

PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS

Members of the public may submit written comments on draft advisory opinions.

DRAFT B of ADVISORY OPINION 2012-08 is now available for comment. It was requested by Eric M. Zolt, on behalf of Repledge, and is scheduled to be considered by the Commission at its public meeting on April 12, 2012.. The meeting will begin at 10:00 a.m. and will be held in the 9th Floor Hearing Room at the Federal Election Commission, 999 E Street, NW, Washington, DC. Individuals who plan to attend the public meeting and who require special assistance, such as sign language interpretation or other reasonable accommodations, should contact the Commission Secretary, at (202) 694-1040, at least 72 hours prior to the meeting date.

If you wish to comment on DRAFT B of ADVISORY OPINION 2012-08, please note the following requirements:

- 1) Comments must be in writing, and they must be both legible and complete.
- 2) Comments must be submitted to the Office of the Commission Secretary by hand delivery or fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel by hand delivery or fax ((202) 219-3923).
- 3) Comments must be received by 5 p.m. (Eastern Time) on April 11, 2012.
- 4) The Commission will generally not accept comments received after the deadline. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.
- 5) All timely received comments will be made available to the public at the Commission's Public Records Office and will be posted on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

REQUESTOR APPEARANCES BEFORE THE COMMISSION

The Commission has implemented a pilot program to allow advisory opinion requestors, or their counsel, to appear before the Commission to answer questions at the open meeting at which the Commission considers the draft advisory opinion. This program took effect on July 7, 2009.

Under the program:

- 1) A requestor has an automatic right to appear before the Commission if any public draft of the advisory opinion is made available to the requestor or requestor's counsel less than one week before the public meeting at which the advisory opinion request will be considered. Under these circumstances, no advance written notice of intent to appear is required. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2).
- 2) A requestor must provide written notice of intent to appear before the Commission if all public drafts of the advisory opinion are made available to requestor or requestor's counsel at least one week before the public meeting at which the Commission will consider the advisory opinion request. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2). The notice of intent to appear must be received by the Office of the Commission Secretary by hand delivery, email (Secretary@fec.gov), or fax ((202) 208-3333), no later than 48 hours before the scheduled public meeting. Requestors are responsible for ensuring that the Office of the Commission Secretary receives timely notice.
- 3) Requestors or their counsel unable to appear physically at a public meeting may participate by telephone, subject to the Commission's technical capabilities.
- 4) Requestors or their counsel who appear before the Commission may do so only for the limited purpose of addressing questions raised by the Commission at the public meeting. Their appearance does not guarantee that any questions will be asked.

FOR FURTHER INFORMATION

Press inquiries: Judith Ingram
Press Officer
(202) 694-1220

Commission Secretary: Shawn Woodhead Werth
(202) 694-1040

Comment Submission Procedure: Kevin Deeley
Acting Associate General Counsel
(202) 694-1650

Other inquiries:

To obtain copies of documents related to Advisory Opinion 2012-08, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at <http://saos.nictusa.com/saos/searchao>.

ADDRESSES

Office of the Commission Secretary
Federal Election Commission
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Washington, DC 20463

Office of General Counsel
ATTN: Kevin Deeley, Esq.
Federal Election Commission
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April 10, 2012

MEMORANDUM

TO: The Commission

FROM: Anthony Herman *FJH*
General Counsel

Kevin Deeley *KD*
Acting Associate General Counsel

Amy Rothstein *AR*
Assistant General Counsel

Theodore Lutz *TL*
Attorney

Subject: AO 2012-08 (Repledge) (Draft B)

AGENDA ITEM

For Meeting of 4-12-12

SUBMITTED LATE

Attached is a proposed draft of the subject advisory opinion. We have been asked to have this draft placed on the Open Session agenda for April 12, 2012.

