



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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ADVISORY OPINION 2015-11

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Dear Messrs. Reese and Hagenbuch:

We are responding to your advisory opinion request on behalf of FYP, LLC concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-46 (the “Act”), and Commission regulations to the requestor’s proposal for processing contributions to political committees. The Commission concludes that the proposal would not result in the requestor making a corporate contribution or serving as a corporate conduit.

Background

The facts presented in this advisory opinion are based on your letter received on September 14, 2015, and your email received on September 22, 2015 (collectively, “AOR”).

The requestor is a limited liability company registered in New Mexico. For purposes of this advisory opinion, the requestor has asked the Commission to assume that it has elected to be treated as a corporation for federal tax purposes.

The requestor is developing a contribution processing platform called MyChange. As described in more detail below, MyChange will “round up” a participating user’s credit card or debit card transactions to the next whole dollar amount and provide the difference between the original transactions and the resulting rounded-up amounts to political committees or other nonprofit organizations designated by the user. For example, if a user uses an enrolled credit card to charge a cup of coffee for \$2.30 and (separately) a newspaper for \$1.50, then at the end of the billing cycle MyChange will charge \$1.20 (\$0.70 plus \$.50) to the user’s card and send

that amount, minus fees, to the user's designated recipients. *See* Advisory Opinion Request at AOR001.

Contribution Process

Users will access the MyChange platform through the MyChange website or by downloading the MyChange app. After entering information about the credit and debit cards that the user wishes to enroll in the round-up program, the user will select recipients from a list on the app or website. Each user will be able to designate up to three recipients for each credit or debit card and to assign a percentage of future round-ups to each recipient. Users who designate a political committee recipient will be required to verify their eligibility to make contributions under federal law and to submit information about their occupations and employers.¹

The requestor will calculate and process user round-ups on a monthly basis. The requestor will work with a vendor to calculate the total amount of the round-ups derived from each user's credit and debit card transactions in a given month. The requestor's merchant service provider will then use the MyChange software to charge each user's credit or debit card for that total amount. At any time until the user's card is charged for that month, the user will be able to: set a monthly cap on contributions and donations; instruct the requestor to charge the credit card double or triple the monthly round-up; add additional credit or debit cards; cancel a round-up; or withdraw from the program entirely.

The merchant service provider will transmit the user's monthly round-up funds to a merchant account that the requestor plans to establish exclusively to accept deposit of those funds and to keep them separate from the requestor's own treasury funds. Within one business day after the user's credit or debit card is charged, the funds will be transferred from the merchant account to the user's designated recipient (less the service fee, which is discussed further below). The requestor states that it "[will] not exercise any direction or control" over the transfers, except that it "may limit the amount of the transfer to avoid exceeding the relevant contribution limit." AOR003. Shortly afterwards, the user will receive an email indicating the total amount charged against his or her card.

When the merchant service provider charges a user's credit or debit card, MyChange's software will produce a spreadsheet record of the user's itemized contributions and donations for the month and the year-to-date. MyChange will also keep a separate accounting of the contributions or donations sent to each recipient and will send each recipient a monthly itemized spreadsheet of all users' contributions or donations to that recipient. The requestor represents that this transmittal "will include all information that political committees will need to comply

¹ Users will be required to attest to the following statement:

"This contribution is made from my own funds, and funds are not being provided to me by another person or entity for the purpose of making this contribution. I am making this contribution with my own personal credit card and not with a corporate or business credit card or a card issued to another person. I am not a federal contractor. I am at least eighteen years old. I am a U.S. citizen or lawfully admitted permanent resident (*i.e.* green card holder)."

with their reporting obligations” under the Act and Commission regulations, including each user’s address, occupation and employer. AOR003. Recipients will also be able to access the MyChange website at any time to download this information.

At the end of each month, the requestor will reconcile the actual funds processed through the merchant service account with its internal records to “ensure that the proper [amounts] have been forwarded to the proper recipient, as designated by the user.” *Id.* As part of the reconciliation, the requestor will (1) compare the total amount received in the merchant account with MyChange’s internal record of funds received; (2) compare the amount paid out of the merchant account with MyChange’s internal record of the total amount paid to each recipient; and (3) perform an overall account reconciliation to ensure that the amount received equals the total amount distributed to all recipients and the fees distributed to the requestor.

