



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Office of the Commission Secretary *LC*

DATE: June 8, 2022

SUBJECT: AO 2022-03 (Democracy Engine) Requestor Comment

Attached is a comment on AO 2022-03 (Democracy Engine). This matter is on the Open Meeting Agenda for June 8, 2022.

Attachment

RECEIVED

By Office of the Commission Secretary at 9:23 am, Jun 08, 2022

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June 8, 2022

Federal Election Commission
Office of the General Counsel
1025 First Street, NE
Washington, D.C. 20463

Re: Comments on AO 2022-03 (Democracy Engine, LLC), Drafts A, B, and Revised Draft A

Dear Commissioners:

We submit these comments on behalf of Democracy Engine, LLC (“Democracy Engine”) and respectfully urge the Commission to adopt Draft B.

The key difference between Drafts A & B is the different path each takes in applying 11 C.F.R. § 114.2(f), the prohibition on corporations facilitating the making of contributions to candidates and committees (other than a corporation’s own separate segregated fund). Like Draft B, Draft A (at 8) recognizes that “services provided by [a] commercial contribution processor to individual contributors would not result in facilitation” (citing FEC Adv. Op. 2021-07 (PAC Management Services)). But unlike Draft B, Draft A ignores how this principle applies here.

There are three basic elements of the Democracy Engine platform. Each of these parts is paid for by the relevant person using that particular feature, as summarized in the chart below:

The Corporation Pays for:

The website design and implementation,
so that the corporation can communicate
its recommendations to its restricted class

Real-time data about who is contributing

Individual Contributors Pay for:

The costs of making the actual
contribution

Draft B correctly recognizes (at 10-11) that “Democracy Engine would separately provide contribution payment processing services to individual contributors who visit the customized page,” and that “Democracy Engine, not its corporate client, would provide the method of transmitting contributions through its web-based payment processing platform [for] a ‘commercially reasonable convenience fee.’” In other words, this is not a “part and parcel” arrangement, as Revised Draft A postulates (at 11), where the corporation pays for all of the

costs and individual contributors are free-riding beneficiaries. Rather both corporations and individuals are separately contracting for and paying for the services they receive. Here, Democracy Engine is simply providing individuals with the same services the Commission recognized just last year would “not result in the illegal facilitation of a political contribution by a corporation.” FEC Adv. Op. 2021-07 at 8; see *also* FEC Adv. Op. 2006-08 (Matthew Brooks) (approving program where individuals paid the vendor for the “incidental cost in making [the] contributions”).

Draft A and Revised Draft A spend significant time laying out – and then reiterating – incorrect facts as well as irrelevant legal paradigms. Draft A states (at 9) that the “Commission has not previously considered whether a vendor may contract with a corporation to process contributions by members of the corporation’s restricted class to candidates or political committees.” That statement will be as true tomorrow as it is today. Democracy Engine has not asked that question. Democracy Engine and its corporate clients are not looking to and will not subsidize individual employee giving. Instead, if the individuals choose to contribute to the candidate, the individuals will be separately contracting with Democracy Engine and will be paying Democracy Engine for this processing service so that the funds will, in fact, go directly to the candidates.

Revised Draft A (at 10-11) also admits that that the Commission has previously “concluded that a vendor [permissibly] processed contributions on behalf of the individual contributor where the vendor transferred funds and information about an individual . . . at the request of the individual, and not at the request of the recipient political committee.” (Emphasis added.) While this line of reasoning seems irrelevant to us, we nevertheless note that if the Commission wants to draw the line there, the individuals are making the request here.

To be sure, the corporation’s restricted class communication – i.e., the branded website – will direct individuals to the Democracy Engine platform where individuals can agree to Democracy Engine’s legal terms and then make their own contribution. But providing a web address referral is both explicitly permitted by the FEC’s regulations, see 11 C.F.R. § 114.2(f)(2)(ii) (permitting the provision of address-related information), and a well-established practice in the regulated community.