Attachment

1 ADVISORY OPINION 2012-08

2 Mr. Eric Zolt
3 546 South Rimpau Boulevard
4 Los Angeles, CA 90020
5

DRAFT B

6 Dear Mr. Zolt:

7 We are responding to your advisory opinion request on behalf of Repledge,
8 concerning the application of the Federal Election Campaign Act of 1971, as amended
9 (the "Act"), and Commission regulations to Repledge's proposal. Repledge asks whether
10 (1) a pledge to make a contribution will be a contribution at the time of the pledge;
11 (2) Repledge will receive a contribution when it receives a fee for services rendered;
12 (3) Repledge will have the major purpose of influencing a Federal election (if the
13 Commission answers Questions 1 and 2 affirmatively); (4) a payment to Repledge will be
14 a contribution; (5) Repledge will make corporate contributions; (6) Repledge will
15 facilitate the making of contributions; (7) Repledge will act as a conduit or intermediary;
16 and (8) Repledge must file any reports with the Commission.

17 The Commission concludes that the Act and Commission regulations would not
18 permit Repledge to conduct the proposed activities described in its request because the
19 proposed activities would cause Repledge to violate the prohibition on a corporation
20 facilitating the making of contributions to candidates or political committees.

21 ***Background***

22 The facts presented in this advisory opinion are based on your letter received on
23 March 2, 2012.

24 Repledge is a corporation that was founded by Mr. Zolt and two of his colleagues
25 to enable individuals to remove equally pledged funds from political campaigns and

1 redirect those funds to charitable purposes.¹ Repledge intends to establish a Web-based
2 platform that allows individuals to remove pledged funds in equal amounts from
3 opposing candidates for Federal office and to donate their funds, instead, to organizations
4 exempt from taxation under section 501(c)(3) of the Internal Revenue Code ("charities").
5 Repledge's Web-based platform will serve as "a virtual meeting place where supporters
6 of opposing Federal candidates can agree to refrain from making contributions to the
7 candidates' principal campaign committees and instead direct their funds to charities."
8 The platform will allow individuals who register with Repledge ("members") to pledge
9 money to a Federal candidate and at the same time designate the charity that will receive
10 funds if the pledge is matched by supporters of the opposing candidate. Repledge does
11 not exercise any direction or control over any member's choice as to which candidate
12 receives a pledge.

13 Repledge will provide its service through "Fund Drives." Fund Drives will be
14 open to all members and will generally last from seven to 14 days. During a Fund Drive,
15 members will select their preferred candidate and charity. Members will make pledges
16 by entering their credit card information through a payment processor, such as PayPal or
17 WePay, and choosing the amount of their pledges. The payment processor will pre-
18 approve the amounts pledged for the remaining period of the Fund Drive, but the
19 amounts will not be charged to members' credit card accounts and the ultimate recipients
20 of the pledged amounts will not be determined until the end of the Fund Drive.

¹ The founders of Repledge have not yet decided whether Repledge will operate as a for-profit or non-profit corporation.

1 At the end of the Fund Drive, the payment processor will charge the members'
2 credit cards. Repledge will inform the payment processor how to allocate the funds
3 among the listed charities and the Federal candidate, based on the percentage of the funds
4 that were matched by supporters of the opposing candidate and the percentage of funds
5 that were unmatched. After deducting its processing fee, the payment processor will set
6 up unique accounts for all potential recipients (the listed charities, the Federal candidate,
7 and Repledge) and will notify the recipients that they may withdraw the funds from their
8 respective accounts. The funds transferred as political contributions or charitable
9 donations will not be deposited in, or pass through, any Repledge account. Repledge will
10 disclose and inform its members of all transaction and processing fees and the amounts
11 distributed to the respective charities and political committees.

12 Repledge states that it will charge a commercially reasonable percentage-based
13 transaction fee that will cover operating costs plus a reasonable profit. Repledge
14 currently estimates the fee at one percent of the amounts pledged. Repledge also states
15 that the recipients of funds will receive their funds after the processing costs of credit
16 card transactions have been deducted by the payment processor.

