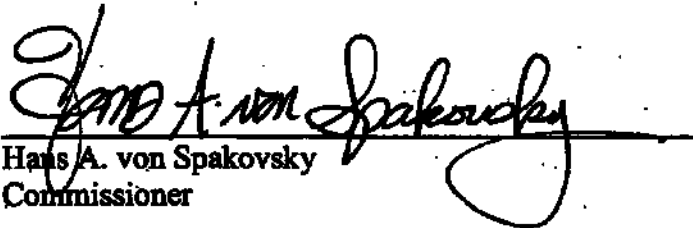
<sup>13</sup> On April 19, 2007, the cost of immediately wiring \$1,000 via an online transaction from the District of Columbia to another location within the United States was \$81.00. “Economy” service, in which the funds transfer within three business days, costs \$34.99 for the same \$1,000 online transfer. See [https://wumt.westernunion.com/index\\_consumer.asp](https://wumt.westernunion.com/index_consumer.asp).

<sup>14</sup> Utility providers also use the “convenience fee” model, which is not surprising considering that the price of electricity, water, gas, etc., is commonly regulated, meaning providers cannot just raise their prices as normal merchants do.

fundraising by credit card is somehow different. While ostensibly adhering to longtime Commission practice, my colleagues have affirmatively written into the law an aberration in how contributions are treated. One form of contribution – the most efficient one, at that – has been singled out for disparate treatment for no reason other than that is how political committees in the past have chosen to order their affairs. This disparate treatment came about not through reasoned analysis, but at least since 1991 as the byproduct of how advisory opinion requests were structured at a time when the “convenience fee” business model did not even exist.

The Commission has missed an opportunity to correct an inconsistency in its body of law while also permitting political committees to accept funds on the same terms as everyone else, including Federal government agencies such as the Internal Revenue Service. The agency is once again, unfortunately, not taking into account changing commercial practices and their migration to the campaign finance system. We should not stand in the way of innovative changes that do not violate FECA simply because they are different than the traditional way things have been done.

April 19, 2007



Hans A. von Spakovsky  
Commissioner