



FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 2, 2012

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2012-22

Mr. Andrew Davis
skimmerhat
281 Summer Drive NE
Atlanta, GA 30328

Dear Mr. Davis:

We are responding to your advisory opinion request on behalf of skimmerhat, concerning the application of the Federal Election Campaign Act (the “Act”) and Commission regulations to skimmerhat’s planned web-based contribution platform. The Commission concludes that the proposed platform would be permissible under the Act and Commission regulations.

Background

The facts presented in this advisory opinion are based on your letter received on June 20, 2012 and your email received on August 1, 2012.

Skimmerhat is a for-profit corporation registered in the State of Delaware.¹ Skimmerhat proposes to establish a web-based platform – skimmerhat.com (the “site”) – that will “provid[e] an easy way for users to find candidates with whom they have shared values” and “engage small donors who previously have been sitting ‘on the sidelines’ in the electoral process.”

Skimmerhat states in its request that it will provide its services “on a strictly non-partisan, issue-neutral basis.” Visitors to and registered members of the site (“users”) will be able to use the skimmerhat platform to search for Federal candidates using any of three primary search criteria: geographic location, ideological similarities, or single-issue positions.

Utilizing the geographic location feature, users will be presented with a map of the United States and will be able to search for Federal candidates by location. As a user

¹ Skimmerhat is owned and operated by three individuals, none of whom is a Federal candidate.

pinpoints the location of a race in which he or she is interested, candidates will be listed, along with their political party, as either “incumbents” or “challengers.” If available, photographs of candidates will also be displayed. Also listed at this level is his or her “popularity” among members of the site.²

Users may also search for candidates with whom they are ideologically similar by taking a “candidate matching survey,” which poses a series of “yes/no” ideological questions to users. These answers are then compared to the positions of all Federal candidates.³ A list of candidates is then displayed on the results page, ranked from highest to lowest, based upon the matching percentage with the user.

Finally, users can search for candidates based on their position on a single issue. Using skimmerhat’s list of political issues, a user can find any candidate that matches the user’s position on an individual issue.

Once matched with Federal candidates, users will be directed to a “candidate page” that is hosted on the site. Every Federal candidate will have his or her own candidate page, which will include a photo, biographical information, campaign finance information, recent updates, and issue positions. Skimmerhat staff will curate candidate data using information available from the candidate’s official campaign website, public records (such as voting records), or other educational sources. Campaign finance data and other candidate information may be curated and displayed through the use of application programming interfaces (“API”)⁴ by trusted third-party resources.

Each candidate page will also feature an electronic contribution form, which provides users with a way to make contributions to the Federal candidates with whom they are matched. Contributions will be limited to \$2,500. Users will also be notified by language on the contribution form that contributions in aggregate amounts in excess of \$2,500 per candidate, per election cycle, are not acceptable. The information requested on the contribution form will include the contributor’s name, mailing address, occupation and name of employer. This information will be required for each contribution, regardless of amount.⁵ If any one of these fields is left blank, the contribution will not be

² An up/down voting system on which to indicate popularity with candidates will be available to registered members of the site.

³ Skimmerhat will use publicly available information to discern the position of candidates on various issues. Where such information is not available, or the candidate’s position is too nuanced to accurately fit within a “yes/no” framework, the question will be left as “no opinion” to avoid misrepresentation of a candidate’s position. The binary nature of the survey is designed to simplify the matching process. In the future, though, skimmerhat intends to expand upon this matching feature to allow for more nuanced answers.

⁴ APIs are ways to share and display data across online platforms. They can take many different forms, depending on the context and functionality of their use.

⁵ The donation form will also include the following disclaimer: “Federal law requires political committees to report the name, mailing address, occupation and name of employer for each individual whose contributions aggregate in excess of \$200 in a calendar year.”

accepted.⁶ Additionally, contributor information will be securely stored in skimmerhat's electronic logs for reporting and audit purposes.

Skimmerhat will assess an eight percent "processing and convenience" fee per transaction, which will cover credit card processing and provide a profit to the company. This eight percent "convenience fee" will be applied, in a separate field, in addition to the contribution amount. This convenience fee will be assessed in a manner similar to that of a sales tax at the point of purchase for commercial goods. The total transaction amount will be the contribution plus the eight percent fee. By assessing the convenience fee in this manner, skimmerhat will pass the user's full intended contribution amount to the recipient candidate, while charging the user the fee.