17 Members may not pledge funds in excess of any contribution limits applicable to
18 contributions from individuals to candidates for Federal office, and Repledge will inform
19 members of the contribution amount limits established by 2 U.S.C. 441a. Repledge will
20 require each member to provide the member's name, mailing address, name of employer,

1 and occupation, and Repledge will provide recipients of contributions with this
2 information.² Finally, Repledge will require each member to confirm prior to donating
3 that he or she may lawfully make a contribution.³

4 ***Questions Presented***

- 5 *1. Would a monetary pledge from a member to a Federal political committee and*
6 *charity, which is pre-approved by a third-party payment processor, charged to a*
7 *member's credit card, and which eventually results in a contribution to a Federal*
8 *committee or a donation to charity (depending on whether the pledge is matched*
9 *by a supporter of an opposing candidate or party), constitute a "contribution"*
10 *under 2 U.S.C. 431(8) at the time of the pledge?*
- 11 *a. Would such a pledge constitute a "contribution" under 2 U.S.C. 431(8) at*
12 *the time the pledge is made through Repledge, subject to the 10-day*
13 *forwarding requirement established by 11 CFR 102.8(a)?*

² 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.

³ 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 funds 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.

- 1 *b. Would any portion of such a pledge that results in a donation to a charity*
2 *(because all or part of the pledge is matched by a supporter of an*
3 *opposing candidate or party) nevertheless constitute a "contribution" for*
4 *the purposes of the contribution limits established by 2 U.S.C. 441a(a)?*
- 5 2. *Would Repledge's receipt of a small percentage-based transaction fee constitute*
6 *the receipt of a "contribution" by Repledge under 2 U.S.C. 431(8)?*
- 7 3. *If a monetary pledge from a Repledge member to a Federal committee or*
8 *Repledge's receipt of a small percentage-based transaction fee would constitute a*
9 *"contribution" under 2 U.S.C. 431(8), is Repledge's "major purpose"*
10 *influencing Federal candidate elections such that it would be required to organize*
11 *and register as a "political committee" under 2 U.S.C. 431(4) and 433 when and*
12 *if it exceeds the \$1,000 contribution threshold established by 2 U.S.C. 431(4)?*
- 13 4. *Would payment of a small percentage-based transaction fee to Repledge*
14 *constitute a contribution to the recipient political committee?*
- 15 5. *Would a Repledge member's contributions to political committees result in*
16 *impermissible corporate contributions from Repledge to those political*
17 *committees under 2 U.S.C. 441b?*
- 18 6. *Would a Repledge member's contributions to political committees cause Repledge*
19 *to violate the prohibition on a corporation "facilitating the making of*
20 *contributions to candidates or political committees" in 11 CFR 114.2(f)(1)?*
- 21 7. *Would a Repledge member's contributions to Federal committees cause Repledge*
22 *to violate the prohibition on a corporation "acting as a conduit for contributions*
23 *earmarked to candidates" in 11 CFR 110.6(b)(2)(ii)?*

- 1 8. *Would a Repledge member's contributions to Federal committees subject*
2 *Repledge to any reporting requirements of the Act or Commission regulations,*
3 *including but not limited to the "conduit and intermediary" reporting*
4 *requirements established by 11 CFR 110.6(c)?*

5 ***Legal Analysis and Conclusions***

- 6 1. *Would a monetary pledge from a member to a Federal political committee and*
7 *charity, which 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*
10 *by a supporter of an opposing candidate or party), constitute a "contribution"*
11 *under 2 U.S.C. 431(8) at the time of the pledge?*

- 12 a. *Would such a pledge constitute a "contribution" under 2 U.S.C. 431(8) at*
13 *the time the pledge is made through Repledge, subject to the 10-day*
14 *forwarding requirement established by 11 CFR 102.8(a)?*

- 15 b. *Would any portion of such a pledge that results in a donation to a charity*
16 *(because all or part of the pledge is matched by a supporter of an*
17 *opposing candidate or party) nevertheless constitute a "contribution" for*
18 *the purposes of the contribution limits established by 2 U.S.C. 441a(a)?*

19 No, a monetary pledge from a member to a Federal political committee and
20 charity as described in the request would not constitute a "contribution" under
21 2 U.S.C. 431(8) at the time of the pledge and would not be subject to the 10-day
22 forwarding requirement established by 11 CFR 102.8(a). Any portion of such a pledge

1 that results in a donation to a charity would not constitute a “contribution” for purposes
2 of the contribution limits established by 2 U.S.C. 441a(a).

3 Under the Act and Commission regulations, a “contribution” includes “any gift,
4 subscription, loan, advance, or deposit of money or anything of value made by any
5 person for the purpose of influencing any election for Federal office.”

