



FEDERAL ELECTION COMMISSION
Washington, DC 20463

April 21, 1995

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1995-9

Matt Dorsey
Treasurer
NewtWatch PAC
1837 16th Street, N.W.
Washington, D.C. 20009

Dear Mr. Dorsey:

This responds to your letter dated March 8, 1995, and supplementary materials received on March 24, requesting an advisory opinion on behalf of NewtWatch PAC ("the Committee") concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to contributions to the Committee.

You state that the Committee's mission is to "provide a forum for publicly available information on selected public officials, most notably Speaker of the House Newt Gingrich" and that it "exists principally as a 'virtual PAC' on the World Wide Web." Anyone who has the necessary computer equipment can access the information the Committee provides through the Internet by using the uniform resource locator <http://www.cais.com/newtwatch/>. Materials available on the Committee's World Wide Web site about Speaker Gingrich include his voting record on selected issues, information about the Ethics Committee and FEC complaints, contribution data from political action committees and individuals, personal finances, honoraria, and his sponsorship of commemorative bills. The Committee filed a statement of organization on February 22, 1995.

You present several questions regarding the Committee's use of the Internet and the World Wide Web to solicit and accept contributions.^{1/}

Question 1

You ask the Commission to confirm that the Committee's use of the Internet, specifically a World Wide Web site, to distribute its communications regarding Speaker Gingrich and to solicit contributions constitutes general public political advertising under 11 CFR 110.11(a)(1)^{2/}.

The term "general public political advertising" is not defined in the Act or Commission regulations, but may be applied on a case-by-case basis to forms of communication not specifically listed in 11 CFR 110.11. In recent years, there has been a rapid expansion of services available on the Internet, a sizable increase in the number of persons using it, increased ease of accessing the Internet, and a decline in the costs of hardware and software needed to do so. The Commission concludes that the combination of these factors means that use of the World Wide Web site operated by the Committee should be viewed as a form of general public political advertising under 11 CFR 110.11.

The materials available on the Committee's World Wide Web site on and after March 14, 1995 include the following disclaimer: "Paid for by NewtWatch and not authorized by any candidate or candidate's committee." The Commission concludes that the wording of this disclaimer complies with 2 U.S.C. 441d(a)(3) and 11 CFR 110.11(a)(1)(iv)(A).^{3/}

Disclaimers are located at the end of the home page^{4/} and immediately following the request for contributor information. They are printed in the same size type as much of the body of the communication. Accordingly, the disclaimers are presented in a clear and conspicuous manner, as required by 11 CFR 110.11(a)(1).

Question 2

You ask whether the Committee may use the Internet, the World Wide Web and related technology to accept contributions "using credit cards, electronic fund transfers and potentially other electronic means." You state that you wish to use the service of First Virtual Holding Company ("FVHC"), a financial services company specifically created to enable on-line commerce via the Internet. Included in your request is part of the on-line information provided by FVHC to sellers and purchasers describing its services. Contributors would need to have accounts with FVHC and provide FVHC with their credit card number. Contributors then complete the Committee's solicitation form and provide their FVHC Account ID number (which is not the same as their credit card number). The Committee will then notify FVHC of the transaction. Before the transaction is actually processed, however, FVHC sends the contributor an e-mail message requesting confirmation of the transaction. The contributor has the option of either approving or disapproving the transaction. From time to time, the contributor's credit card would be billed for accrued charges and the Committee's checking account would be credited with payment.

The Commission has not previously considered this type of procedure. The Commission has, however, recognized that the Act and regulations allow lawful contributions to be made not only by personal check, but also in other ways, including properly documented use of contributors' credit cards (Advisory Opinions 1978-68 and 1984-45), automatic fund transfers from contributors' bank accounts to a committee account (Advisory Opinion 1989-26) and telephone calls to 900 line services (Advisory Opinions 1991-20 and 1990-1). The situation you

present involves the use of credit cards and appears to be very similar to these situations. Accordingly, the Commission concludes that nothing in the Act or Commission regulations precludes the implementation of your proposed contribution system, provided the recordkeeping and reporting requirements described below are followed.

