

# MORVILLO ABRAMOWITZ GRAND IASON & ANELLO P.C.

ELKAN ABRAMOWITZ  
RICHARD F. ALBERT  
ROBERT J. ANELLO\*  
LAWRENCE S. BADER  
BENJAMIN S. FISCHER  
CATHERINE M. FOTI  
PAUL R. GRAND  
LAWRENCE IASON  
BRIAN A. JACOBS  
JUDITH L. MOGUL  
JODI MISHNER PEIKIN  
ROBERT M. RADICK\*  
JONATHAN S. SACK\*\*  
EDWARD M. SPIRO  
JEREMY H. TEMKIN  
RICHARD D. WEINBERG

565 FIFTH AVENUE  
NEW YORK, NEW YORK 10017  
(212) 856-9600  
FAX: (212) 856-9494

[www.maglaw.com](http://www.maglaw.com)

WRITER'S CONTACT INFORMATION  
(212) 880-9610  
[jsack@maglaw.com](mailto:jsack@maglaw.com)

COUNSEL  
JASMINE JUTEAU  
CURTIS B. LEITNER  
DANIEL F. WACHTTELL  
ROBERT G. MORVILLO  
1938-2011  
MICHAEL C. SILBERBERG  
1940-2002  
JOHN J. TIGUE, JR.  
1939-2009

\*ALSO ADMITTED IN WASHINGTON, D.C.  
\*\*ALSO ADMITTED IN CONNECTICUT

December 4, 2018

## By Email and FedEx

Federal Election Commission  
Office of General Counsel  
1050 First Street, NE  
Washington, DC 20463

Re: *Advisory Opinion Request 2018-13 (OsiaNetwork LLC)*

Dear Commissioners:

We represent OsiaNetwork LLC (“OsiaNetwork”) in connection with the above-referenced advisory opinion request (“AOR”). We write to provide OsiaNetwork’s comments on draft opinion 18-49A (the “Draft Opinion”). The Draft Opinion concluded that OsiaNetwork’s proposal would result in (i) a contribution by individuals who use OsiaNetwork’s services to support political committees, and (ii) a contribution by OsiaNetwork.

The conclusions of the Draft Opinion are mistaken for several reasons. As to the first issue, OsiaNetwork’s proposal is authorized by the governing statute and applicable regulation, 52 U.S.C. § 30101(8)(B)(i) (“Section (8)(B)(i)”) and 11 C.F.R. § 100.94 (“Section 100.94”), and the Draft Opinion is wrong to confine the voluntary internet activities exemption to activities that it narrowly defines as “communicative” or “expressive.” This interpretation of Section 100.94 is not consistent with the text and purpose of the statute and regulation, and it would stifle the very innovation that the Commission sought to encourage by promulgating Section 100.94.

As to the second issue, the Draft Opinion rests on a mistaken understanding of OsiaNetwork’s proposal, which leads to an incorrect application of the two-part test set out in Advisory Opinion 2010-21 (the “*ReCellular* test”). In addition, the Draft Opinion relies on other advisory opinions addressing proposals that are very different from OsiaNetwork’s. Rather,

Federal Election Commission  
December 4, 2018  
Page 2

OsiaNetwork's proposal is comparable to services, held not to be contributions, which allow individuals to support their preferred committees. *See, e.g.*, Advisory Opinion 2012-09 (*Points for Politics*).

For these reasons, we urge the Commission to issue an opinion which concludes that OsiaNetwork's proposal would not result in a contribution from either OsiaNetwork or the volunteers that use its services.

### LEGAL BACKGROUND

Section 30101(8)(B)(i) of Title 52 of the United States Code defines the word contribution, as used in the Federal Elections Campaign Act (the "Act"), to exclude "the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee." The Commission has made clear that "[v]olunteer services by individuals are specifically exempt from the definition of 'contribution' contained in the Act." Adv. Op. 1987-25 at 1 (*Otaola*).

Section 100.94(b) of Title 11 of the Code of Federal Regulations was promulgated under Section (8)(B)(i) of the Act "to extend explicitly the existing individual activity exceptions to the Internet," *see* Internet Communications, 71 Fed. Reg. 18,589, 603 (Apr. 12, 2006). The regulation implemented the statute by specifically exempting certain voluntary internet activities from the definition of contribution. Section 100.94(b) provides that

the term 'Internet activities' includes, *but is not limited to*: Sending or forwarding electronic messages; providing a hyperlink or other direct access to another person's Web site; blogging; creating, maintaining, or hosting a Web site; paying a nominal fee for the use of another person's Web site; and any other form of communication distributed over the Internet.

11 C.F.R. § 100.94(b) (emphasis added).

### DISCUSSION

#### I. OsiaNetwork's Proposal Does Not Result in a Contribution by Individuals

The Draft Opinion cites but does not discuss the exception expressed in Section (8)(B)(i) of the Act. Rather, the Draft Opinion bases its analysis solely on a narrow interpretation of the scope of voluntary "[i]nternet activities" under Section 100.94(b). As explained below, the Draft Opinion's conclusions are not consistent with either the authorizing statute or its implementing regulation and should not be adopted by the Commission.