6 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a). “Anything of value” includes all in-kind
7 contributions, including the provision of goods or services without charge or at a charge
8 that is less than the usual and normal charge. 11 CFR 100.52(d)(1). The term “usual and
9 normal charge” means the price of goods in the market from which they ordinarily would
10 have been purchased at the time of the contribution, or the commercially reasonable rate
11 prevailing at the time that the services were rendered. *See* 11 CFR 100.52(d)(2); *see also*
12 11 CFR 100.51(a) (defining contribution as including “other things of value described in
13 this subpart”).

14 The Commission has previously distinguished between pledges and contributions.
15 In Advisory Opinion 2010-23 (CTIA – The Wireless Association), for example, the
16 Commission considered a proposal in which cell phone users would initiate contributions
17 to political committees by text message. The Commission stated that “a contribution
18 would be made at the time that a wireless subscriber pays a bill that includes a charge
19 resulting from a Code-initiated pledge to contribute – not at the time a pledge is made.”
20 *See also* Advisory Opinion 1990-14 (AT&T) (“When a person makes a 900 line phone
21 call, he or she has not yet made a contribution. The caller has merely pledged to make a
22 contribution[.]”).

1 Additionally, in Advisory Opinion 1985-29 (Breux), the Commission determined
2 that an unsecured promise in a promissory note to pay interest to a candidate committee
3 was not a contribution. “[A]ny actual payment of interest,” however, the Commission
4 found, would be a contribution. Advisory Opinion 1985-29 (Breux); *see also* Advisory
5 Opinion 1991-31 (Goss) (charitable donations made by an individual in the candidate’s
6 name “in lieu of contributions to the campaign” are not “something of value” to the
7 candidate and thus not contributions).

8 Similarly, here, a member will not provide “something of value” to a political
9 committee upon pledging funds to a Fund Drive. Repledge and its members may well
10 not know until the Fund Drive is over whether any of the pledged funds will result in a
11 political contribution. Indeed, if Repledge achieves its goals, all of the money pledged
12 during a Fund Drive will, after fees, be donated to charity.

13 The Commission’s conclusion that a pledge under Repledge’s proposal is not a
14 contribution is consistent with congressional intent and the history of the Act. Prior to
15 January 8, 1980, the Act stated that the term “contribution” included “a written contract,
16 promise, or agreement, whether or not legally enforceable.” 2 U.S.C. 431(e)(2) (1976);
17 *see also* 11 CFR 100.4(a)(3) (1977). In the 1979 amendments to the Act, however,
18 Congress removed that language from the definition of “contribution.” *See generally*
19 Amendments to Federal Election Campaign Act of 1971, Pub. L. No. 96-187,
20 93 Stat. 1339 (1979). In Advisory Opinion 1985-29 (Breux), the Commission explained
21 that “[t]he effect of such a repeal is that a mere promise to make a contribution is not by
22 itself subject to the Act as a contribution.”

1 Because a pledge under Repledge's proposal does not constitute a contribution
2 under 2 U.S.C. 431(8), it is not subject to the requirement at 11 CFR 102.8 that
3 contributions received for an authorized committee be forwarded within ten days to the
4 treasurer of the authorized committee.⁴ For the same reason, any portion of a pledge that
5 results in a donation to charity does not count against the member's contribution limits
6 under 2 U.S.C. 441a(a).

7 2. *Would Repledge's receipt of a small percentage-based transaction fee constitute*
8 *the receipt of a "contribution" by Repledge under 2 U.S.C. 431(8)?*

9 No, Repledge's receipt of a small percentage-based transaction fee will not
10 constitute the receipt of a contribution by Repledge under 2 U.S.C. 431(8).

11 As discussed in the response to Question 1, above, under the Act and Commission
12 regulations, a "contribution" includes "any gift, subscription, loan, advance, or deposit of
13 money or anything of value made by any person for the purpose of influencing any
14 election for Federal office." 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a).

