



ADR 2013-12
July 18, 2013

FEDERAL ELECTION COMMISSION

2013 AUG -2 PM 2:58

OFFICE OF GENERAL COUNSEL

Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Request for Advisory Opinion

Dear Sir or Madam,

Pursuant to 2 U.S.C. § 437f, the Service Employees International Union ("SEIU") and SEIU COPE (the "Committee") seek an advisory opinion concerning the use of recorded telephone communications to establish restricted class members' affirmative authorization of payroll deductions and other forms of contribution to the Committee.

FACTUAL BACKGROUND

SEIU currently solicits funds for its connected PAC, SEIU COPE, from members and their families within its restricted class eligible to contribute to the Committee as defined by 11 CFR § 114.1(j). Most commonly, SEIU COPE receives such voluntary contributions through payroll deduction.¹ SEIU currently obtains the required affirmative authorization by the contributor for these payroll deduction either through a traditional hand-written authorization, or through electronic signature obtained through e-mail or web-based transactions as set out in 11 CFR § 114.5 and a series of Advisory Opinions from the Commission.²

SEIU's solicitable class includes a great many low wage workers, and as a result of the continuing digital divide in this country many class members do not have ready access to either email or the Internet. However, virtually all class members are reachable by telephone (and a subset of these members also can receive text messages). SEIU here seeks an opinion about its plan to

¹ SEIU COPE also receives a limited number of contributions through credit card or bank draft payments outside of the payroll deduction system.

² The Commission's rules do not specify which forms of express authorization are adequate to satisfy the requirement that any deduction be the result of the donor's affirmative authorization. Instead, in a series of Advisory Opinions the Commission has approved procedures which in its view provide adequate safeguards for the use of forms of authorization other than personally signed written check-off forms. See, e.g., Advisory Opinion 1999-3.

MARY KAY HENRY
International President

ELISEO MEDINA
International Secretary-Treasurer

KIRK ADAMS
Executive Vice President

MICHAEL P. FISHMAN
Executive Vice President

GERRY HUDSON
Executive Vice President

EILEEN KIRLIN
Executive Vice President

VALARIE LONG
Executive Vice President

TOM WOODRUFF
Executive Vice President

SERVICE EMPLOYEES
INTERNATIONAL UNION
CTW, CLC

800 Massachusetts Ave, NW
Washington, DC 20036

202.730.7000

TDD:202.730.7481

www.SEIU.org

obtain and record a class member's affirmative authorization to authorize a payroll deduction or other contribution to SEIU COPE through a recorded oral communication over the telephone.

SEIU proposes to obtain affirmative authorization in the following manner: First, SEIU will place a call to its member, using its existing membership records which typically include a telephone number. It will indicate as required by state law that it is recording the conversation, and begin recording. It will then verify that it is in fact speaking with the member it called and that the individual is a current member. It will do so by asking the member to provide unique verification to SEIU that SEIU can match with information contained in its membership records. The requested information will be a combination of at least full name, address and current employer, or in some cases other information such as an employer identification number that the member could find on her pay stub, or the last four digits of her social security number.

When SEIU has confirmed it is speaking with a member of its restricted class, it will make its contribution request. In the course of making its request, SEIU will confirm that the member is a US citizen, and provide all of the information required by Commission rules, as set out in 11 CFR § 114.5(a) as well as a reminder that contributions are not tax deductible. If the member agrees to make a contribution either directly or through check-off at their workplace, SEIU will record that information on a machine-readable document confirming that the member has voluntarily agreed to make a contribution to SEIU COPE in the specified amount by telephonic communication. The date of the call, the identity of the SEIU representative who made the call will also be recorded in the machine-readable record. That machine-readable record, along with the recorded tape of the telephone conversation, will be maintained by SEIU for at least three years after the contribution is reported as required by 11 CFR § 104.14(b)(1). If the member has a texting service available on his or her phone, SEIU will text a summary of the transaction to the member. Finally, in the phone call, and in any text message, SEIU will provide a number to call and in the alternative an address to write to cancel the contribution should the member at any time wish to do so.

