

1 ADVISORY OPINION 2015-08

2 Mr. Eric Zolt
3 546 South Rimpau Boulevard
4 Los Angeles, CA 90020

DRAFT E

5 Dear Mr. Zolt:

6 We are responding to your advisory opinion request on behalf of Repledge
7 concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-
8 30146 (the “Act”), and Commission regulations to Repledge’s proposal to process
9 contributions made through its website.¹ The Commission concludes that Repledge may
10 conduct the proposed activities as described in its request and that Repledge would not be
11 required to file reports with the Commission regarding the proposed activities.

12 ***Background***

13 The facts presented in this advisory opinion are based on your letter received on
14 August 6, 2015, and your email received on August 19, 2015.

15 Repledge is a for-profit corporation that you founded with two colleagues.
16 Repledge intends to establish a web-based platform as “a virtual meeting place,” through
17 which supporters of opposing federal candidates can agree to give money to charity
18 instead of making contributions to the candidates they support. Advisory Opinion
19 Request at AOR001. Specifically, the platform will allow individuals who register as
20 Repledge “members” to pledge money to a federal candidate while at the same time
21 designating a charity to receive the funds if the pledge is “matched” by supporters of the

¹ Repledge previously submitted an advisory opinion request with respect to the same proposed activity, Advisory Opinion Request 2012-08 (Repledge), but the Commission was unable to approve a response to that request by the required four affirmative votes. See 52 U.S.C. §§ 30106(c), 30107(a)(7); 11 C.F.R. § 112.4(a). Public documents relating to Advisory Opinion Request 2012-08 (Repledge) are available on the Commission’s website.

1 opposing candidate. For example, if Repledge members pledge \$1000 to Candidate X
2 and \$700 to her opponent Candidate Y (for total pledges of \$1700), then \$1400 (the
3 amount of matched pledges) will be donated to charities of the members' choice, \$300
4 (the amount of unmatched pledges) will be contributed to Candidate X, and \$0 will be
5 contributed to Candidate Y.

6 Repledge proposes to establish its platform with respect to the two major party
7 nominees in the 2016 presidential election. Repledge states that it will operate in a
8 nonpartisan manner and will not advocate the election or defeat of these or any other
9 federal candidates or support or oppose any political party.

10 Repledge will operate through "fund drives." Fund drives will be open to all
11 members and are expected to last from seven to fourteen days. During each fund drive,
12 members will make pledges to their preferred candidates and charities by entering their
13 credit card information through a payment processor, such as PayPal or WePay, and
14 indicating the amounts pledged. The payment processor will "pre-approve" — that is,
15 will place a hold on — the amounts pledged and will charge the members' credit cards
16 after the fund drive. AOR002 n.2. Once pledges are pre-approved, members will not be
17 able to rescind them. AOR012.

18 After the payment processor charges the members' credit cards for the pledged
19 amounts, Repledge will inform the payment processor how to allocate the funds (less the
20 processor's fee, which the processor will deduct from the charged amounts) among the
21 recipient charities and candidates based on the amounts of matched and unmatched
22 pledges. No later than 10 days after the fund drive, the payment processor will set up a

1 unique account for each recipient and will notify each recipient that it may withdraw the
2 funds from its respective account

3 Repledge will associate individual contributors with the transmitted amounts
4 based on the percentage of candidate pledges that go unmatched. For example, if 10
5 members each pledge \$100 to Candidate X (for a total of \$1000), and 20 members each
6 pledge \$20 to Candidate Y (for a total of \$400), then 60% (\$600 out of \$1000) of the
7 pledges to Candidate X will have gone unmatched. Thus, 60% of each individual's
8 pledge to Candidate X (net of fees) will be contributed to Candidate X, and the remaining
9 40% of each pledge to Candidate X — and 100% of the pledges to candidate Y — will be
10 donated to the members' designated charities.

11 Aside from agreements that might be necessary to effectuate the transfer of funds
12 after fund drives, Repledge will not enter any contractual relationships with recipient
13 political committees. The funds transferred as contributions or charitable donations will
14 not be deposited in, or pass through, accounts established or maintained by Repledge.
15 Repledge will disclose to its participating members and to the recipients of pledged funds
16 all transaction and processing fees and the amounts distributed to the respective charities
17 and political committees.