15 The facts presented in the request indicate that Repledge will be organized and
16 operated solely to provide services to its members. The fees that Repledge proposes to
17 charge its members are in exchange for services rendered and are intended to be
18 commercially reasonable, to cover its operating costs, and to generate a reasonable profit.
19 Repledge will charge the same fees regardless of whether its members' pledges
20 ultimately result in contributions to a Federal candidate or donations to charity.

21 Moreover, Repledge does not propose to advocate the election or defeat of any Federal

⁴ Repledge states that, once a Fund Drive is complete and its members' contributions are made, it will forward contributors' names, addresses, employers, and occupations to recipient political committees. This is consistent with the Act, Commission regulations, and prior advisory opinions. See 2 U.S.C. 432(b), (c); 11 CFR 102.8; Advisory Opinion 2010-23 (CTIA).

1 candidate or support or oppose any political party. Nor is Repledge owned or controlled
2 by any Federal candidate.

3 The funds that Repledge proposes to charge its members are materially
4 indistinguishable from the fees for services proposed by the requestors in a number of
5 recent advisory opinions. *See, e.g.,* Advisory Opinion 2011-19 (GivingSphere); Advisory
6 Opinion 2011-06 (Democracy Engine); Advisory Opinion 2006-08 (Brooks). As in those
7 advisory opinions, the Commission does not consider the fees that Repledge proposes to
8 charge its members to be contributions to Repledge under 2 U.S.C. 431(8).

9 *3. If a monetary pledge from a Repledge member to a Federal committee or*
10 *Repledge's receipt of a small percentage-based transaction fee would constitute a*
11 *"contribution" under 2 U.S.C. 431(8), is Repledge's "major purpose"*
12 *influencing Federal candidate elections such that it would be required to organize*
13 *and register as a "political committee" under 2 U.S.C. 431(4) and 433 when and*
14 *if it exceeded the \$1,000 contribution threshold established by 2 U.S.C. 431(4)?*

15 Because neither a monetary pledge from a Repledge member to a Federal
16 committee nor Repledge's receipt of a percentage-based transaction fee is a contribution,
17 this question is moot.

18 *4. Would payment of a small percentage-based transaction fee to Repledge*
19 *constitute a contribution to the recipient political committee?*

20 No, the payment of a small percentage-based transaction fee to Repledge will not
21 constitute a contribution to the recipient political committee, because the fee will not
22 relieve recipient political committees of a financial obligation that they otherwise would
23 have had to pay themselves.

1 As discussed in the response to Question 1, above, “anything of value” includes
2 all in-kind contributions, including the provision of goods or services without charge or at
3 a charge that is less than the usual and normal charge. 11 CFR 100.52(d)(1). The term
4 “usual and normal charge” means the price of goods in the market from which they
5 ordinarily would have been purchased at the time of the contribution, or the commercially
6 reasonable rate prevailing at the time that the services were rendered. *See*
7 11 CFR 100.52(d)(2).

8 The Commission has recently reaffirmed the distinction between companies that
9 provide services to political committees and those that provide services to contributors.
10 *See* Advisory Opinion 2011-19 (GivingSphere); Advisory Opinion 2011-06 (Democracy
11 Engine); *see also* Advisory Opinion 2007-04 (Atlatl); Advisory Opinion 2006-08
12 (Brooks).

13 Like the requestors in Advisory Opinion 2011-19 (GivingSphere), Advisory
14 Opinion 2011-06 (Democracy Engine), and Advisory Opinion 2006-08 (Brooks),
15 Repledge will provide its services “at the request and for the benefit of [its members], not
16 of the recipient political committees,” and thus will not “relieve the recipient political
17 committees of a financial burden that they would otherwise have had to pay for
18 themselves.” Advisory Opinion 2007-04 (Atlatl). Repledge members will access its
19 services through the Repledge website, and Repledge does not propose to enter into
20 contractual relationships with any of the recipient political committees. Further, as part
21 of its mission to redirect political contributions to charities, Repledge will process
22 donations to charity in addition to processing political contributions. *See* Advisory
23 Opinion 2007-04 (Atlatl). For its services, Repledge will charge its members a fee set to

1 cover costs and provide a profit. Under these facts, Repledge's services will be provided
2 to its members and not to the recipient political committees, and the members' fees will
3 not relieve recipient political committees of a financial burden they would otherwise have
4 to pay.

