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June 21, 2017

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BY HAND DELIVERY

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FEDERAL ELECTION
COMMISSION
2017 JUN 22 AM 11:05
OFFICE OF GENERAL
COUNSEL

Re: Advisory Opinion Request

Dear Ms. Stevenson:

Pursuant to 52 U.S.C. § 30108, we request an advisory opinion on behalf of Mr. Eli Stein and Mr. Jeremy Gottlieb, confirming the permissibility of their business plan under the Federal Election Campaign Act of 1971.

FACTUAL BACKGROUND

Mr. Stein and Mr. Gottlieb seek to create a for-profit LLC (the “Project”) that will develop and administer an app that allows users to participate in the political process by rounding-up the change from their everyday cashless purchases and contributing the rounded-up amount to candidates for federal office (the “App”).¹ For example, if a user purchases an item at the store for \$13.45, the App would round up to \$14.00 and users could select which candidate(s) received the difference of \$0.55. The specific processes that the Project would use are outlined below.

The App Allows Users to Find and Support Candidates in Swing Districts

The goal of the Project is to help users easily identify races where their contributions will have the most impact. It will do this by using data and analysis to identify “swing” districts in U.S. House and Senate races. Based on the results of its analysis, the Project will select approximately 20 to 30 candidates to be included on the App (“Featured Candidates”). The Project will not interact with campaigns in any way when selecting the Featured Candidates. For example, it will not solicit candidates or campaigns for information about their stances or positions on issues, or for information about their previous donors. There will be no mechanism for candidates to apply to be Featured Candidates. Rather, the Project itself – as a means of providing a service to its users – will determine the menu of Featured Candidates based on its own research and analysis

¹ The Project will not be established, financed, maintained, or controlled by any federal officeholder or candidate or any political party committee.

identifying swing districts in upcoming elections. The Project may add or remove candidates from the App over time based on updates to its research.

Users will control how their money is distributed among the Featured Candidates:

- Users may select the “All Candidates” option, which will result in the App distributing the user’s contribution equally among all of the Featured Candidates.
- Users may create a “Custom Basket” which allows them to choose which of the Featured Candidates to support. The App will distribute the contribution equally among each of the candidates in the user’s Custom Basket.
- Users may select among baskets of candidates that the App creates from the list of Featured Candidates. These “Project Baskets” may be based on any criteria that the Project determines is likely to encourage participation, such as region (e.g. Midwestern candidates), gender (e.g. female candidates), nature of opponent (e.g. challenging incumbents), or funds raised to date (e.g. the candidates who have raised the least amount to date).²

In the future, the Project may consider other approaches to how it distributes a user’s contribution, such as an option to allow for unequal divisions among candidates. (Currently, that feature would be unduly burdensome). Each option will be accompanied by clear disclaimer language stating how a user’s funds would be allocated. Product decisions will be made with an eye toward increasing user participation in the App, *not* for the purpose of influencing any federal election. The goal is to allow users to leverage the App’s data and analysis to easily engage in the political process. Rather than users researching which races are closest or which candidates are most in need of contributions, the App provides this service for them. The Project believes this will increase participation among its target customers and facilitate users’ repeat, ongoing engagement with the App.

In its first election cycle of existence, the Project plans to market these services to Democratic donors. As a result of the deep divisions in the current political environment, the Project’s founders do not believe they could successfully market the App as a bipartisan platform to users who are deeply loyal to their respective political parties. Due to the current groundswell in voter and donor interest in swinging the U.S. House of Representatives to Democratic control, the Project plans to market the App to Democratic donors and will feature only Democratic

² If the Project wishes to add or subtract candidates from a Project Basket, any user who has selected that Project Basket will be notified and given an option to affirmatively opt-in to the new version of the Project Basket with clear disclaimer language stating how a user’s funds would be allocated. If the user takes no action, her/his funds will continue to be allocated to candidates in the prior version of the Project Basket unless and until the User reallocates her/his funds.

candidates on the App. While the Project may decide to expand its user base to supporters of other parties in the future, doing so at this time would threaten the commercial viability of the Project in its startup phase.³

The Project Will Process Users' Contributions to the Users' Chosen Candidates, Net of a User-Paid Fee

Users begin the process of making contributions by visiting the Project's website and adding information regarding the credit cards, debit cards, and/or bank accounts (collectively, "Accounts") the user wishes to use to make rounded-up allocations. Next, the user downloads the App and selects how his or her contributions will be allocated from the choices offered by the App. Users can add or remove additional Accounts at any time, and can change their contribution allocations at any time.