18 Repledge states that it will deduct a commercially reasonable percentage-based
19 transaction fee from each pledge. The fee will be set at a percentage to cover operating
20 costs and generate a reasonable profit. Repledge currently estimates the fee at one
21 percent each pledge.

22 Repledge states that it will inform its members about the contribution limits
23 established by the Act and will not allow members to pledge funds in excess of those

1 limits. Repledge will also require each member to confirm before pledging funds that he
2 or she may lawfully make a contribution.² Finally, Repledge will require each member to
3 provide the member's name, mailing address, name of employer, and occupation, and
4 Repledge will provide this information to recipients of contributions.³

5 ***Questions Presented***

6 1. *Would a monetary pledge from a member to a federal political committee and*
7 *charity, which pledge is pre-approved by a third-party payment processor, charged to a*
8 *member's credit card, and which eventually results in a contribution to a federal*
9 *committee or a donation to charity (depending on whether the pledge is matched by a*
10 *supporter of an opposing candidate or party), constitute a "contribution" under*
11 *52 U.S.C. § 30101(8), subject to the 10-day forwarding requirement established by*
12 *11 C.F.R. § 102.8(a) at the time the pledge is made?*

² Repledge will require each member to check a box on the website to confirm that the following statements are true and accurate:

1. I am a United States citizen or a lawfully admitted permanent resident of the United States.
2. This contribution is not made from the general treasury funds of a corporation, labor organization or national bank.
3. This contribution is not made from the treasury of an entity or person who is a federal contractor.
4. This contribution is not made from the funds of a political action committee.
5. This contribution is not made from the funds of an individual registered as a federal lobbyist or a foreign agent, or an entity that is a federally registered lobbying firm or foreign agent.
6. I am not a minor under the age of 16.
7. The funds I am donating are not being provided to me by another person or entity for the purpose of making this contribution.

³ The Repledge website will explain that:

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 individuals whose contributions to a federal committee exceed \$200 in an election cycle. 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.

1 2. *Would Repledge’s processing and forwarding of members’ contributions to*
2 *federal committees result in impermissible corporate contributions from Repledge to*
3 *those committees under 52 U.S.C. § 30118?*

4 3. *Would Repledge’s processing and forwarding of members’ contributions to*
5 *federal committees violate the prohibition on a corporation “acting as a conduit for*
6 *contributions earmarked to candidates” in 11 C.F.R. § 110.6(b)(2)(ii) or any federal*
7 *campaign finance law or restriction?*

8 4. *Would Repledge’s receipt of a small percentage-based transaction fee constitute*
9 *the receipt of a “contribution” by Repledge under 52 U.S.C. § 30101(8)?*

10 5. *Would a Repledge member’s payment of a small percentage-based transaction fee*
11 *to Repledge and/or its payment processor constitute a contribution to the recipient*
12 *political committee?*

13 6. *Would a Repledge member’s contributions to federal committees subject*
14 *Repledge to any reporting requirements of the Act or Commission regulations, including*
15 *but not limited to the “conduit and intermediary” reporting requirements established by*
16 *11 C.F.R. § 110.6(c)?*

17 ***Legal Analysis and Conclusions***

18 1. *Would a monetary pledge from a member to a federal political committee and*
19 *charity, which pledge is pre-approved by a third-party payment processor, charged to a*
20 *member’s credit card, and which eventually results in a contribution to a federal*
21 *committee or a donation to charity (depending on whether the pledge is matched by a*
22 *supporter of an opposing candidate or party), constitute a “contribution” under*

1 *52 U.S.C. § 30101(8), subject to the 10-day forwarding requirement established by*
2 *11 C.F.R. § 102.8(a) at the time the pledge is made?*

3 No, a monetary pledge from a member to a federal political committee and charity
4 would not constitute a “contribution” at the time of the pledge and therefore would not be
5 subject to the 10-day forwarding requirement established by 52 U.S.C. § 30102(b)(1) .

