

April 17, 2007

By Electronic Mail

Thomasenia Duncan, Esq.
Acting General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comment on Alt. Drafts of AO 2007-4 (Atlatl)

Dear Ms. Duncan:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 in regard to alternative drafts A and B of Advisory Opinion 2007-4, published by the Commission's Office of General Counsel on April 11, 2007.¹ These alternative draft opinions respond to an advisory opinion request (AOR 2007-4) filed by Atlatl, Inc. ("Atlatl").

Atlatl, a corporation, proposes to offer a fundraising service to federal political committees for the processing of contributions to such committees. Specifically, a committee using Atlatl's services would place a link on its Web site to Atlatl's contribution-processing Web site. Visitors to the committee's Web site could then make a contribution to the committee via the Web-link and would be charged a percentage-based "convenience fee" by Atlatl. Atlatl asks in AOR 2007-4 whether the dollar amount of the "convenience fee" charged to contributors would be considered part of the contributions to the committee. *See* AOR 2007-4 at 1.

As an initial matter, both draft opinions correctly conclude that Atlatl's proposal to process online credit card contributions for political committees will not result in impermissible corporate contributions by Atlatl to those political committees because Atlatl, as a commercial vendor, will be providing these services to the committees in the ordinary course of business and at the usual and normal charge.

However, the Drafts differ with respect to the question of whether payment of the "convenience fees" to Atlatl by contributors would result in contributions by the contributors to the committees. Draft A concludes that contributor payment of the "convenience fee" would be a contribution to the recipient committee, while Draft B concludes that contributor payment of the "convenience fee" would not be a contribution to the recipient committee.

¹ *See* Agenda Document No. 07-29; available at <http://www.fec.gov/agenda/2007/mtgdoc07-29.pdf>.

We support the analysis in Draft A. Draft A correctly recognizes that the convenience fee is a cost negotiated by, and imposed upon, the political committee, which is the beneficiary of the services provided by Atlatl. Thus, the payment of the convenience fee made to Atlatl by the individual donor is an in-kind contribution by the donor to the political committee which benefits from the services provided by Atlatl. Accordingly, the donor's payment of the fee should be treated as a contribution by the donor to the committee, and counted against the donor's contribution limit to the committee.

Draft A recognizes that Atlatl "proposes to enter into agreements to *provide services to political committees* (i.e. processing contributions made to political committees) for a 'convenience fee.'" Draft A at 7 (emphasis added). Draft A further recognizes that the amount of the "convenience fee" will be negotiated between Atlatl and the political committees, and that the "convenience fee" will "cover the costs that political committees, like other organizations that accept credit card payments, would have to pay for the processing services they receive." *Id.* Most importantly, Draft A acknowledges that "by paying the 'convenience fee,' contributors would relieve recipient political committees of a financial obligation that political committees would otherwise have to pay for themselves, thereby providing something of value to these committees." *Id.* at 8. Such a provision of "something of value" to a federal political committee clearly falls within the definition of "contribution." *See* 2 U.S.C. § 431(8)(A)(i) and 11 C.F.R. § 100.52(a).

Draft B, concluding that the contributor's payment of the "convenience fee" would not be a contribution to the recipient committee, relies principally on Advisory Opinion 2006-8 (Brooks). In Advisory Opinion 2006-8, the Commission opined that a corporation would be permitted to offer a variety of subscription-based services to individuals: the corporation planned to accept funds from subscribers who would, at a later date, direct funds to be contributed to candidates, political committees, or donated to other non-profit organizations selected by the subscriber.

However, as correctly recognized in Draft A, the situation presented in the Atlatl AOR differs materially from that in AO 2006-8. *See* Draft A at 8. "Unlike the current situation, in Advisory Opinion 2006-8 (Brooks), the corporation did not anticipate entering into any contractual relationship with any political committee." *Id.* Here, by contrast, Atlatl will enter contractual agreements with political committees to provide services directly to such committees – the price of which will be determined through negotiation between the committee and Atlatl, and access to which will be facilitated by link from the committee's Web site to Atlatl's Web site. This arrangement stands in sharp contrast to the circumstances in Advisory Opinion 2006-8, where the requestor corporation was working hand-in-hand with individuals and at arm's length from committees. Here, Atlatl will be working hand-in-hand with committees and at arm's length from the individual contributors.

In other words, the primary contractual relationship in the Atlatl AOR is between the political committee and the vendor corporation, both of whom negotiate the terms of the contractual relationship and the fee to be charged, and the incidence of the vendor's fee falls on the committee. When that fee is paid by the individual donor, it is an in-kind contribution by the donor to the committee. In *Brooks*, by contrast, the primary contractual relationship was

between the individual donor and the vendor corporation (Brooks “intends to form a for-profit corporation that would provide commercial services to individuals....” Ad. Op. 2006-8 at 1). The service fee was a term negotiated between the individual donor and the vendor. *Id.* The payment of that fee by the individual donor is a payment for services contracted by the individual in exchange for a benefit provided to the individual.

Draft A includes a long list of Advisory Opinions establishing that fundraising services provided to political committees, such as the processing of credit card contributions, must be paid for by such political committees. *See* Draft A at 6-7 (citing Ad. Ops. 1999-8 (Specter), 1995-34 (Politechs), 1995-9 (NewtWatch), 1994-33 (VITEL), and 1991-1 (Deloitte & Touche)). For the reasons stated above, the factual circumstances described in these Advisory Opinions are far more analogous to Atlatl’s proposed activities than those set forth in Advisory Opinion 2006-8.

Draft B is sharply at odds with this long line of Advisory Opinions and would, simply put, permit federal political committees to off-load their fundraising expenses to contributors, with the effect of evading federal contribution limits. Under the logic of Draft B, for instance, a political committee’s vendor costs for a fundraising event, such as a dinner, could be shifted to the donors, and the payment of the vendor costs by the donors would not be treated as a contribution. But just as the “entire amount paid to attend a fundraising or other political event ... is a contribution,” 11 C.F.R. § 100.53, so too is the entire amount paid to make a contribution via a Web-based vendor hired by a committee to facilitate the making of such contributions. In both situations, the political committee contracts with a vendor for a fundraising service and receives something of value.

Accordingly, we urge the Commission to approve “Draft A” of the alternative draft Advisory Opinions 2007-04.

We appreciate the opportunity to comment on this matter.

Sincerely,

/s/ Fred Wertheimer

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