The User's rounded-up allocations through the App will be treated as pledges until the User's aggregate rounded-up allocations reach a minimum threshold (for example, \$10) (hereinafter, the "Minimum Threshold"). If the User withdraws from participation in the App prior to reaching the Minimum Threshold, any pledges will be automatically cancelled and the User's credit card will not be charged. After each user's pledged to all Featured Candidates in the aggregate reach the Minimum Threshold, , the User's credit card will be charged for those pledges and the funds will be processed into a merchant services account belonging to the Project.⁴

This merchant services account will keep contributors' funds separate from the Project's general treasury funds. Using specific recordkeeping and accounting systems to ensure that only users' permissible funds flow to political committees, the Project will transfer contributions from the Project's account to the accounts of the candidate committees as designated by the user. The Project will transfer users' funds to the recipient committees as soon as possible (and no later than ten days) after funds are placed in the Project's merchant services account. The Project will not exercise direction or control over users' funds in its account, with the exception that the Project will not process a transfer to a committee that exceeds the applicable contribution limits.

The Project will charge users a fee for its services. While the amount of the fee has not yet been determined, the Project will set the fee to (1) cover the Project's overhead, research, programming, and other costs; (2) cover all costs such as bank fees and processing fees incurred in performing credit and debit card processing and contribution transfers; and (3) also provide a

³ For purposes of the request, the Commission may presume that the Project will be a corporation for purposes of the Federal Election Campaign Act.

⁴ At this point, the process resets and the User will not be charged again until her/his pledges to all Featured Candidates on the App again hit the Minimum Threshold. In other words, aggregation on the App works like the \$10,000 threshold for reporting independent expenditures.

commercially reasonable profit to the Project.⁵ The Project will not contract with campaigns to provide contribution processing services to campaigns, and will not receive compensation from recipient campaigns. Instead, because the Project provides research, analysis, and contribution processing services to users, the Project will cover costs and earn a profit by charging fees to users. As a result of this structure, the amount of the contribution forwarded from the Project's merchant services account to the various recipient committees' accounts will be net of the Project's fee. The amount of the fee itself will be retained by the Project and transferred into the Project's general treasury account; only the remainder of the funds will be provided to the designated recipients.

At the same time it transfers users' funds to recipient committees, the Project will also provide each committee with all of the information it will need to meet its own compliance requirements under the Act and Commission regulations. This information will include each user's name, address, occupation, and employer. The Project will also provide this information to recipient committees on an as-needed basis if a committee indicates a need for information in between contribution transfers. Users will also receive electronic notice specifying how much they have donated to each committee through the App, so that they can monitor their own contribution limits.

The App will otherwise be designed to ensure compliance with all federal campaign finance laws and regulations. Users will be required to provide their full name, address, occupation, and employer before being permitted to make contributions. In addition, users will be required to affirmatively agree to the following statement when designating contributions:

This contribution is made from my own funds. Funds are not being provided to me by another person or entity for the purpose of making political contributions. I am making this contribution with my own personal credit card or bank account and not with the credit card or bank account of a corporation, business, or another person. I am not a federal contractor. I am at least eighteen years old, and I am a U.S. citizen or lawfully admitted permanent resident.

Failure to agree to this statement will result in a user not being allowed to add credit or debit card information to the App or select designated candidates to receive contributions.

LEGAL DISCUSSION

The Project's business plan as described above complies with the Federal Election Campaign Act (the "Act") and Federal Election Commission ("FEC" or "the Commission") regulations.