6 Under the Act and Commission regulations, a “contribution” includes “any gift,
7 subscription, loan, advance, or deposit of money or anything of value made by any
8 person for the purpose of influencing any election for Federal office.” 52 U.S.C.
9 § 30101(8)(A)(i); 11 C.F.R. § 100.52(a). The Act provides that “[e]very person who
10 receives a contribution for an authorized political committee shall, no later than 10 days
11 after receiving such contribution, forward to the treasurer such contribution.” 52 U.S.C.
12 § 30102(b)(1); *see also* 11 C.F.R. § 102.8(a).

13 The Commission has previously recognized that a mere pledge to make a
14 contribution is not itself a contribution. Prior to 1980, the Act defined “contribution” to
15 include “a written contract, promise, or agreement, whether or not legally enforceable.”
16 2 U.S.C. § 431(e)(2) (1976); *see also* 11 C.F.R. § 100.4(a)(3) (1977). In the 1979
17 amendments to the Act, however, Congress removed that language from the definition of
18 “contribution.” *See generally* Amendments to Federal Election Campaign Act of 1971,
19 Pub. L. No. 96-187, 93 Stat. 1339 (1979). The Commission has explained that “[t]he
20 effect of [this] repeal is that a mere promise to make a contribution is not by itself subject
21 to the Act as a contribution.” Advisory Opinion 1985-29 (John Breaux Committee) at 4
22 n.4. Thus, in Advisory Opinion 1985-29 (John Breaux Committee), the Commission
23 determined that an “unsecured promise” to pay interest on a loan to a candidate

1 committee was not a contribution, although “any actual payment of interest” would be a
2 contribution. *Id.* at 3. Accordingly, a member of Repledge will not make a contribution
3 to a political committee merely by pledging funds during a fund drive. A member’s
4 pledge represents only a conditional promise to make a contribution to a candidate,
5 depending on whether and to what extent the amount pledged is matched by other
6 members’ pledges to the opposing candidate.

7 Because a pledge under Repledge’s proposal is not a contribution under 52 U.S.C.
8 § 30101(8), the pledge is not subject to the forwarding requirement of 52 U.S.C.
9 § 30102(b).

10 2. *Would Repledge’s processing and forwarding of members’ contributions to*
11 *federal committees result in impermissible corporate contributions from Repledge to*
12 *those committees under 52 U.S.C. § 30118?*

13 No, Repledge’s processing and forwarding of members’ contributions to political
14 committees would not result in impermissible corporate contributions from Repledge to
15 recipient committees.

16 The Act and Commission regulations prohibit corporations from making a
17 contribution in connection with a Federal election. *See* 52 U.S.C. § 30118(a); 11 C.F.R.
18 § 114.2(b)(1). A “contribution” includes any “direct or indirect payment, distribution,
19 loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any
20 candidate, campaign committee, or political party or organization, in connection with any
21 [federal] election.” 52 U.S.C. § 30118(b)(2); 11 C.F.R. § 114.2(b)(1); *see also* 52 U.S.C.
22 § 30101(8)(A)(i); 11 C.F.R. § 100.52(a). “Anything of value” includes in-kind
23 contributions, such as the provision of goods or services without charge or at a charge

1 that is less than the usual and normal charge. *See* 11 C.F.R. § 100.52(d)(1). Commission
2 regulations define “usual and normal charge” as the price of goods in the market from
3 which they ordinarily would have been purchased at the time of the contribution, or the
4 commercially reasonable rate prevailing at the time the services were rendered.” *See* 11
5 C.F.R. § 100.52(d)(2).

6 The Commission has previously concluded that entities that process contributions
7 as a service to contributors without entering into agreements with — or receiving
8 compensation from — the recipient political committees are not making contributions
9 because the entities are not providing any services to the recipient political committees.
10 *See, e.g.*, Advisory Opinion 2014-07 (Crowdpac) at 6 (distinguishing between companies
11 that process contributions as service to contributors and companies that process
12 contributions as service to recipient political committees); Advisory Opinion 2012-22
13 (skimmerhat) at 4-6 (same); Advisory Opinion 2011-19 (GivingSphere) at 7 (same);
14 Advisory Opinion 2011-06 (Democracy Engine) at 5 (same).