5 Accordingly, the payment of a small percentage-based transaction fee to Repledge
6 will not constitute a contribution to the recipient political committee.

7 *5. Would a Repledge member's contributions to political committees result in*
8 *impermissible corporate contributions from Repledge to those political*
9 *committees under 2 U.S.C. 441b?*

10 No, a Repledge member's contributions to political committees would not result
11 in impermissible corporate contributions from Repledge to those political committees
12 under 2 U.S.C. 441b.

13 As discussed in the answer to Question 4, above, there is a distinction under the
14 Act between companies that provide services to political committees and those that
15 provide services to contributors. *See* Advisory Opinion 2011-19 (GivingSphere);
16 Advisory Opinion 2011-06 (Democracy Engine); *see also* Advisory Opinion 2007-04
17 (Atlant); Advisory Opinion 2006-08 (Brooks). Companies that process contributions to
18 political committees as a service to the political committees must be compensated for
19 those services by the political committees to avoid making in-kind contributions.
20 Companies that process contributions as a service to the contributors, however, do not
21 need to be compensated for these services by the recipient political committees because
22 the companies are not providing any services or anything of value to the recipient
23 political committees. *See* Advisory Opinion 2011-19 (GivingSphere); Advisory Opinion

2011-06 (Democracy Engine); Advisory Opinion 2006-08 (Brooks); *see also* Advisory Opinion 2010-21 (ReCellular) (concluding that a company is not required to charge a political committee for costs already paid by the company's customers, as long as the company "does not provide any services without charge, or at less than the usual and normal charge").

Because the Commission has determined that Repledge will provide services at the request and for the benefit of its members, and not recipient political committees, Repledge's proposal would not result in impermissible contributions by Repledge to any political committee.

6. *Would a Repledge member's contributions to political committees cause Repledge to violate the prohibition on a corporation "facilitating the making of contributions to candidates or political committees" in 11 CFR 114.2(f)(1)?*

Yes, a Repledge member's contributions to political committees would cause Repledge to violate the prohibition on a corporation "facilitating the making of contributions to candidates or political committees" at 11 CFR 114.2(f).

Commission regulations prohibit corporations and labor organizations "from facilitating the making of contributions to candidates or political committees." 11 CFR 114.2(f)(1). Commission regulations define facilitation as "using corporate or labor organization resources or facilities to engage in fundraising activities in connection with any federal election." 11 CFR 114.2(f)(1); *see also* Explanation and Justification for Final Rules on Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates, 60 FR 64260, 64264 (Dec. 14, 1995) (facilitation means using corporate or labor organization resources "to engage in fundraising for

1 candidates”); 11 CFR 114.2(f)(2) (facilitation includes providing food for a political
2 committee’s fundraiser absent advance payment at fair market value). In past Advisory
3 Opinions, the Commission has concluded certain services that assist a contributor in
4 making a contribution do not run afoul of the prohibition on corporations facilitating the
5 making of contributions because certain electronic transactional services are so essential
6 to the flow of modern commerce that they are akin to “delivery services, bill-paying
7 services, or check writing services.” Advisory Opinion 2011-06 (Democracy Engine)
8 (citing Advisory Opinion 2006-08 (Brooks)). Here, Repledge states in its request that it
9 does not provide payment processing services to its subscribers.

10 Repledge simultaneously contends that it does not propose to engage in
11 fundraising for candidates. Nonetheless, with rare exceptions, the most likely result of a
12 Repledge Fund Drive will be both contributions to candidates and donations to charity.
13 Repledge’s Web-based platform will allow members to pledge money to a Federal
14 candidate and at the same time designate the charity that will receive funds if the pledge
15 is matched by supporters of the opposing candidate. During a Fund Drive, members
16 support their preferred Federal candidates by pledging money to that candidate, and at the
17 conclusion of a Fund Drive the candidate that receives the most pledges will be the
18 recipient of a contribution.