⁵ The Project currently plans to focus the App on helping users contribute to federal candidates. However, if the App ever helps users contribute to entities not registered with the FEC, such as nonprofit organizations or non-federal candidates, it will charge users the same fee no matter the identity or nature of the recipient organization.

Specifically, the services that the Project provides to users via the App do not result in an impermissible contribution by the Project to political committees, and comply with all other reporting and recordkeeping requirements.

A. The Services the Project Provides Are Not a Contribution

The Act and Commission regulations prohibit corporations from making any contribution in connection with Federal elections. 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b)(1). The Act defines “contribution” broadly to include 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. §§ 30101(8)(A)(i), 30188(b)(2); *see also* 11 C.F.R. §§ 100.52(a), 114.2(b)(1). Commission regulations define “anything of value” to include not only monetary contributions, but also 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. 11 C.F.R. 100.52(d)(1). Commission regulations further 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 prevailing rate at the time the services were rendered.” 11 C.F.R. § 100.52(d)(2).

As explained below, the services the Project seeks to provide to its users are not contributions to committees under the Act and Commission regulations.

1. The App Provides Services to Users, Not to Political Committees

In its previous advisory opinions, the Commission has allowed service providers to offer contribution processing and related services to users on terms similar to those that the Project proposes here. Specifically, the Commission has made clear that no contribution from a service provider to a political committee takes place when (i) users take advantage of a vendor’s services to make political contributions; (ii) there is no mechanism by which recipient committees can approach the vendor to sign up for its services; and (iii) the users, rather than the recipient political committees, pay a fee to the vendor. *See, e.g.*, Advisory Opinion 2015-08 (Repledge) (distinguishing between companies that process contributions as a service to contributors and companies that process contributions as a service to recipient political committees).

The Commission’s analysis in these cases has turned on whether the services are provided at the request and for the benefit of the contributors, not of the recipient committees. *See* Advisory Opinion 2011-06 (Democracy Engine). In cases where the services do not “relieve the recipient political committees of a financial burden they would otherwise have to pay for themselves,” then services provided to contributors are “not considered to be contributions to the recipient political committees.” *Id.* Rather, in such cases the Commission has likened the services that

companies provide to widely available delivery services like UPS, which are also used to transmit contributions to their intended recipients. *See* Advisory Opinion 2012-22 (skimmerhat); Advisory Opinion 2011-06.

The Project's proposal resembles the platforms that the Commission has previously determined provide a service to users rather than committees. The Project is a commercial venture that plans to provide a widely available, donor-facing web-based platform to (i) allow users to identify those political campaigns where contributions can have the most impact and (ii) enable the users to make contributions to those campaigns or other campaigns that users designate. Thus, the Project provides both contribution processing services and research and data analytics services to its users. *See* Advisory Opinion 2014-07 (Crowdpac) (approving functions to assist voters in identifying like-minded candidates). Like other proposals the Commission has considered, the Project will charge users a fee sufficient to cover its costs – including third-party contribution processing costs – and provide the company with a commercially reasonable profit. *See* Advisory Opinion 2015-08, Advisory Opinion 2012-22. In addition, the Project will not enter into any agreement with political committees to provide services to the committees. In other words, the Project will not entertain offers or proposals from recipient committees who wish to be featured on the App to receive political contributions. Rather, the Project will select the committees that will appear on the App based on its own research and analysis, and based on user feedback.⁶

Accordingly, we respectfully request that the Commission confirm that the Project may provide users with analytics and data processing services, and charge users a fee for those services, without the amount of the user-paid fee being considered a contribution to recipient political committees.

