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April 8, 2011

P. Christopher Hughey  
Acting General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

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FEDERAL ELECTION  
COMMISSION  
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OFFICE OF GENERAL  
COUNSEL

**Re: Request for Advisory Opinion**

Dear Mr. Hughey:

Pursuant to 2 U.S.C. § 437f and 11 C.F.R. § 112.1, Democracy Engine, LLC (“the Vendor”), Democracy Engine, Inc., PAC (“Democracy Engine PAC” or “the PAC”) and the undersigned two individuals request an advisory opinion with respect to three questions about the application of the Federal Election Campaign Act (“the Act”) to contributions by the individuals to the PAC and other political committees that will be made through the Vendor using the payment system outlined below.

The individuals seek to contribute via the Vendor to the PAC and other political committees that (1) are registered with the Federal Election Commission (“the Commission”), (2) may lawfully solicit the individuals to contribute, and (3) may lawfully accept the individuals’ contributions up to the applicable contributions limits established by the Act, depending on the precise nature of the political committee as a candidate committee, political party committee, separate segregated fund (“SSF”) or nonconnected committee.

**BACKGROUND**

1. The PAC is an SSF of Democracy Engine, Inc., a Delaware corporation. The PAC was not established by, and is not financed, maintained, or controlled by, any federal candidate or political party committee, and it is not affiliated with any other federal political committee within the meaning of 11 C.F.R. § 100.5(g).
2. The individuals are United States citizens and members of the PAC’s restricted class.

3. The Vendor is a for-profit limited liability company offering a web-based payment service that provides a client ("Subscriber") with the ability to make contributions to federal political committees in the ordinary course of its larger donation-processing business. The undersigned individuals intend to become Subscribers.
4. The Vendor does not solicit contributions for any political committee or other entity. Rather, the Vendor maintains a directory of potential recipients ("Recipients") of contributions, consisting in part of authorized committees of federal candidates and other federal political committees. This directory enables the Vendor to process contributions within the meaning of the Act, as well as donations to other entities, as designated by a Subscriber. The Vendor exercises no direction or control concerning the Subscribers' choice of Recipients.
5. In order to make a contribution through the Vendor, a Subscriber identifies on the Vendor's secure website the intended Recipient and the amount he or she wishes to contribute to that recipient. If the Recipient is not already included in the Vendor's directory, the Vendor adds that Recipient to the directory. If the Recipient is an SSF, such as the PAC, then the Vendor uses protocols to ensure that the Subscriber is a member of the SSF's connected organization's restricted class.
6. If the Subscriber designates a particular political committee as a Recipient, the Vendor informs the Subscriber of the contribution limits established by 11 C.F.R. § 110.1, and the Vendor does not process contributions that the Vendor ascertains or believes will exceed those limits.
7. In addition to payment processing information, the Subscriber is required to provide information to the Vendor that the Recipient political committee must maintain or report, including the Subscriber's name, mailing address, employer and occupation. See 2 U.S.C. §§ 431(13), 434(b)(3)(A); 11 C.F.R. § 104.8(a).
8. The Vendor's secure website that collects this information from Subscribers states as follows:

"Candidates and committees registered with the Federal Election Commission are required to use their best efforts to collect and report the name, address, employer and occupation of all contributors. We require you to enter this information so that we can provide it to those recipients of your contributions. This helps ensure that your contribution will be accepted."

9. The Vendor's secure website also requires Subscribers to attest to the following facts as a condition of processing their contributions to such candidates and committees:

"I confirm that the following statements are true and accurate:

1. I am not a federal contractor.
2. I am at least eighteen years old.

3. I am either a United States citizen or a lawful permanent resident of the United States.
  4. This contribution is made from my own funds, and funds are not being provided to me by another person or entity for the purpose of making this contribution.
  5. If I am making this contribution with a credit or debit card, I am making this contribution with my own personal credit or debit card and not with a corporate or business credit or debit card or a card issued to another person.
  6. If I am making this contribution with an electronic check, the electronic check is drawn on my personal account and not a corporate or business account or the account of another person.”
10. Each of the undersigned individuals will satisfy all of these Subscriber requirements. A Subscriber will enter into a contract with the Vendor governing these transactions (“Terms of Service”) as a condition of receiving the Vendor’s services. This contract will include the following provisions:<sup>1</sup>
- a. “The amount of each Contribution that you [(the Subscriber)] make using the [Vendor’s] Services (net of all fees charged to you under this Agreement) constitutes a “contribution” to a Recipient that is a political candidate or political committee that is registered with the Federal Election Commission or a comparable state or local governmental body, or a “donation” to any other Recipient, and it will be reported as such in accordance with applicable laws, rules and regulations.”
  - b. “You agree to pay all fees for your use of the [Vendor’s] Services.”
  - c. “In accordance with applicable law, each Recipient may record and, if required, publicly report the Subscriber’s Contribution. Such amount also will be credited to Subscriber in calculating Subscriber’s compliance with applicable legally prescribed contribution limits.”
11. The Vendor accepts credit and debit cards and electronic checks as forms of payment.
12. The Subscriber’s contributions will be deposited, via a Vendor merchant account, in a Vendor bank account (the “Transfer Account”) that is completely segregated from the Vendor’s corporate operating funds.
13. In accordance with the Terms of Service, the Vendor will deduct a Convenience Fee from the Subscriber’s contribution prior to transmittal to the Recipient. The Convenience Fee is set so as to cover all of the fees and costs of the financial institutions involved in the credit card transaction (*i.e.*, the bank issuing the credit card, the card association, the card processor and the card network) and the Vendor’s