Under Commission regulations, a contribution is considered "made" when the contributor relinquishes control. 11 CFR 110.1(b)(6). In the situation you propose, the Commission would view the date the contributor sends the electronic confirmation to FVHC as the date the contribution is made. This situation is similar to the transactions presented in Advisory Opinion 1990-4. The date your committee receives the contribution will be the date on which the Committee receives notice that the contributor has confirmed the charge to his or her FVHC account.

The expenses incurred by FVHC, which is a corporation, in providing services facilitating this program would be a prohibited contribution by FVHC if uncompensated. 2 U.S.C. 441b(a); 11 CFR 114.2(b). You state that FVHC charges a 2% commission on all transactions, and that the Committee intends to pay and report this normal and customary commission as an operating expenditure pursuant to 11 CFR 104.3(b)(1)(i) and (3)(i). In a subsequent communication, you provided materials indicating that FVHC also charges a \$10 registration fee, a 29-cent fee per transaction, and a \$1 processing fee each time a payment is made by FVHC to your account.

The Commission concludes that these amounts are operating expenditures of the Committee and are reportable by it pursuant to the Act. 2 U.S.C. 432(c)(5) and 434(b)(5)(A); 11 CFR 102.9(b) and 104.3(b)(3) and (4). The 2% charge, and the other fees to be paid by the Committee, appear to be the usual and normal charge for the services to be provided by FVHC. 11 CFR 100.7(a)(1)(iii)(A). See Advisory Opinions 1989-26 and 1978-68. Note that the Committee must treat the full amount of a donor's contribution as the contributed amount for purposes of the limits and reporting provisions of the Act, even though the Committee will receive a lesser amount because of FVHC's fees.

Your request recognizes your obligation to comply with the recordkeeping and reporting requirements of the Act. 2 U.S.C. 432 and 434. The documentation required under 2 U.S.C. 432(c) and regulation sections 102.9 and 104.14 must be preserved and available for audit, inspection or examination by the Commission for at least three years after the filing of the report to which the documentation relates. See 2 U.S.C. 432(d) and 11 CFR 102.9(c) and 104.14(b)(3).

When applying the requirements of these regulations, the Commission has previously permitted the maintenance of certain types of committee records in non-paper form. See Advisory Opinions 1994-40 and 1993-4. Electronic transactions of this nature must entail the creation and maintenance of a complete and reliable "paper trail" for recordkeeping, disclosure and audit purposes. In addition to the records FVHC will provide to you regarding contributions, you have indicated in a subsequent communication that the contributor information, confirmation records and attestations (see discussion below) will be sent electronically to a computer file containing a log of contributor data.^{5/} The Committee should take steps to ensure that the contributor data is backed up in a form that enables the Committee to maintain either machine

readable or paper copies of these records for three years after the date on which it reports the contributions.

Question 3

You ask whether the Committee, using the Internet and related technology, can adequately ensure that it makes best efforts to obtain, maintain and submit contributor information required by the Act. This includes the name and address of any individual whose previous contributions to the Committee in the same calendar year aggregate over \$200, together with the date and full amount of the individual's contribution, as well as his or her occupation and employer. 2 U.S.C. 432(c)(1) and (c)(3) and 434(b)(3)(A); 11 CFR 102.9(a)(2) and 104.3(a)(4)(i). For contributions in excess of \$50 that aggregate to \$200 or less for the calendar year, a record of the same information must be kept minus the occupation and employer's name. 2 U.S.C. 432(c)(2) and 11 CFR 102.9(a)(1). See Advisory Opinion 1980-99 with respect to contributions of \$50 or less.

You have provided a sample of the on-line contributor response form you propose to use to obtain this information. You explain that if a potential contributor fails to supply this information, he or she will receive an immediate message asking again for the information.⁶

The Commission notes that 11 CFR 104.7(b)(2) requires you to make one oral or written follow-up attempt to obtain the information for any contribution you receive that exceeds \$200 and lacks the contributor's identification. The request must be made no later than thirty days after the Committee receives the contribution. In the unique situation you present, the follow-up request may consist of an electronic message sent to the contributor's E-mail address. However, such request must be made after the committee receives notice of the donor's confirmation and must meet the specific requirements of 11 CFR 104.7(b)(2). Accordingly, if the above steps are taken, your method would appear to satisfy the Act's recordkeeping and reporting requirements.