In addition to processing funds from permissible sources under the Act, the requestor expects the merchant account sometimes to “process funds from users who are prohibited sources under the Act, such as federal contractors or corporations, who are making [donations] to organizations other than political committees.” AOR007. The requestor will use the recordkeeping system described above to “ensure that only funds from permissible sources flow to political committees” and that the merchant account “will never be in a position where it does not have sufficient permissible funds to transfer to political committees.” *Id.*

List of Recipients

Once each month, the requestor “will populate its app with additional political committees and nonprofit organizations from which users may choose to direct rounded-up funds.”² Political committees can request to be added to the MyChange platform, and users can ask MyChange to add committees to the list of recipients. AOR002. The requestor will make eligibility determinations by applying a “standard set of commercially-based factors.” AOR002, AOR006. The MyChange platform will not include, for example, committees that “are not in good standing with the Commission,” nor will it include committees that do not share requestor’s “users’ ideology and values.” *Id.* The requestor represents that the “commercial viability” of its business plan “hinges on” these limitations. AOR006, AOR010.

The requestor states that the only business relationships it will have with the political committees that it approves to receive contributions through MyChange will be entering into terms of service with them “for the limited purpose of facilitating the transfer of users’ funds to the committees’ accounts.” AOR002, AOR010. The requestor plans to advertise its program to the public and does not plan to work with political committees to market the program directly to the committees’ contributors.

² The requestor states that it will include on its list of eligible recipients “authorized committees and committees that make contributions to authorized committees,” as well as nonfederal candidates and committees. AOR002 & n.1.

User Fees

The requestor will assess each user a fee for using the MyChange program. The fee will be calculated as a percentage of the total funds charged to the user's credit or debit card in a given transaction. The requestor expects the fee to cover all of its costs in providing the services described above, including "its vendor and operational costs associated with transferring users' funds," AOR003, "transaction processing fees and other bank fees," AOR004, and the cost of "collecting the users' information and transmitting such information to the recipient," AOR010. The fee will also provide the requestor with "a reasonable profit." AOR003, AOR004. The requestor states that the fee will "represent[] the normal and usual charge" for its services. AOR004 (internal citations omitted). The fee will be drawn from the funds charged to the user's credit or debit card before the remainder of those funds is provided to the designated recipients. The fee percentage "will be the same regardless of whether the recipient of the funds is a political committee or [another] nonprofit organization." AOR010.

Question Presented

Does the requestor's proposed business plan comply with the Act and Commission regulations?

Legal Analysis and Conclusion

As discussed below, the requestor's proposed business plan would not result in the requestor making a contribution to the recipient political committees or serving as a conduit. The Commission could not agree on how to treat fees paid by users to the requestor for the service provided.

A. Corporate Contributions and Users' Payment of Fees

The Act and Commission regulations prohibit corporations from making a contribution in connection with a Federal election. *See* 52 U.S.C. § 30118(a); 11 C.F.R. § 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 candidate, campaign committee, or political party or organization, in connection with any [federal] election." 52 U.S.C. § 30118(b)(2); 11 C.F.R. § 114.2(b)(1); *see also* 52 U.S.C. § 30101(8)(A)(i); 11 C.F.R. § 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 C.F.R. § 100.52(d)(1). Commission regulations define "usual and normal charge" as "the price of those 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." 11 C.F.R. § 100.52(d)(2).