Once the user accepts the transaction, contributions will be routed to skimmerhat's merchant account, and the eight percent fee will be directed to the company's separate business account. No funds will be commingled in skimmerhat's corporate treasury account. All disbursements of funds will be taken directly from skimmerhat's merchant account, and not from the company's corporate treasury account. Contributions will be forwarded to candidate campaigns. Skimmerhat has represented that it will forward all contributions within ten days of receipt along with certain identifying information. Along with the forwarded contributions, a transmittal report will be sent to the recipient candidate committee to facilitate the candidate committee's reporting of contributions. Should a candidate committee reject or refuse contributions, skimmerhat will make refunds to the original contributor and disable the contribution form on that candidate's page to prevent further contributions.

Skimmerhat will provide candidates with the option of assuming limited managerial control over basic biographical information on their candidate pages, as well as setting positions on issues. Before gaining access to their candidate pages, candidates or persons associated their authorized committees must first be approved by skimmerhat to ensure they are "legitimate representatives of the campaign." Candidates and their

⁶ Before the donation is accepted, each user will be required to manually select in the affirmative a check box for the following attestation:

By checking this box, I confirm that the following statements are true and accurate:

1. This contribution is made from my own funds and not those of another.
2. This contribution is not from the general treasury funds of a corporation, labor organization or national bank.
3. I am not a Federal government contractor.
4. I am not a foreign national who lacks permanent resident status in the United States.
5. I am over the age of 18, and if not, I am a minor making this contribution of my own volition, and not at the request or direction of another individual.

If this box is not checked, the contribution will not be accepted. In addition, skimmerhat plans to make an effort to screen, and reject, all contributions from foreign nationals, government contractors, national banks, and corporations organized by authority of any law of Congress.

authorized committees must also agree to Terms of Service,⁷ which explicitly prohibit the use of the skimmerhat platform to conduct fundraising outside of skimmerhat or “for any activity that can be reasonably deemed outside of that which enhances the quality and accuracy of candidate information available to users.” Should skimmerhat discover any activity or contribution that violates its Terms of Service, candidates will be warned, and the activity or content removed from the website. Skimmerhat will retain the right to reassume control over candidate pages should it deem a permission change necessary.

Questions Presented

1. *Under the proposed plan, can skimmerhat receive earmarked contributions from individuals and forward those contributions to Federal candidates without committing an impermissible action under the Act?*
2. *Would skimmerhat’s processing and convenience fee of eight percent count towards a user’s individual contribution limit to a candidate?*
3. *Can skimmerhat provide factual information about candidates to its users?*
4. *Under the proposed plan, could candidates be granted limited access to manage their profiles without causing skimmerhat to provide a material service to the candidate, creating an impermissible action under the Act?*
5. *Can skimmerhat use Federal Election Commission data pertaining to candidate finance information that is either compiled directly by skimmerhat staff, or curated through APIs?*
6. *Under the proposed plan, is skimmerhat required to file any reports with the Federal Election Commission?*

Legal Analysis and Conclusions

1. *Under the proposed plan, can skimmerhat receive earmarked contributions from individuals and forward those contributions to Federal candidates without committing an impermissible action under the Act?*

Yes, skimmerhat may receive earmarked contributions from individuals and forward those contributions to Federal candidates without engaging in an impermissible action under the Act.

The Act and Commission regulations prohibit corporations from making a contribution in connection with a Federal election. *See* 2 U.S.C. 441b(a); 11 CFR 114.2(b)(1). A “contribution” includes any “direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any

⁷ Skimmerhat has not yet drafted the “Terms of Service” referred to here. It plans to finalize them before launching its site.

candidate, campaign committee, or political party or organization, in connection with any [Federal] election.” 2 U.S.C. 441b(b)(2); 11 CFR 114.2(b)(1); *see also* 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a). “Anything of value” includes in-kind contributions, such as the provision of goods or services without charge or at a charge that is less than the usual and normal charge. *See* 11 CFR 100.52(d)(1). “Usual and normal charge” is defined as the price of goods in the market from which they ordinarily would have been purchased at the time of the contribution, or the commercially reasonable rate prevailing at the time the services were rendered. *See* 11 CFR 100.52(d)(2).

Skimmerhat proposes to transmit contributions to political committees⁸ without receiving payment from political committees. The Commission has previously concluded that companies that process contributions to political committees as a service to the political committees must be compensated for those services to avoid making in-kind contributions. *See* Advisory Opinion 2007-04 (Atlatl). Companies that process contributions as a service to contributors, however, do not need to be compensated for these services by the recipient political committees because the companies are not providing any services or anything of value to the recipient political committees. *See, e.g.,* Advisory Opinion 2011-19 (GivingSphere).