Question 4

Your request raises a question as to whether you can adequately ensure that contributions from prohibited sources are not made or accepted, given the unique global nature of the Internet and the unrestricted access to your World Wide Web site. You have described in detail the methods you intend to employ to safeguard against the receipt of excessive contributions, contributions in the name of another, and contributions from corporations, labor organizations, national banks, federal government contractors and foreign nationals, which are prohibited by the Act. 2 U.S.C. 441b, 441f, 441e, and 441a(a)(1)(A). The sample solicitation materials you submitted include a form on which contributors are asked to attest that they are making the contribution from their own funds and not those of another. They are also asked to attest that the contribution is not from the general treasury funds of a corporation, labor organization or national bank. The sample form also requests attestations that contributors are not Federal government contractors and are not foreign nationals who lack permanent resident status in the United States.

You have also included samples of the on-line responses would-be contributors will receive if any of these boxes are checked "no" or left blank. The proposed responses state in large type: "Sorry, Federal law prevents us from accepting contributions from a foreign national who lacks permanent resident status in the United States;" "Sorry, Federal law prevents us from accepting contributions from a Federal government contractor;" "Sorry, Federal law prevents us from accepting contributions from general treasury funds of a corporation, labor organization or national bank;" and "Sorry, Federal law prevents us from accepting contributions from funds other than those of the donor." In smaller type, each of these responses to potential contributors also says "If you think you may have filled out the contribution form incorrectly you should try again."

The following cautionary language should be substituted instead of your proposed language, to let potential contributors know that the Act may affect not only the ability of the Committee to accept their contributions, but also their ability to contribute: "Sorry, Federal law prohibits foreign nationals who lack permanent residence status from contributing to NewtWatch;"⁷⁷ "Sorry, Federal law prohibits corporations, labor organizations or national banks from contributing general treasury funds to NewtWatch;" "Sorry, Federal law prohibits any person from contributing another person's funds to NewtWatch;" and "Sorry, Federal law prohibits government contractors from contributing to NewtWatch."

The Commission notes that the Committee may receive responses to its solicitation from minor children (persons under 18 years of age) who have access to the Internet and the Committee's World Wide Web site. The Committee may accept these contributions if the minor makes the decision to contribute knowingly and voluntarily, and the child contributes his or her own funds, and the contribution is not controlled by another individual or made from the proceeds of a gift given to provide funds to be contributed. 11 CFR 110.1(i)(2). Accordingly, to ensure that contributions from minors meet these standards, you should revise your attestation to inform potential contributors of these requirements.

Other Issues

A. Committee and Project Names

You state that as Treasurer of the Committee it is your intention to fully comply with the Act and regulations. The Commission notes that the following issues are also raised by your proposed activity.

First, the Committee, which is not the authorized committee of any candidate, and the World Wide Web site are both named "NewtWatch." Reports filed by Speaker Gingrich's authorized committee, Friends of Newt Gingrich, show that the Speaker's authorized committee received over \$5000 in contributions after the 1994 general election and reported no debts or obligations, thereby qualifying him as a candidate for 1996. 2 U.S.C. 431(2).

The Act and Commission regulations prohibit an unauthorized committee from including the name of any candidate in its committee name. 2 U.S.C. 432(e)(4); 11 CFR 102.14(a). This restriction applies to the use of a candidate's first name where the first name clearly conveys the

identity of the candidate. See, Buckley v. Valeo, 424 U.S. 1, 43 fn. 51 (1976) (candidate is clearly identified where his or her name, nickname, initials, photograph, or other unambiguous reference appear as part of a communication). The Commission concludes that the term "NewtWatch" may not be used as part of the Committee's name.