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<sup>1</sup> This advisory opinion request does not seek advice on any provision of the Terms of Service other than those presented in this request, and we understand that any advisory opinion issued would not take into account or assert a position regarding any other provision.

costs, and provide a reasonable profit to the Vendor. The Vendor, and not the Recipient, pays the fees and costs to those financial institutions. The Vendor sets the Convenience Fee in a commercially reasonable manner in accordance with market conditions with respect to all Recipients.

14. The Vendor transfers funds from its Transfer Account to the Recipient from a Subscriber no later than 10 days after the Subscriber authorizes the contribution to the Recipient using the Vendor. The Vendor aggregates all Subscriber contributions it receives for the Recipient since the Vendor's last transfer to the Recipient, subtracts and retains the respective Convenience Fees from the Subscribers who have contributed to the Recipient using the Vendor during that period, and remits the remainder to the Recipient by either a check or an authorized clearing house ("ACH") electronic transfer.
15. The Vendor does not enter into any contractual agreement with a Recipient, except possibly for a contract limited to ensuring that ACH electronic transfers of funds may be effectuated.
16. The Vendor makes available to each Recipient certain Subscriber data, including name, mailing address, employer, occupation and date and amount of contribution, via a secure website.

#### **QUESTIONS PRESENTED**

1. *Would the Vendor's services in processing Subscribers' contributions to the PAC and other Recipient political committees result in impermissible corporate contributions by the Vendor to those committees?*
2. *Would a Subscriber's payment to the Vendor of the Convenience Fee constitute a contribution to the PAC or any other Recipient committee?*
3. *How, if at all, should the PAC report the Convenience Fee to the Commission?*

#### **DISCUSSION**

The Vendor, the PAC and the undersigned individuals respectfully suggest that their questions should be answered as follows.

1. *Would the Vendor's services in processing a Subscriber's contributions to the PAC and other Recipient political committees result in impermissible corporate contributions by the Vendor to those committees?*

No, the Vendor's services would not result in an impermissible contribution because the Vendor will provide its services solely to the Subscriber. The Vendor will be contractually engaged only by the Subscriber, not by the Recipient committee of the

**Subscriber's contribution. The Vendor will process a contribution to a particular Recipient only because the Vendor's client, the Subscriber, chose the Recipient and directed the Vendor to process the contribution.**

**Accordingly, the Vendor will resemble the vendor corporation in Advisory Opinion ("AO") 2006-08. That vendor, as the Vendor here plans to do, contracted only with contributors and not with political committee recipients of those contributors' contributions. The Commission has made plain that the identity of the vendor's contracting party is important, and perhaps definitive, as to who is the beneficiary of the vendor's services. See AO 2006-08, pp. 3-5; AO 2007-04, p. 5.**

**Moreover, the Vendor here, like the vendor in AO 2006-08, plans to charge each subscriber a fee for the performance of the following services: accepting funds from the subscriber; arranging for the subscriber to attest to facts demonstrating that the subscriber is a permissible source of contributions under the Act; depositing those funds into a separate merchant account; taking instruction from the subscriber as to the identities of the recipients of the funds; ascertaining whether or not the directed contribution would be permissible for that subscriber under applicable contribution source prohibitions and amount limits; transmitting the contribution to those recipients (within ten days if to a political committee); and providing recipient political committees with the subscriber's name, mailing address, occupation and name of employer. In AO 2006-08, at p. 4, the Commission likened these vendor services to "delivery services, bill paying services, or check writing services."**