The Commission concludes that the requestor's proposal would not result in prohibited corporate contributions from the requestor to recipient political committees. The Commission could not agree on the legal basis for its conclusion by the required four affirmative votes. 52 U.S.C. § 30106(c); 11 C.F.R. § 112.4(a). *Compare* Draft A, Advisory Opinion Request 2015-11

(FYP) at 8-13, Agenda Document No. 15-62-A (Nov. 6, 2015), <http://saos.fec.gov/aodocs/201511.pdf> with Draft B, Advisory Opinion Request 2015-11 (FYP) at 6-9, Agenda Document No. 15-62-B (Nov. 16, 2015), http://saos.fec.gov/aodocs/201511_1.pdf. The Commission could not agree whether a MyChange user's payment of fees for the processing of a contribution to a political committee constitutes a contribution from the user to the recipient committee.³

B. *Corporate Conduits*

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

The Commission concludes that the requestor would not be acting as a conduit in

³ In the view of some Commissioners, the requestor's proposal complies with the Act and Commission regulations provided that the fees paid by users to the requestor are included in the total amounts of the contributions made by users to recipient political committees. These Commissioners concluded that the requestor will provide a service to the recipient political committees by allowing only committees that pass its ideological screening to receive users' contributions. See Draft A, Advisory Opinion Request 2015-11 (FYP) at 8-9, Agenda Document No. 15-62-A (Nov. 6, 2015), <http://saos.fec.gov/aodocs/201511.pdf>. The users' payments of fees to the requestor therefore are contributions to the committees because it "relieve[s] recipient political committees of a financial obligation that [they] would otherwise have to pay themselves, thereby providing something of value to these committees." See Advisory Opinion 2007-04 (Atlatl) at 4-5; Advisory Opinion 2012-09 (Points for Politics) at 6. See Draft A, Advisory Opinion Request 2015-11 (FYP) at 8-9, 15-16, Agenda Document No. 15-62-A (Nov. 6, 2015), <http://saos.fec.gov/aodocs/201511.pdf>; Advisory Opinion 2015-11 (FYP), Certification (Nov. 18, 2015) (Chair Ravel and Commissioner Weintraub voting to approve Draft A, Agenda Document No. 15-62-A).

Some Commissioners concluded that, under prior Commission advisory opinions, the fees MyChange's users will pay to the requestor will not be contributions to recipient political committees, because those fees "are [to pay] for services rendered 'for the benefit of the contributors, not of the recipient political committees,'" and accordingly "such fees '[do] not relieve the recipient political committees of a financial burden they would otherwise have had to pay for themselves.'" Advisory Opinion 2015-08 (Repledge) at 9 (quoting Advisory Opinion 2014-07 (Crowdpac)); Advisory Opinion 2012-22 (skimmerhat) at 6; Advisory Opinion 2011-06 (Democracy Engine). See Draft B, Advisory Opinion Request 2015-11 (FYP) at 9-10, Agenda Document No. 15-62-B (Nov. 16, 2015), http://saos.fec.gov/aodocs/201511_1.pdf; Advisory Opinion 2015-11 (FYP), Certification (Nov. 18, 2015) (Vice Chairman Petersen and Commissioners Hunter and Goodman voting to approve Draft B, Agenda Document No. 15-62-B). These Commissioners determined that this conclusion was not affected by requestor's proposal to include on the MyChange platform only those committees that meet "a standard set of commercially-based [eligibility] factors," including whether the recipient committee is in good standing with the Commission and whether the committee shares MyChange users' "ideology and values." AOR002, AOR006; see Advisory Opinion 1994-30 (CCI) at 6-7 (concluding that "there is nothing in the Act requiring a business entity to target its business toward clients or individuals that represent all parties or ideologies").

processing contributions from users to recipient political committees. The Commission could not agree on the legal basis for its conclusion by the required four affirmative votes. 52 U.S.C. § 30106(c); 11 C.F.R. § 112.4(a). *Compare* Draft A, Advisory Opinion Request 2015-11 (FYP) at 13-15, Agenda Document No. 15-62-A (Nov. 6, 2015), <http://saos.fec.gov/aodocs/201511.pdf> with Draft B, Advisory Opinion Request 2015-11 (FYP) at 10-12, Agenda Document No. 15-62-B (Nov. 16, 2015), http://saos.fec.gov/aodocs/201511_1.pdf.

The Commission expresses no opinion regarding the potential application of federal tax law or other state or local laws to the proposed activities because those questions are not within the Commission's jurisdiction.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in this advisory opinion request. *See* 52 U.S.C. § 30108. 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* 52 U.S.C. § 30108(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. Any advisory opinions cited herein are available on the Commission's website.

On behalf of the Commission,



Ann M. Ravel
Chair