2. The App Can Permissibly Limit the Committees to which its Users May Contribute

The fact that the Project will not feature all federal candidates on the App does not alter the conclusion that the Project's services are provided only to its users, and not to Featured Candidates. As the Commission has previously concluded, "there is nothing in the Act requiring a business entity to target its business toward clients or individuals that represent all parties or ideologies." Advisory Opinion 1994-30 (CCI). Rather, the Commission has long held that a vendor does not need to work with any and all political committees. Vendors are allowed to establish objective commercial criteria and apply that standard set of commercially-based factors when shaping their business offerings. *See* Advisory Opinion 2012-38 (CTIA – The Wireless

⁶ Entities that provide contribution processing services to users may nonetheless enter into agreements with recipient committees for the sole purpose "of facilitating transfers of users' funds to the committees' accounts." Advisory Opinion 2015-08; Advisory Opinion 2014-07; Advisory Opinion 2011-06. Like these other service providers that the Commission has advised, the Project may also enter into such limited-scope agreements with recipient committees.

Association); *see also* Advisory Opinion 2006-08 (Brooks) (limiting the parties and PAC it works with based on criteria important to the success of the vendor's business). Thus, even if the Project were providing services to political committees, it could – like countless federal campaign vendors before it – market its services to only one side of the political spectrum; to only those committees that are in good standing with the FEC; or to only those committees that meet whatever eligibility factors that the Project determined were important to the success of its business.

However, the Project is a step further removed even from these and other prior examples because the Project offers services solely to its users, not to political committees. Users, not the recipient committees, pay for the Project's analytics and contribution processing services. Most importantly, recipient committees cannot request to be included on the App, and the Project will not enter into agreements to provide services to committees. To be clear: unlike some other platforms the Commission has considered, there is no mechanism by which a recipient political committee can request or in any way influence whether the committee will be included among the App's menu of featured candidates.⁷

In this context, the Project is not providing services to recipient committees under any test that the Commission has previously applied. Rather, the Project's only customers are its users, and Project is free to structure its business offerings to these customers in a way that it believes are best suited to lead to commercial success. To that end, the Project has determined at this time to feature Democratic candidates in swing districts on the App, as determined by the Project's research and data analysis. That determination does not result in the Project providing a service to those Featured Candidates; rather, the business determination is part-and-parcel of providing the service of helping users identify which candidates will realize the greatest benefit from the users' contributions. By marketing its product only to Democratic donors, the Project is only further refining its platform in a way that it believes, as a commercial matter, is most likely to attract users and promote the success of the business. The Project believes that its brand and its ability to market its product would be harmed without the ability to make this determination.

Accordingly, the Project requests confirmation that it can limit the available pool of recipient committees to which its customers can make contributions without the services provided to users – or the fees paid for those services – being considered a contribution to those recipient committees that are included on the App.

B. The Project is Not a Conduit

Pursuant to the Act, all contributions made by a person “including contributions which are in any

⁷ *Compare* Advisory Opinion Request 2015-11 (FYP LLC) (proposing to allow committees to apply to receive contributions through the platform, and then applying a set of commercial criteria before entering into service agreements with any particular committee).

way earmarked or otherwise directed through an intermediary or conduit to such candidate” are treated as contributions from the original donor to the candidate. 52 U.S.C. § 30116(a)(8). Commission regulations define “earmarked” as a designation, instruction, or encumbrance “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). Corporations and LLCs taxed as corporations are prohibited from serving as conduits or intermediaries for earmarked contributions. 11 C.F.R. § 110.6(b)(2)(ii).

The Project plans to process and deliver contributions that users designate for clearly identified federal candidates. However, the Project would not be acting as an impermissible corporate conduit. The Commission has repeatedly concluded that “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.” In these cases, the Commission has reasoned that such “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’” and are not considered conduits or intermediaries. Advisory Opinion 2012-22 (citing Advisory Opinion 2011-06). Thus, the Project requests confirmation that contributions made through its services would not be contributions earmarked through a conduit or intermediary, but would instead be “direct contributions to the candidate or candidate’s committee made via a commercial contribution processing service.” *See id.*

C. The Project Meets All Other Criteria the Commission Has Deemed Relevant

1. The Project’s Merchant Services Account is Compliant

As discussed, the App assists users in identifying those races and candidates where users’ political contributions will have the most impact, and makes it easy for users to contribute to those candidates by rounding-up the users’ everyday purchases. As noted above, once the Minimum Threshold is reached, the App will charge the User’s credit and the funds will be processed into a merchant services account belonging to the Project. The merchant services account will be separate from the Project’s general treasury funds.