19 Although Repledge’s business model contemplates diverting funds away from
20 political committees and to charitable organizations, in essence it serves as an elaborate
21 fundraising device.⁵ While this fundraising model may be innovative, it is not the type of

⁵ While 11 CFR 114.2(f)(1) provides that firms that provide goods or services as commercial vendors under 11 CFR part 116 do not facilitate the making of contributions, that provision does not apply here. 11 CFR part 116 requires a firm to provide “goods or services to a candidate or political committee” to qualify as a

1 service the Commission has previously permitted on the theory that the permissible
2 services were akin to “delivery services, bill-paying services, or check writing services.”
3 Advisory Opinion 2011-06 (Democracy Engine) (citing Advisory Opinion 2006-08
4 (Brooks)). As explained in response to Question 7, Repledge has represented that none
5 of the contributions raised through its website will be deposited in or pass through its
6 own accounts. Indeed, the primary reason that Repledge’s proposal does not violate the
7 prohibition on a corporation acting as a conduit for earmarked contributions to candidates
8 at 11 CFR 110.6(b)(2)(ii) is because its customers will contract with a separate payment
9 processor that will be responsible for processing and transmitting the contributions to
10 candidates and charities.

11 Accordingly, under the model described in your request, a Repledge member’s
12 contributions to political committees would cause Repledge to violate the prohibition on
13 a corporation facilitating the making of contributions under 11 CFR 114.2(f)(1).

14 7. *Would a Repledge member’s contributions to Federal committees cause Repledge*
15 *to violate the prohibition on a corporation “acting as a conduit for contributions*
16 *earmarked to candidates” in 11 CFR 110.6(b)(2)(ii)?*

17 No, a Repledge member’s contributions to Federal committees would not cause
18 Repledge to violate the prohibition on a corporation “acting as a conduit for contributions
19 earmarked to candidates” at 11 CFR 110.6(b)(2)(ii).

commercial vendor. Repledge, however, will not provide any services to political committees. It will, instead, provide a fundraising platform to its customers. Thus, Repledge does not qualify as a commercial vendor in this context. For similar reasons, Advisory Opinion 2007-04 (Atlas) and Advisory Opinion 2004-19 (DollarVote) are distinguishable from Repledge’s proposal. In those advisory opinions, the Commission addressed 11 CFR 114.2(f) and the commercial vendor exception because those proposals involved the requestor entering into contractual relationships with candidates and candidate committees. See also Advisory Opinion 2003-16 (Providian) (concluding that a bank would not violate 11 CFR 114.2(f) because of the nature of its relationship with a national party committee).

1 The Act and Commission regulations provide for the earmarking of contributions
2 “made by a person, either directly or indirectly, on behalf of a particular candidate.”

3 2 U.S.C. 441a(a)(8); 11 CFR 110.6. An earmarked contribution is one with a
4 “designation, instruction, or encumbrance, whether direct or indirect, express or implied,
5 oral or written, which results in all or any part of the contribution . . . being made to . . . a
6 clearly identified candidate or a candidate’s authorized committee.” 11 CFR 110.6.

7 “[A]ny person who receives and forwards an earmarked contribution to a candidate or a
8 candidate’s authorized committee” is a conduit or intermediary. 11 CFR 110.6(b)(2).

9 Any person prohibited from making contributions, such as a corporation, or expenditures
10 may not act as a conduit or intermediary. 11 CFR 110.6(b)(2)(ii).

11 The Commission has previously recognized that a key element of being a conduit
12 or intermediary is receiving and forwarding earmarked contributions to a candidate. *See*
13 Advisory Opinion 2006-30 (ActBlue) (a nonconnected committee is a conduit when it
14 “solicit[s] and receive[s]” earmarked contributions and subsequently transmits a check to
15 candidates “for the total amount of the earmarked contributions that it has received for
16 that candidate”); *see also* Advisory Opinion 2004-19 (DollarVote) (a corporation may not
17 “collect and forward earmarked contributions”). A person receives a contribution on “the
18 date such person obtains possession of the contribution.” 11 CFR 102.8(a). Under
19 Repledge’s business model, it will never take possession of any contributions because, as
20 Repledge states in its request, “[t]he funds transferred as political contributions or
21 charitable donations will not be deposited in, or pass through, any Repledge account.”
22 Instead, once a Fund Drive is complete, the payment processor will charge members’
23 credit cards for the amount of their pledges, deduct its transaction fees, and transfer the

1 funds to unique accounts that it has established for each political committee, charity, and
2 Repledge, respectively.