In contrast to the committee name restrictions, a candidate's name may be used in the title of a special project operated by an unauthorized committee if the project title clearly and unambiguously shows opposition to the named candidate. 11 CFR 102.14(b)(3). The operation of a World Wide Web site would be considered a project of the Committee. Here, the Commission notes that under the regulations, phrases showing clear and unambiguous opposition to a candidate are not limited to specific words such as "defeat" or "oppose." The use of the term "watch," when coupled with a candidate's name, conveys clear and unambiguous opposition to the candidate being watched. "NewtWatch" connotes your view that Speaker Gingrich needs to be kept under careful and constant close scrutiny, and your view that users need to be on the alert or to be on their guard with respect to Speaker Gingrich. Accordingly, the Act and Commission regulations do not prohibit the Committee from using the name "NewtWatch" as a project name.

B. Use of FEC Contributor Data

Second, a perusal of the materials available through the World Wide Web site includes lists of contributors who gave \$200 or more to Speaker Gingrich's authorized committee. These lists include the contributors' cities and states but do not include their street addresses or telephone numbers. The lists are preceded by the statement, "While FEC data is public information, use of this data for fundraising purposes is prohibited by federal law."

The Act requires the Commission to make available for public inspection and copying committee reports containing the name and mailing address of individual contributors giving over \$200 per calendar year. The Act further provides that "any information copied from such reports or statements may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes, other than using the name and address of any political committee to solicit contributions from such committee." 2 U.S.C. 438(a)(4).

Based on the legislative history of the Act, the Commission has previously stated that the principal purpose of restricting the sale or use of information copied from reports is to protect individual contributors from having their names sold or used for commercial purposes. See Advisory Opinions 1995-5, 1989-19, 1984-2 and 1980-101. The sponsor of the amendment creating this restriction stated that the purpose was the protection of the privacy of the "very public-spirited citizens" who make contributions to campaigns. 117 Cong. Rec. 30057-58 (1971) (remarks of Senator Bellmon). In Federal Election Commission v. Political Contributions Data, Inc., 943 F.2d 190 (2d Cir. 1991) ("FEC v. PCD"), the Second Circuit concluded that where a similar list lacked mailing addresses and phone numbers, and contained a caveat against solicitation and commercial use, there is little risk, if any, of solicitation or harassment of contributors. The court stated that it was "virtually certain that these reports will be used for informative purposes (similar to newspapers, magazines, and books ...)."

The Commission concludes that the inclusion of the lists of contributors to the Friends of Newt Gingrich committee does not violate 2 U.S.C. 438(a)(4). The lists do not appear to contain sufficient information to generate solicitations to Speaker Gingrich's contributors. Moreover, the public posting of contributor information on the World Wide Web site appears similar to the situation in FEC v. PCD.

Nevertheless, the Commission cautions you that the statement you include in the communications available on the World Wide Web site should be amended to reflect that the statutory prohibition applies to the sale or use of contributors' names copied from FEC reports for commercial purposes, as well as sale or use for purposes of soliciting contributions.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

(signed)

Danny L. McDonald
Chairman

Enclosures (AOs 1995-5, 1994-40, 1993-4, 1991-20, 1990-4, 1990-1, 1989-26, 1989-19, 1984-45, 1984-2, 1980-101, 1980-99 and 1978-68)

1 Because your committee is not the authorized committee of any presidential candidate, this advisory opinion does not address the separate and additional issues raised by 26 U.S.C. 9031 -- 9042 and related Commission regulations at 11 CFR Parts 9031-9039 regarding the use of the Internet by a presidential candidate to solicit or accept contributions.

2 You also ask whether the use of the Internet constitutes political advertising in a general public communication under 11 CFR 100.7(b)(15)(i) and 100.7(b)(17)(i). These provisions are applicable only to state and local committees of political parties, and thus do not appear to be implicated by the activities of your committee.

3 The materials attached to your advisory opinion request included a different formulation of the disclaimer, which does not need to be addressed given that the previous disclaimer was updated as of March 14th.

4 A home page is the first page a user will see when accessing a particular World Wide Web site. It functions as a combination of an introduction, a table of contents and an advertisement for the Web site.

5 The "server" is a computer that stores and distributes the pages for a particular World Wide Web site. It also records the contributor data log.

6 The Commission suggests that you modify the reference "(Required for First Virtual)" so as to make clear that it applies to the FVHC identification number rather than the occupation and employer information.

7 As discussed below, a revised committee name should be substituted for the name "NewtWatch."