LEGAL DISCUSSION

The Act and Commission rules mandate that "when a payroll deduction or other check-off process is used for an SSF, there must be an affirmative authorization by the contributor in order to permit the deduction." Advisory Opinion 1999-3 at 2, citing *Federal Election Commission v. National Education Ass'n*, 457 F. Supp. 1102 (D.D.C. 1978). Neither the Act nor the Commission rules specify the precise form of affirmative authorization that is necessary, but the Commission has consistently "interpreted its regulations to be consistent with contemporary technological innovations, including the maintenance of records in non-paper forms," Advisory Opinion 1999-3 at 3, including in particular telephonic

authorizations. Advisory Opinion 1999-6. In particular, the Commission has approved a telephone-based authorization system through an automated phone call that operates without the safeguards afforded by a human operator, without providing the contemporaneous notices provided by SEIU's proposed method (instead providing notice through a magazine mailed to union retirees), without maintaining a recording of the call, and where no steps are taken to assure that only members of the restricted class could request PAC deductions (leaving it to the PAC after the fact to return unlawful contributions). Advisory Opinion 1999-6 at 2 & n.3. The Commission concluded there that "the fact that the contributing member does not make a handwritten signature on a paper document to authorize the allotment deduction is not significant" in the context of a telephonic system. *Id.* at 6. It also held that the unique features of telephonic authorization "are materially indistinguishable from those considered and relied upon" in an earlier Advisory Opinion approving on-line solicitations. *Id.* at 7. In relevant respects SEIU's protocol is more protective than the protocol the Commission previously approved in Advisory Opinion 1999-6.

In these Advisory Opinions permitting telephonic and electronic authorizations, the Commission has set out a series of criteria, each of which is fully satisfied here. *See id.*, Advisory Opinion 2001-04; Advisory Opinion 2000-11; Advisory Opinion 1999-6; Advisory Opinion 1997-25; Advisory Opinion 1996-42:

There needs to be a protocol to establish through a "unique identifier" that the authorized employee has in fact authorized the contribution. Advisory Opinion 1999-3 at 3. Here, the protocol calls for the employee to provide a unique identifier such as address and current employer, an employee identification number, or the last four digits of her social security number.

The protocol must include a recitation of the restrictions set out in 11 CFR § 114.5(a) concerning the voluntariness of the contribution, that any suggested amounts are merely suggestions and that the person is free to contribute more or less, or nothing at all, that she will not be favored or disfavored by reason of their decision not to contribute or the amount of their contribution, that the contributions will be used for political purposes, that she has the right to refuse to contribute without fear of reprisal. SEIU's protocol includes this notice, a record of which will be retained in the tape of the telephone conversation.

The protocol must permit the employee to modify or revoke her contribution at any time either through the same electronic method authorization was initially obtained or in writing. Advisory Opinion 1999-3 at 3-4. SEIU's protocol provides such a process.

Finally, there must be "complete and reliable records" of the authorization maintained for at least the three years after the contribution is reported, either in paper form or machine readable "as to be available to the

Commission in the event of an audit or investigation". Advisory Opinion 1999-3 at 3. See 11 CFR § 104.14(b)(3) and 102.9(c). SEIU's protocol contains two such records for each transaction which SEIU has committed to maintain for the three year period: A contemporaneous machine-readable record of the transaction; and a tape of the telephone conversation.

CONCLUSION

Based on these factual and legal predicates, SEIU and the Committee seek confirmation that the proposed system for telephonic confirmation of a member's affirmative authorization for payroll deduction to SEIU COPE is consistent with the Act and the Commission's rules.

Sincerely,

A handwritten signature in black ink that reads "Mark Schneider". The signature is written in a cursive, flowing style.

Mark Schneider
Counsel to SEIU and SEIU COPE