15 Here, as in prior advisory opinions, Repledge is a commercial entity that proposes
16 to develop a web-based platform through which its customers can make contributions to
17 political committees. Like prior requestors, Repledge will provide services only “at the
18 request and for the benefit of the contributors, not of the recipient political committees,”
19 and will charge a transaction fee that will cover its costs and provide it with a profit.
20 Advisory Opinion 2007-04 (Atlatl) at 6; *see also* Advisory Opinion 2011-06 (Democracy
21 Engine) at 5. Also like those requestors, Repledge members’ funds will be transmitted
22 only at their own request and not pursuant to agreements with political committees.
23 Repledge will not contract with recipient political committees, except possibly for the

1 limited purpose of effectuating authorized fund transfers. *See* Advisory Opinion 2011-06
2 (Democracy Engine) at 5.⁴

3 Repledge’s proposal differs from those previously approved by the Commission
4 in two ways. First, Repledge will process and transmit contributions only to the major
5 party nominees in the 2016 presidential election— with pledges to one effectively
6 canceling out pledges to the other, as opposed to, for example, any candidate whose name
7 appears in a searchable index or who has registered an authorized committee with the
8 Commission. Second, the ultimate amount of a member’s contribution to a candidate
9 will depend in part on the actions of other members — specifically, how much the other
10 members pledge to that candidate’s opponent.

11 The Commission does not consider these two features of Repledge’s proposal to
12 require a different outcome here than in the prior advisory opinions. Although
13 Repledge’s members will use its website to contribute only to major party nominees in
14 the 2016 presidential election, this selection of a set of opposing candidates — with
15 pledges to one effectively canceling out pledges to the other — does not raise concerns
16 that Repledge is selecting candidate recipients to influence the outcome of the election.
17 As long as Repledge transmits funds to the opposing candidates, as requested by its
18 members, on identical terms and without any preferential placement or treatment,
19 Repledge’s reasonable commercial decision to limit its universe of candidate recipients
20 does not render its proposal impermissible.

21 The proposal also differs from those addressed in prior advisory opinions in that
22 the final amount of a member’s contribution to a candidate will depend, in part, on

1 whether and to what extent other members pledge funds to the candidate's opponent.
2 The Commission does not consider this difference to be material. Here, Repledge will
3 establish in advance of accepting pledges the criterion under which it will transmit its
4 members' contributions to candidates — namely, the percentage of pledges that go
5 unmatched — and will communicate that criterion to users before they designate the
6 recipients and amounts of their pledges. This criterion is not subject to change. Then, at
7 the close of a fund drive, "Repledge will disclose all transaction costs and processing fees
8 and disclose the amounts distributed to the respective charities and political committees"
9 (AOR003), thereby enabling verification of the matching calculations. Therefore, the
10 fact that the final amount of a member's contribution will partly depend on other
11 members' pledges is consistent with the standards that the Commission has established in
12 finding prior proposals to be permissible.

13 Accordingly, Repledge's processing and forwarding of its members' contributions
14 to political committees would not result in impermissible corporate contributions from
15 Repledge to the recipient committees.

16 3. *Would Repledge's processing and forwarding of members' contributions to*
17 *federal committees violate the prohibition on a corporation "acting as a conduit for*
18 *contributions earmarked to candidates" in 11 C.F.R. § 110.6(b)(2)(ii) or any federal*
19 *campaign finance law or restriction?*

20 No, Repledge's processing and forwarding of members' contributions to federal
21 committees would not violate the prohibition on a corporation "acting as a conduit for
22 contributions earmarked to candidates" in 11 C.F.R. § 110.6(b)(2)(ii).

1 For purposes of the contribution limitations, “all contributions made by a person,
2 . . . including contributions which are in any way earmarked or otherwise directed
3 through an intermediary or conduit to such candidate,” are treated as contributions from
4 the person to the candidate. 52 U.S.C. § 30116(a)(8). “Earmarked” means “a
5 designation, instruction, or encumbrance, whether direct or indirect, express or implied,
6 oral or written, which results in all or any part of a contribution . . . being made to . . . a
7 clearly identified candidate.” 11 C.F.R. § 110.6(b)(1). A “conduit or intermediary” is
8 “any person who receives and forwards an earmarked contribution to a candidate.”
9 11 C.F.R. § 110.6(b)(2).