While we understand Draft A’s desire to prevent corporate facilitation in order to comply with the regulation, we also think this draft treats as facilitation something explicitly permitted by the regulation. As Draft A notes, the prohibition is designed to prevent the provision of “materials for the purpose of transmitting or delivering contributions, such as stamps, envelopes . . . or other similar items, . . . but not [the provision of] the address of the candidate or political committee.” If the Commission were to adopt Draft A, the Commission would not only ban corporations from providing the stamps and envelopes to its employees, but it would also prohibit those same employees from buying their own envelopes from the same vendor that supplied the corporation simply because the corporation gave out the vendor’s web address. Respectfully, that cannot be the law.

Furthermore, the regulation addresses “materials.” The examples provided are physical items such as stamps and envelopes and similar items which subsidize an individual contributor’s out-of-pocket costs. A candidate address or a link, which are informational items, are not physical assets. Here, there is no subsidization of the costs to the individual contributor. *Cf.* FEC Adv. Op. 1987-29 (Nat’l Ass’n of Life Underwriters) (holding, in a program with similarities to this one,

that a corporation is not facilitating contributions when its role is limited to “the communication of information”). The corporation is not providing any physical asset to its employees; rather, it is providing a link or an address through which employees can choose – and pay a fee for – making their own contribution. Indeed, the Commission has frequently gone further and held that “providing a link for donations to a candidate” is not the sort of activity the FEC should be regulating. *Internet Communications*, 71 Fed. Reg. 18,589, 18,600 (Apr. 12, 2006) (quoting statement of Senator Russ Feingold); see also FEC Adv. Op. 1999-17 (George W. Bush for President Exploratory Committee). The Commission should not reverse course now.

Lastly, Draft A (at 10) acknowledges that the facilitation prohibition does not apply for “[s]oliciting contributions to be sent directly to candidates if the solicitation is directed to the restricted class.” 11 C.F.R. § 114.2(f)(4)(ii). But Draft A finds this exception inapplicable because Democracy Engine provides real-time contributor data back to the corporation. This analysis is inapt, as it is unrelated to whether the contributions are going “directly” to a candidate. “Directly,” in the facilitation context, simply means that contributors “will send [their funds] directly to candidates, without being bundled or forwarded through the separate segregated fund.” *Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates*, 60 Fed. Reg. 64,260, 64,265 (Dec. 14, 1995) (emphasis added). Indeed, Democracy Engine was quite careful to design its offering so as to fall within the four corners of this exemption to the definition of facilitation.

Moreover, the reality is that every election year, corporations and unions send thousands of emails to their restricted classes about candidates and committees. Given the evolution of modern fundraising, most – if not all – of these emails incorporate links to third-party websites like ActBlue or WinRed where individuals may make their contributions. Just as Democracy Engine would do, those websites process the contributions, charge a processing fee, and send the funds to the candidates. Obviously, the corporation cannot pay the processing fee. But individual contributors may certainly pay without violating any anti-facilitation principle. See, e.g., FEC Adv. Op. 2021-07. If the Commission adopts Draft A, it would call into question all of these commonplace communications by corporations and unions. At bottom, Draft A is akin to saying that anytime a corporation or labor union forwards around an ActBlue or WinRed link, those contributions are not made “directly” to candidates and, as such, would constitute facilitation.

* * *

We appreciate the Commission’s consideration of Democracy Engine’s original request and these comments, and we are hopeful that the Commission will approve Draft B. In our view, Draft B more accurately represents the facts and provides the correct paradigm for analyzing Democracy Engine’s proposed platform and appropriately balances innovation with the need to adhere to the Commission’s regulatory safeguards and precedents.

Federal Election Commission
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Sincerely,

A handwritten signature in black ink that reads "Carol A. Laham". The signature is written in a cursive style with a light gray background behind it.

Carol A. Laham
Andrew G. Woodson