



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Commission Secretary's Office 

DATE: November 20, 2015

**SUBJECT: Comments on Draft AO 2015-11
(FYP, LLC)**

Attached are late submitted comments received from Ezra W. Reese, Esq. and Tyler J. Hagenbuch, Esq. on behalf of the requestor. This matter was on the November 10 - 17, 2015 Open Meeting Agenda.

Attachment

November 19, 2015

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BY ELECTRONIC MAIL

Office of the Commission Secretary
Attn: Shawn Woodhead Werth
Secretary and Clerk of the Commission
Federal Election Commission
999 E. Street NW
Washington, D.C. 20463

Re: Comments on Draft Advisory Opinions for Advisory Opinion Request 2015-11

Dear Ms. Werth:

We submit these comments on behalf of FYP, LLC ("FYP") in response to Draft Advisory Opinions A and B in the above-referenced matter (the "Draft Advisory Opinions"). At the November 17, 2015, continuation of the November 10, 2015, open meeting of the Federal Election Commission, ("FEC" or "the Commission"), the Commission failed to adopt Draft A by a vote of 2-4, and failed to adopt Draft B by a vote of 3-3.

Despite these votes, we believe there is consensus among a majority of Commissioners regarding several aspects of FYP's proposal for its MyChange app. The areas of consensus concern several central aspects FYP's business plan and MyChange's functionality. If a majority of Commissioners do, in fact, agree on the permissibility of these functions, then we believe FYP is entitled to formal acknowledgement of that agreement. 52 U.S.C. § 30108; 11 C.F.R. § 112.4(a). Moreover, it is important that during a time when the Commission is sometimes divided by real differences, that it demonstrates that it can continue to find and build consensus where there is agreement. This is particularly important when the Commission is presented with novel proposals: as "[t]echnological innovation is changing politics and campaign finance,"¹ political committees, vendors and contributors all benefit when the FEC states with a clear voice that an emerging technology complies with campaign finance laws.

In this matter, the Draft Advisory Opinions agree that much of MyChange's functionality in FYP's proposal is permissible. For example, the Draft Advisory Opinions both agree that FYP's proposed fee structure is calculated to meet the standard for the "normal and usual charge" under Commission precedent; that the disclaimer language and user notification functions of the MyChange app comply with Commission requirements; that FYP's proposed use of a merchant

¹ Chair Ann M. Ravel, *Message from Chair Ann M. Ravel*, FEC RECORD: COMMISSION (Jan. 20, 2015), <http://www.fec.gov/pages/fecrecord/2015/january/messagefromchairRavel.shtml>.

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account and contribution tracking systems and reconciliation practices for that account are sufficient to ensure the funds transferred to recipient committees are users' permissible funds; and that, as a general matter, FYP is allowed to apply a standard set of business criteria that includes an ideological criterion when determining which political committees it will allow users to identify as recipients of the users' funds.

In sum, the Draft Advisory Opinions agree as to the substantial majority of questions on which FYP sought the Commission's opinion. The difference between the drafts is how the application of business criteria to screen out certain recipients affects the treatment of users' payments of fees. FYP is continuing to assess what, if any, adjustments to its business plan may be necessary as a result of the lack of consensus on that particular question. **However, as a matter of law, policy, and business, lack of consensus on this particular issue must not prevent the Commission from recognizing that a majority of Commissioners approve the MyChange business plan.**

To that end, attached to this comment is a draft statement that demonstrates the broad agreement between the Draft Advisory Opinions. The statement is based largely on the overlapping language between the Commission's drafts; language that is not included in both Draft Advisory Opinions and is original to the attached draft statement is identified by red, underlined text. We believe this presentation underscores the fact that there appears to be majority consensus on FYP's proposal.

Thank you for your consideration.

Very truly yours,

/s/ Ezra W. Reese

Ezra W. Reese
Tyler J. Hagenbuch
Counsel to FYP, LLC

enclosure

Draft Statement Reflecting Areas of Agreement in Drafts A and Draft B

Prepared by Counsel to FYP

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 is permissible; however, the Commission could not approve a response by the required four affirmative votes regarding the proper treatment of fees paid for processing contributions to political committees.

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 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

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)."

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 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.*

Recipient Committees

The requestor will allow users to designate user contributions to political committees and organizations that meet the requestor’s eligibility requirements, including committees that are in good standing with the Commission and committees that share users’ ideology and values. The requestor states that the only business relationships it will have with the political committees that receive contributions through MyChange will be entering into terms of service with them “for the limited purpose of facilitating transfers of users’ funds to the committees’ accounts. AOR 002, AOR 010. 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.

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 “will be the same regardless of whether the recipient of the funds is a political committee or [another] nonprofit organization.” AOR010.

Legal Analysis and Conclusion

Yes, as discussed below, the requestor’s proposal complies with federal campaign finance law.

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

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).

Here, the requestor proposes to process contributions to candidates' authorized committees (as well as to other political committees). Because the requestor asks the Commission to treat it as a corporation for purposes of this advisory opinion, AOR009, and corporations may not make contributions, *see* 52 U.S.C. § 30118, the requestor would not be permitted to act as a "conduit" for contributions earmarked for candidates. *See* 52 U.S.C. § 30116(a); 11 C.F.R. §§ 110.6(b)(2)(ii), 114.2(b)(1). The processing and forwarding of members' contributions to federal committees through the MyChange platform would not violate the prohibition on a corporation 'acting as a conduit for contributions earmarked to candidates' in 11 C.F.R. § 110.6(b)(2)(ii).

Treatment of Fees

The Commission could not approve a response by the required four affirmative votes regarding whether the fees paid by contributors to the requestor must be included in the total amounts of the contributions made to recipient political committees.

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



Comments on Draft Advisory Opinions for Advisory Opinion Request 2015-11
Hagenbuch, Tyler J. (Perkins Coie)
11/19/2015 10:52 AM

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1 Attachment



FYP, LLC - Comments on AOR 2015-11.pdf

Dear Ms. Werth:

Attached to this email please find comments on the Draft Advisory Opinions for Advisory Opinion Request 2015-11. These comments are submitted on behalf of FYP, LLC.

Best regards,
Tyler Hagenbuch

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