**The Vendor will have no other contact with a Recipient committee except, at most, to ascertain whatever information is necessary to effectuate the Subscriber's direction that the contribution actually be delivered to that committee – effectively, obtaining or verifying the Recipient's address in electronic or other form. The Vendor's doing so will not convert the Vendor's services for the Subscriber into an in-kind contribution to the *Recipient*, or create any kind of principal-agent relationship between the Recipient and the Vendor. It is instructive on this point that in AO 2006-08, at p. 5, the Commission concluded that, when the vendor corporation received and relayed to its subscribers the contribution suggestions of political committees, and did so selectively on the basis of whether, in the vendor's judgment, the particular suggestion matched the particular subscriber's profile, the vendor was nonetheless performing a service solely for the *subscriber*, namely, assisting that subscriber to make contribution decisions. The fact that the recipient committee initiated the suggestion and the vendor exercised discretion in dealing with it did not render the *committee* the recipient of the vendor's services, which would implicate the contribution rules. The anticipated contacts between the Vendor here and the Recipients – purely ministerial in effectuating the Subscriber's delivery instructions – warrant the same conclusion.**

**Nor would the payment of the Convenience Fee comprise a contribution by the Vendor to the PAC or any other Recipient committee. The Vendor will not pay this fee, which will reflect a complete payment by the Subscriber to the Vendor of the costs that the Vendor incurs in performing its services for the Subscriber, plus an amount as profit**

for the Vendor. And, in no circumstance will the amount of the fee be less than the amount of the costs incurred by the Vendor for performing its services; so, even if the services could be deemed to be performed by the Vendor for the *Recipient*, the Vendor could not be construed to be making any in-kind contribution to the Recipient in the amount of some shortfall between the Vendor's actual processing costs and the fee it receives.

The Commission concluded in AO 2006-08, at pp. 4 and 5, that the vendor acted "permissibl[y]" under the Act and its regulations. Because the Vendor here will perform like services also for a fee, and there is no other aspect of the Vendor's proposed activities that could distinctly comprise a contribution to the PAC or any other Recipient committee, the Vendor likewise will act permissibly and make no contribution to Recipient committees.

*2. Would a Subscriber's payment to the Vendor of the Convenience Fee constitute a contribution to the PAC or any other Recipient committee?*

No, the Subscriber's payment of the Convenience Fee would not constitute a contribution by the Subscriber to the PAC or any other Recipient committee. Again, the Vendor will perform the services for the Subscriber, not the PAC or any other Recipient, and the Subscriber will pay the Convenience Fee to the Vendor in order to compensate the Vendor for those services to the Subscriber. As the Commission observed in AO 2007-06, at pp. 5-6, "the incidental cost [to the vendor in AO 2006-08] in making [the subscriber's] contributions" for which the subscriber compensated the vendor was a portion of the "services...provided [by the vendor] at the request and for the benefit of the Subscriber, not of the recipient political committees." (Although the vendor in AO 2006-08 also performed certain informational services for contributors, it did so for an additional fee; that does not affect the analysis here.) And, because the Vendor's proposed services here are akin to the "delivery services, bill paying services, or check writing services" that the Commission has recognized are performed by a vendor for its subscriber-contributor, and not for the ultimate recipient of the subscriber's contribution, here the Subscriber's payment of the Vendor's associated costs of handling a transaction, in the form of the Convenience Fee, will not "relieve the recipient political committees of a financial burden they would otherwise have had to pay for themselves." AO 2007-04, p. 6.

*3. How, if at all, should the PAC report the Convenience Fee to the Commission?*

The Vendor's Transfer Account is devoted solely to collecting and remitting Subscriber contributions to the PAC and other Recipients, in this case the non-fee portion of the contribution payments. And, as discussed above, that fee will not relieve the PAC of a financial burden that it otherwise would have to pay itself. See AO 2006-08, pp. 4-5; AO 2007-04, p. 4. Accordingly, the PAC intends to report to the Commission as contributions received only the funds it actually received, and not the Convenience Fee that it neither received nor would have incurred otherwise.

Alternatively, if the Commission were to conclude that the proposed arrangement entails the provision by the Vendor of a service to the PAC, then a contribution by the Subscriber to the PAC in the amount of the paid Convenience Fee (assuming that all of the Vendor's services are so construed as performed for the Recipient) will result. In that event, the PAC would report as the contribution it received the entire amount that the Subscriber authorized via the Vendor, including the Convenience Fee, and the PAC separately would report to the Commission the Convenience Fee portion as an operating expense of its own. *See, e.g.,* AO 2007-04, p. 6, and AOs cited therein.

Thank you for your consideration.

Yours truly,



Laurence E. Gold

Counsel to Democracy Engine, LLC,  
Democracy Engine PAC,  
Jonathan Zucker and Erik Pennebaker

cc: Democracy Engine, LLC  
Democracy Engine PAC  
Jonathan Zucker  
Erik Pennebaker