Here, skimmerhat will provide a commercial service to its users when it transmits their contributions to candidates. Skimmerhat will operate exclusively on a commercial basis, and the transaction fee that it will charge will cover its credit card processing costs and provide a profit to the company. Through its platform, skimmerhat’s users will be able to search for and identify recipient candidates by geographic location, ideological similarities, and issue positions. Users will make contributions to those candidates from skimmerhat’s website, rather than from the candidates’ own websites, and otherwise irrespective of candidate involvement with skimmerhat’s candidate pages. And, further, upon agreeing to skimmerhat’s terms of service, skimmerhat will transmit users’ funds only at the request of its users, not pursuant to negotiated agreements with political committees. *Compare* Advisory Opinion 2011-19 (GivingSphere) (hosting a database and website through which customers identify recipients and transmit funds) *with* Advisory Opinion 2007-04 (Atlatl) (proposing only to process online credit card contributions initiated on political committees’ websites).

Skimmerhat’s proposed service closely resembles the services approved by the Commission in Advisory Opinion 2011-19 (GivingSphere). In that advisory opinion, as here, a corporation proposed to develop a web-based platform through which its customers could identify political committees and transfer contributions to political committees. *Id.* Because, as discussed above, skimmerhat will provide services to its customers and not political committees, skimmerhat’s proposal is analogous to widely available delivery services, such as United Parcel Service, which a contributor may use to

⁸ Skimmerhat indicates that contributions processed through its site “will be limited to \$2,500.” The Commission notes that for 2011-2012 election cycle, an individual may give to a Federal candidate \$2,500 *per election*. In other words, a Federal candidate who participates in two elections during the current election cycle may receive contributions from an individual totaling \$5,000.

deliver a contribution, or an electronic bill-pay service, such as those provided by banks.⁹ *See also* Advisory Opinion 2011-06 (Democracy Engine). Thus, as further explained in the response to Question 6 below, skimmerhat would also not be operating as a conduit or intermediary for contributions. *See* 2 U.S.C. 441a(a)(8); 11 CFR 110.6(b)(2)(ii).

Accordingly, skimmerhat may undertake its proposal without its services constituting a prohibited in-kind contribution or otherwise engaging in an impermissible action under the Act and Commission regulations.

2. *Would skimmerhat's processing and convenience fee of eight percent count towards a user's individual contribution limit to a candidate?*

No, skimmerhat's processing and convenience fee of eight percent will not count towards a user's individual contribution limits to a candidate.

As discussed in the answer to Question 1, above, the Commission has distinguished between situations in which a company provides services to recipient political committees, and situations in which a company provides services to its customers. In Advisory Opinion 2007-04 (Atlatl), the contractual relationship was between the company that processed the contributions and the recipient political committee. The Commission concluded that the amount of contributions to political committees must include fees paid by contributors to the company. In contrast, in Advisory Opinion 2011-06 (Democracy Engine), the Commission concluded that the amount of the contributions would not include processing fees paid by contributors, because the services provided by the vendor were "at the request and for the benefit of the contributors, not of the recipient political committees." Thus, fees paid for those services did not "relieve the recipient political committees of a financial burden they would otherwise have had to pay for themselves," and were not contributions to the recipient political committees. Advisory Opinion 2011-06 (Democracy Engine).

Similarly, here, skimmerhat will provide its services at the request of and for the benefit of its customers, and not the recipient political committees. Therefore, because payment of the convenience fee will not relieve any recipient political committee of a financial burden that it would otherwise have had to pay for itself, the payment of the convenience fee by the subscribers will not constitute a contribution by the subscribers to any recipient political committee.

3. *Can skimmerhat provide factual information about candidates to its users?*

Yes, skimmerhat may provide factual information about candidates to its users. Skimmerhat's business model includes providing its customers with tools that they can use to gain information about and to evaluate potential recipient candidates. To this end,

⁹ Consistent with this analogy, skimmerhat makes clear that, if a candidate or committee refuses to accept a contribution, it will return a contributor's funds and it will prevent candidates from using the skimmerhat platform to raise contributions outside of skimmerhat.

skimmerhat proposes to enable users to identify candidates by geographic location, through a candidate matching survey, and by their positions on issues. A candidate page will include a photograph, biographical information, campaign finance information, recent updates, issue positions, and a donation page. Skimmerhat will initially develop the pages using information from candidates' websites, public records, and through the use of APIs. Skimmerhat states that it has a vested commercial interest in seeking participation of users from all political parties and ideological backgrounds.