3 The fact that political contributions will not be deposited in any Repledge account
4 is not dispositive, however, because the payment processor may actually be acting as an
5 agent of the enterprise. Cf. 11 CFR 300.2(b) (an agent has “express or implied” authority
6 to “solicit, direct, or receive any contribution, donation, or transfer of funds”). You state
7 in your request that members will pledge their funds using a payment processing
8 company like PayPal or WePay. So long as these payment processors are providing
9 services to the members directly in order “to assist them in making contributions, similar
10 to corporations that provide delivery services, bill paying services, or check writing
11 services,” Advisory Opinion 2006-08 (Brooks), they will not be collecting and
12 transmitting contributions on behalf of Repledge and Repledge will not be a conduit or
13 intermediary under 11 CFR 110.6(b)(2).

14 8. *Would a Repledge member’s contributions to Federal committees subject*
15 *Repledge to any reporting requirements of the Act or Commission regulations,*
16 *including but not limited to the “conduit and intermediary” reporting*
17 *requirements established by 11 CFR 110.6(c)?*

18 No, a Repledge member’s contributions to Federal committees will not subject
19 Repledge to any reporting requirements under the Act or Commission regulations,
20 including but not limited to the “conduit and intermediary” reporting requirements
21 established by 11 CFR 100.6(c).

22 The Act and Commission regulations require certain persons to file reports with
23 the Commission. For example, a “treasurer of a political committee shall file reports of

1 receipts and disbursements.” *See* 2 U.S.C. 434(a)(1); 11 CFR 104.1. Persons who spend
2 above thresholds amounts on independent expenditures or electioneering communications
3 must file reports with the Commission. *See* 2 U.S.C. 434(c), (f); 11 CFR 104.20, 109.10.
4 Also, persons acting as conduits or intermediaries for earmarked contributions to
5 candidates and their committees must file reports with the Commission.
6 11 CFR 110.6(c).

7 Repledge is not a political committee, and therefore is not subject to the reporting
8 requirements for political committees. *See* 2 U.S.C. 434(a)(1); 11 CFR 104.1. Repledge
9 makes no representations indicating that it will engage in express advocacy. Thus, it will
10 not be subject to the reporting requirements for persons making independent
11 expenditures. *See* 2 U.S.C. 431(17) (“The term ‘independent expenditure’ means an
12 expenditure by a person . . . expressly advocating the election or defeat of a clearly
13 identified candidate”); *see also* 11 CFR 100.16. Moreover, given that all relevant
14 communications will take place on the Internet, Repledge’s proposal will not implicate
15 the reporting requirements for persons making electioneering communications. *See*
16 2 U.S.C. 434(f)(3)(A)(i) (“The term ‘electioneering communications’ means any
17 broadcast, cable, or satellite communications”); *see also* 11 CFR 100.29. Finally, as
18 explained in the response to Question 7, above, Repledge will not act as a conduit or
19 intermediary under 11 CFR 110.6. Thus, Repledge’s proposal would not subject it to any
20 reporting requirements under the Act or Commission regulations.

21 This response constitutes an advisory opinion concerning the application of the
22 Act and Commission regulations to the specific transaction or activity set forth in your
23 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any

1 of the facts or assumptions presented, and such facts or assumptions are material to a
2 conclusion presented in this advisory opinion, then the requestor may not rely on that
3 conclusion as support for its proposed activity. Any person involved in any specific
4 transaction or activity which is indistinguishable in all its material aspects from the
5 transaction or activity with respect to which this advisory opinion is rendered may rely on
6 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
7 conclusions in this advisory opinion may be affected by subsequent developments in the
8 law, including, but not limited to, statutes, regulations, advisory opinions, and case law.
9 The cited advisory opinions are available on the Commission's website, www.fec.gov, or
10 directly from the Commission's Advisory Opinion searchable database at
11 <http://www.fec.gov/searchao>.

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On behalf of the Commission,

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Caroline C. Hunter
Chair

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