10 Persons prohibited from making contributions and expenditures are prohibited
11 from being conduits or intermediaries. 11 C.F.R. § 110.6(b)(2)(ii). Because corporations
12 may not make contributions to candidate committees, *see* 52 U.S.C. § 30118, they may
13 not permissibly serve as conduits.

14 The Commission has recognized, however, that “certain electronic transactional
15 services that assist a contributor in making a contribution” – even when provided by a
16 corporation – “do not run afoul of the prohibition on corporations acting as a conduit or
17 intermediary for earmarked contributions” because they are “so essential to the flow of
18 modern commerce . . . that they are akin to delivery services, bill-paying services, or
19 check writing services.” Advisory Opinion 2012-22 (skimmerhat) at 10 (internal
20 quotations omitted).

21 As noted above, Repledge is a corporate, commercial entity that proposes to
22 establish a web-based platform that its customers can voluntarily choose to employ to
23 make contributions to political committees. Repledge will operate on a commercial basis

1 and will charge its members a fee for its services that will cover its costs and provide it
2 with a profit. Further, Repledge will process and transmit its members' contributions to
3 political committees in the ordinary course of business and only at the request of its
4 members. Repledge's actions in calculating and processing member contributions is an
5 electronic transactional service that is thus "akin to delivery services, bill-paying
6 services, or check writing services." . Advisory Opinion 2012-22 (skimmerhat) at 10
7 (internal quotations omitted). Therefore, "contributions made through the [Repledge]
8 platform are not contributions to an intermediary and earmarked for a candidate or
9 authorized committee; they are direct contributions to the candidate . . . made via a
10 commercial processing service." *Id.*

11 Accordingly, Repledge's processing and forwarding of members' contributions to
12 federal committees would not violate the prohibition on a corporation "acting as a
13 conduit for contributions earmarked to candidates" in 11 C.F.R. § 110.6(b)(2)(ii).

14 4. *Would Repledge's receipt of a small percentage-based transaction fee constitute*
15 *the receipt of a "contribution" by Repledge under 52 U.S.C. § 30101(8)?*

16 5. *Would a Repledge member's payment of a small percentage-based transaction fee*
17 *to Repledge and/or its payment processor constitute a contribution to the recipient*
18 *political committee?*

19 No, Repledge's receipt of a transaction fee would not constitute the receipt of
20 contributions by Repledge. Nor would a Repledge member's payment of a transaction
21 fee to Repledge or its payment processor constitute contributions to the recipient political
22 committee.

1 As noted above, a “contribution” includes “any gift . . . of money or anything of
2 value made by any person for the purpose of influencing any election for Federal office.”
3 52 U.S.C. § 30101(8)(A)(i); 11 C.F.R. § 100.52(a); *see also* 52 U.S.C. § 30118(b)(2);
4 11 C.F.R. § 114.2(b)(1). “Anything of value” includes in-kind contributions, such as the
5 provision of services without charge or at a charge that is less than the usual and normal
6 charge. *See* 11 C.F.R. § 100.52(d)(1). Thus, the question presented here is whether a
7 Repledge member’s payment of fees for the processing of a contribution to a political
8 committee constitutes either a monetary contribution to Repledge under section 100.52(a)
9 or an in-kind contribution to the recipient committee under section 100.52(d).

10 As discussed above, Repledge will provide payment-processing services to its
11 members. Like any other commercial payment processor or delivery service, Repledge
12 proposes to charge its members fees for providing its services. According to the request,
13 Repledge’s fees are intended to be commercially reasonable, to cover its operating costs,
14 and to generate a reasonable profit. Repledge will charge the same fees regardless of
15 whether its members’ pledges ultimately result in contributions to a federal candidate or
16 donations to charity. Thus, as the Commission has concluded in prior advisory opinions,
17 the fees that Repledge’s members will pay are not contributions to Repledge because they
18 are not gifts or donations to Repledge but, rather, commercial payments in exchange for
19 its processing services. *See, e.g.*, Advisory Opinion 2012-22 (skimmerhat) at 6; Advisory
20 Opinion 2011-06 (Democracy Engine) at 6; *see also* Advisory Opinion 2006-08 (Brooks)
21 at 4.