Skimmerhat's proposal is similar to the one considered by the Commission in Advisory Opinion 2011-19 (GivingSphere), in which a corporation wished to provide basic factual information about candidates to its customers for their use in determining to whom to make contributions through the corporation's web platform. The Commission approved the proposal because the provision of factual information to customers appeared to be a corollary of creating a web platform through which users could identify political committees and transmit contributions. Advisory Opinion 2011-19 (GivingSphere).

Here, too, the information provided by skimmerhat to its customers will supplement the overall service offered by the site. Accordingly, skimmerhat may provide factual information about Federal candidates to its users as proposed.

4. *Under the proposed plan, could candidates be granted limited access to manage their profiles without causing skimmerhat to provide a material service to the candidate, creating an impermissible action under the Act?*

Yes, candidates could be granted the option of assuming limited managerial control over basic biographical information on their candidate pages, as well as setting positions on issues.

The Act and Commission regulations prohibit corporations from making a contribution in connection with a Federal election. *See* 2 U.S.C. 441b(a); 11 CFR 114.2(b)(1). As noted above, a contribution includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a); *see also* 2 U.S.C. 441b(b)(2); 11 CFR 114.2(b)(1).

The Commission has previously issued two advisory opinions to organizations that, like skimmerhat, sought to obtain information from candidates and make that information available on a website. Advisory Opinion 1999-25 (DNet); Advisory Opinion 1999-24 (EZone). In both advisory opinions, the Commission found, after considering a number of factors, that the proposed activity was exempt from the definition of "expenditure" and thus permissible under the Act.

Similar factors are present in the proposal described in this request. Skimmerhat will provide candidates with the limited ability to alter their basic biographical information, as well as to correct their positions on issues, which skimmerhat initially

attempts to discern from publically available sources. Skimmerhat has represented in its request that the purpose of allowing candidates to make these changes to their profiles is to increase the accuracy of the site's data and the effectiveness of the skimmerhat matching process, both of which advance skimmerhat's commercial interests. Furthermore, skimmerhat notes in its request that "[t]he company and its online assets are operated on a commercial basis only" and that skimmerhat "does not seek to influence federal elections in any way." Request at 2. The request adds that "[i]n fact, skimmerhat has a vested commercial interest in seeking participation of users from all political parties and ideological backgrounds." *Id.*

For the reasons stated above, skimmerhat's proposal to provide Federal candidates with the option of assuming limited managerial control over basic biographical information on their candidate pages and setting positions on issues would not result in a prohibited in-kind contribution from skimmerhat or otherwise engage in an impermissible action under the Act.

5. *Can skimmerhat use Federal Election Commission data pertaining to candidate finance information that is either compiled directly by skimmerhat staff, or curated through APIs?*

Yes, skimmerhat may use Commission data pertaining to candidate finance information that is either compiled directly by skimmerhat staff or curated through APIs.

Political committees must file certain statements, notices, and reports with the Commission, which the Commission makes public. 2 U.S.C. 434, 438(a)(4); *see also* 11 CFR Part 104. The Act 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); *see also* 11 CFR 104.15(a).

The prohibition on the use of information in Commission filings serves to prevent information about individual contributors from being sold or used for commercial purposes.¹⁰ *See, e.g.,* Advisory Opinion 2004-24 (NGP Software); Advisory Opinion 1983-44 (Cass Communications); Advisory Opinion 1981-38 (Campac Publications); Advisory Opinion 1980-101 (Weinberger). The prohibition is a "broad prophylactic measure intended to protect the privacy of the contributors about whom information is disclosed in FEC public records." Advisory Opinion 2003-24 (NCTFK). The Commission has allowed the sale or use of the name and address of political committees

¹⁰ The legislative history of the 1979 Amendments to the Act indicates that Congress intended the prohibition on the copying and use of names and addresses to protect individual contributors. H.R. Rep. No. 422 at 23 (1979). Congress was concerned that the Act's reporting requirements would "open up the citizens who are generous and public spirited enough to support our political activities to all kinds of harassment." 117 Cong. Rec. 30057 (1971) (statement of Sen. Bellmon). Senator Bellmon stated that the amendment prohibiting the use of contributor information was intended to "protect the privacy of the generally very public-spirited citizens who make a contribution to a political campaign or a political party." *Id.*

for commercial purposes. *See, e.g.*, Advisory Opinion 2004-24 (NGP Software); Advisory Opinion 1989-19 (Johnson); Advisory Opinion 1980-101 (Weinberger). For example, in Advisory Opinion 1980-101 (Weinberger), the Commission approved the publication and sale of a “directory of comprehensive information concerning [political committees]” so long as the directory did not “identify individuals who made contributions to the [political committees.]” *See also* Advisory Opinion 1989-19 (Johnson) (approving a proposal to sell portions of political committee reports that “did not contain the names of individual contributors”).