The Project will then, as soon as possible but no later than ten days after the payment-processing partner transfers users’ funds to the Project’s account, forward contributions to the recipient committees specified by each user. To do so, the Project will apply specific accounting and recordkeeping processes to (i) identify a user’s total contributions across all Accounts; (ii) screen for impermissible contributions;⁸ (iii) allocate the user’s total permissible contributions among

⁸ Impermissible contributions could include, for example, contributions from a user to a candidate committee that the Project knows based on its own records in excess of the allowable contribution limit. In the future, if the Project decides to expand its services to committees that are not registered with the FEC, the Project would also apply accounting procedures to ensure that only funds from federally permissible sources flow to federal political

the candidates in the user's selected "basket;" (iv) deduct the user-paid fee and place that amount into the Project's general treasury; and, finally, (v) forward the remaining contribution amount to recipient committees. To be clear, the user's fee will be deducted from the user's funds before the funds are transferred to recipients, so that the amount of the Project's fees will not be impermissibly transferred to the recipient committees. *See* Advisory Opinion 2012-09 (Points for Politics); Advisory Opinion 2004-19 (DollarVote.org). Moreover, once users' funds are placed in the Project's merchant services account, the Project will not exercise discretion or control over their disposition. The Project will provide recipient committees with all information regarding the users (such as address, occupation, and employer) that those committees may require to meet their own FEC reporting obligations.

Thus, the Project's merchant account processing platform is substantially similar to those that the Commission has repeatedly approved. *See, e.g.*, Advisory Opinion 2012-22 (approving a merchant service account with similar procedures and safeguards); Advisory Opinion 2006-08 (describing that having a separate merchant account for funds that will be dispersed as contributions, along with other accounting procedures, prevents a contribution by the service provider to a political committee).

We request that the Commission confirm that the Project's proposal likewise complies with the Act and applicable FEC regulations.

2. The Project is Compliant in All Other Respects

The Commission has, at various times, looked to other factors to confirm that business entities are not making or facilitating contributions to political committees. The Project passes these tests as well. For example, the Project is providing contribution-related services in the normal course of its business – helping connect users to ideal committees and processing users' contributions to those committees is the only business in which the Project seeks to engage. As described above, the Project is providing services at the usual and normal charge for the marketplace: specifically, it is assessing a fee that covers all costs and also allows the company to realize a commercially reasonable profit.⁹ In the course of forwarding users contributions to recipient committees, the Project is using the segregated merchant account and screening procedures described above to ensure that no impermissible contributions will be forwarded. Once users' funds reach the merchant account, the Project will not exercise any influence over which candidates will receive the contributions, or the amounts the candidates will receive (those decisions are made only by the user, prior to executing each set of aggregated, rounded-up contributions).

committees, while funds designated by an impermissible source for a nonfederal committee or nonprofit organization flow only to those entities. *See* Advisory Opinion 2015-11 (FYP, LLC).

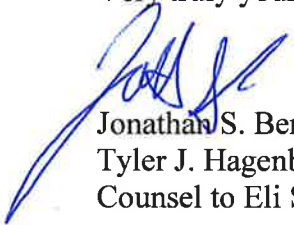
⁹ The fee charged to users for contributing to candidate committees will be identical to the fee charged to users for contributing to entities other than political committees, in the event that App adds such entities.

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Thus, the Project requests confirmation that its proposed business activities will not result in a contribution to recipient committees under any test within the Act or Commission regulations.

We appreciate the Commission's consideration of this request.

Very truly yours,

A handwritten signature in blue ink, appearing to be 'Jonathan S. Berkon', is written over the typed name.

Jonathan S. Berkon
Tyler J. Hagenbuch
Counsel to Eli Stein and Jeremy Gottlieb