22 Nor would the fees paid to Repledge be contributions to recipient political
23 committees. Because these fees “are [to pay] for services rendered ‘for the benefit of the

1 contributors, not of the recipient political committees,’ such fees ‘[do] not relieve the
2 recipient political committees of a financial burden they would otherwise have had to pay
3 for themselves.’” Advisory Opinion 2014-07 (Crowdpac) at 6 (quoting Advisory
4 Opinion 2012-22 (skimmerhat)); Advisory Opinion 2011-06 (Democracy Engine)
5 (internal quotations omitted). In other words, the contributors’ fees will not result in
6 recipient political committees receiving Repledge’s payment-processing services at less
7 than the usual rate because Repledge is not providing those services to the committees in
8 the first instance. Thus, the members’ fee payments are not in-kind contributions to the
9 recipient committees.

10 6. *Would a Repledge member’s contributions to federal committees subject*
11 *Repledge to any reporting requirements of the Act or Commission regulations, including*
12 *but not limited to the “conduit and intermediary” reporting requirements established by*
13 *11 C.F.R. § 110.6(c)?*

14 No, a Repledge member’s contributions to federal committees will not subject
15 Repledge to any reporting requirements under the Act or Commission regulations,
16 including the “conduit and intermediary” reporting requirements established by 11 C.F.R.
17 § 110.6(c).

18 The Act and Commission regulations require certain persons to file reports with
19 the Commission. For example, a “treasurer of a political committee shall file reports of
20 receipts and disbursements.” *See* 52 U.S.C. § 30104(a)(1); 11 C.F.R. § 104.1. Persons
21 who spend more than certain amounts on independent expenditures or electioneering
22 communications must also file reports with the Commission, *see* 52 U.S.C. § 30104(c),

1 (f); 11 C.F.R. §§ 104.20, 109.10, as must persons acting as conduits or intermediaries for
2 earmarked contributions, 11 C.F.R. § 110.6(c).

3 Repledge’s proposed activities would not subject it to the reporting requirements
4 of the Act and Commission regulations. First, Repledge states that it will not expressly
5 advocate the election or defeat of any candidate, so it will not be subject to the reporting
6 requirements for persons making independent expenditures. *See* 52 U.S.C. § 30101(17)
7 (“The term ‘independent expenditure’ means an expenditure by a person . . . expressly
8 advocating the election or defeat of a clearly identified candidate”); *see also* 11
9 C.F.R. § 100.16(a). Second, there is no indication in the advisory opinion request that
10 Repledge will meet the definition of “political committee,” and therefore it is not subject
11 to the reporting requirements for political committees. *See* 52 U.S.C. § 30104(a)(1); 11
12 C.F.R. § 104.1. Third, as explained in the response to Question 3 above, Repledge will
13 not act as a conduit or intermediary under 11 C.F.R. § 110.6. Finally, the request does
14 not indicate that Repledge will make electioneering communications, *see* 52 U.S.C. §
15 30104(f)(3)(A)(i), or engage in any other activities that would subject it to the reporting
16 requirements of the Act and Commission regulations.

17 This response constitutes an advisory opinion concerning the application of the
18 Act and Commission regulations to the specific transaction or activity set forth in this
19 advisory opinion request. *See* 52 U.S.C. § 30108. The Commission emphasizes that, if
20 there is a change in any of the facts or assumptions presented, and such facts or
21 assumptions are material to a conclusion presented in this advisory opinion, then the
22 requestor may not rely on that conclusion as support for her proposed activity. Any
23 person involved in any specific transaction or activity which is indistinguishable in all its

1 material aspects from the transaction or activity with respect to which this advisory
2 opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B).
3 Please note that the analysis or conclusions in this advisory opinion may be affected by
4 subsequent developments in the law including, but not limited to, statutes, regulations,
5 advisory opinions, and case law. Any advisory opinions cited herein are available on the
6 Commission's website.

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On behalf of the Commission,

Ann M. Ravel
Chair