Skimmerhat proposes to provide its customers with factual information about candidates, including campaign finance data obtained from reports filed with the Commission, on its candidate pages. Skimmerhat represents that it will use only campaign finance data regarding candidate fundraising totals and will not use information regarding individual contributors.

Accordingly, because the information that skimmerhat seeks to use concerns political committees, rather than individual contributors, skimmerhat may use Commission data pertaining to candidate finance information that is either compiled directly by skimmerhat staff or curated through APIs.

6. *Under the proposed plan, is skimmerhat required to file any reports with the Federal Election Commission?*

No, under the proposed plan, skimmerhat will not be required to file any reports with the Commission.

The Act and Commission regulations require certain persons to file reports with the Commission. For example, a “treasurer of a political committee shall file reports of receipts and disbursements.” *See* 2 U.S.C. 434(a)(1); 11 CFR 104.1. Persons who spend above threshold amounts on independent expenditures or electioneering communications must file reports with the Commission. *See* 2 U.S.C. 434(c), (f); 11 CFR 104.20, 109.10.

Based on the facts set forth in the request, skimmerhat will be a commercial service provider, not a political committee, and therefore will not be subject to the reporting requirements for political committees. *See* 2 U.S.C. 434(a)(1); 11 CFR 104.1. Skimmerhat also will not engage in express advocacy. Thus, it will not be subject to the reporting requirements for persons making independent expenditures. *See* 2 U.S.C. 431(17) (“The term ‘independent expenditure’ means an expenditure by a person . . . expressly advocating the election or defeat of a clearly identified candidate”); *see also* 11 CFR 100.16. Moreover, given that all relevant communications will take place on the Internet, skimmerhat’s proposal will not implicate the reporting requirements for persons making electioneering communications. *See* 2 U.S.C. 434(f)(3)(A)(i) (“The term ‘electioneering communications’ means any broadcast, cable, or satellite communications”); *see also* 11 CFR 100.29.

The Act and Commission regulations also require intermediaries or conduits of earmarked contributions to report the original source of such a contribution and the recipient candidate or authorized committee. 2 U.S.C. 441a(a)(8); 11 CFR 110.6(c). The provisions addressing earmarked contributions prevent the circumvention of contribution limits [and prohibitions] by ensuring that “contributions to candidates count toward FECA contribution limits . . . regardless of whether contributors give contributions directly to candidates or whether contributors earmark, or otherwise direct, the contributions to candidates through a conduit or intermediary.” Advisory Opinion 2006-30 (ActBlue); *see also* Federal Election Commission v. National Republican Senatorial Committee, 761 F.Supp. 813, 819-20 (D.D.C. 1991) rev'd on other grounds, 966 F.2d 1471 (D.C. Cir. 1992). The contributions made through the skimmerhat platform are not contributions to an intermediary and earmarked for a candidate or authorized committee; they are direct contributions to the candidate or authorized committee made via a commercial processing service. In past Advisory Opinions, the Commission has concluded that certain electronic transactional services that assist a contributor in making a contribution do not run afoul of the prohibition on corporations acting as a conduit or intermediary for earmarked contributions because certain electronic transactional services are so essential to the flow of modern commerce that they are akin to “delivery services, bill-paying services, or check writing services.” Advisory Opinion 2011-06 (Democracy Engine). For that reason, the Commission has not required commercial processing agents to file reports as an intermediary or conduit of earmarked contributions. *See e.g.*, Advisory Opinion 2012-17 (Red Blue T); Advisory Opinion 2012-09 (Points for Politics); Advisory Opinion 2011-19 (Giving Sphere). Thus, skimmerhat’s proposal would not subject it to any reporting requirements under the Act or Commission regulations.¹¹

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law.

¹¹ Skimmerhat states that it will forward any contributions within ten days of receipt along with certain identifying information.

The cited advisory opinions are available on the Commission's website, www.fec.gov, or directly from the Commission's Advisory Opinion searchable database at <http://www.fec.gov/searchao>.

On behalf of the Commission,

(signed)
Caroline Hunter
Chair