Federal Election Commission  
December 4, 2018  
Page 3

A. OsiaNetwork's Proposal Does Not Give Rise to a Contribution Under the Act

Neither the text of the statute nor the Commission's precedent supports limiting the statutory exception in the manner contemplated by the Draft Opinion. Section (8)(B)(i) of the Act, as interpreted by the Commission, excludes a wide range of volunteer services from the definition of "contribution." Such volunteer services include activity related to fundraising, such as leafletting, canvassing, participating in a phone bank, and performing at fundraising concerts. *See, e.g.,* Adv. Op. 2007-22 (*Huryaz*) (concluding that "lit drops, door to door canvassing, handing out literature at transit stations, [and] telephone banking" were not contributions); Factual & Legal Analysis at 6, MURs 5987, 5995, and 6015 (Hillary Clinton For President) (Feb. 30, 2009), <http://eqs.fec.gov/eqsdocsMUR/29044230266.pdf> (concluding that a performance at a fundraising concert is not a contribution under Section(8)(B)(i)).

In Advisory Opinion 2014-20 (*Make Your Laws PAC, Inc.*), the Commission applied that interpretation to facts that are similar to those present here. In *Make Your Laws*, the Commission concluded that Section(8)(B)(i) covered a proposal in which individuals could use "their own equipment (such as a laptop)" to create "website code, logos, 'trademarks,' and 'trade dress'" for a political committee. *See* Adv. Op. 2014-20 at 2-3, (*Make Your Laws PAC, Inc.*). The Commission concluded that the individuals were not making a contribution, even though the volunteers used internet enabled computing resources to create valuable intellectual property for the committee, and signed agreements transferring all rights and ownership of the intellectual property to the committee. *Id.* at 2.

In short, consistent with the Commission's analysis in *Make Your Laws*, the Commission should conclude that an individual's participation in OsiaNetwork's proposal is exempt under Section(8)(B)(i).

B. OsiaNetwork's Proposal Comes Within the Definition of Voluntary "Internet Activities"

Turning to the regulation, the Draft Opinion seeks to limit Section 100.94(b) to internet activities that are "communicative" or "expressive," or that "directly express[] a message" or "amplify[] another person's message." *See* Draft Op. at 8-9. From this premise, the Draft Opinion concludes that an individual who accesses a committee's website to participate in OsiaNetwork's proposal is not voluntarily engaging in exempt internet activity. This interpretation of the exemption is mistaken for several reasons, and individuals should not be deemed contributors merely because they access a page on a committee's website.

First, the Draft Opinion's interpretation of Section 100.94 is inconsistent with the text and the Commission's interpretation of Section (8)(B)(i) of the Act—the statutory provision that Section 100.94 implements. 71 Fed. Reg. at 18,603. Section (8)(B)(i) has been applied to a number of activities that are neither communicative nor expressive, as explained above, and

Federal Election Commission  
December 4, 2018  
Page 4

Section 100.94 should not be interpreted in a manner that is inconsistent with its authorizing statute.<sup>1</sup>

The Draft Opinion's interpretation is also inconsistent with the text of the regulation, which expressly states that the definition of exempted internet activities "*includes, but is not limited to*" the examples that follow. 11 C.F.R. § 100.94(b) (emphasis added). Some—but not all—of the examples that follow are communicative or expressive. Section 100.94(b) includes at least two examples of voluntary activities that are neither communicative nor expressive: namely, "paying a nominal fee for the use of another person's Web site," and "maintaining . . . a Web site." *Id.* The act of paying to use a website is not inherently communicative or expressive, nor are any number of activities required to maintain a website, such as writing code, paying hosting fees, monitoring for malware or other security issues, fixing bugs, backing up data, or updating software. These activities are frequently one or more steps removed from "directly expressing a message" or "amplifying another person's message" over the internet, to use the Draft Opinion's formulation. Draft Op. at 8. Accordingly, the Draft Opinion's interpretation is too narrow, and OsiaNetwork's proposal is contemplated by the inclusive definition of "[i]nternet activity" in Section 100.94(b).<sup>2</sup>

Moreover, subsection 100.94(e) provides that Section 100.94 does not exempt "payment for the purchase or rental of an e-mail address list" or "payment for an e-mail address list that is transferred to a political committee." Neither purchasing an email address list nor paying to transfer it to a political committee is communicative or expressive. If Section 100.94 applied only to communicative or expressive activities, subsection 100.94(e) would be superfluous, which further undercuts the Draft Opinion's proposed interpretation. In any event, it is clear that the voluntary activity contemplated here is certainly not the type of activity deemed to be a contribution under subsection 100.94(e).

The administrative history of the voluntary internet exemption confirms that the exemption should not be limited in the manner proposed by the Draft Opinion. In publishing the rule, the Commission confirmed that its definition of voluntary internet activities "contains *an illustrative, rather than an exhaustive, list of the activities that are covered.*" See 71 Fed. Reg. at 18,605 (emphasis added). This choice was deliberate. As we have noted previously, see OsiaNetwork Comment at 1, Oct. 17, 2018, *available at* [https://www.fec.gov/files/legal/aos/2018-13/201813C\\_2.pdf](https://www.fec.gov/files/legal/aos/2018-13/201813C_2.pdf) (last accessed December 4, 2018), the Commission intentionally

---

<sup>1</sup> See, e.g., *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 401-02 (2008) (rejecting an interpretation of a regulation because it would be in "tension with the structure and purposes" of the authorizing statute).

<sup>2</sup> The Draft Opinion states that the activities listed in Section 100.94(b) include "any other form of communication distributed over the Internet," but the inclusion of that broader category does not change the fact that the list is illustrative, not exhaustive, nor is there any indication that the inclusion of that phrase was intended to limit the type of "Internet activities" covered by Section 100.94(b).

Federal Election Commission  
December 4, 2018  
Page 5

defined internet activities very broadly so that “future advances in technology will be encompassed within the final rules.” *See* 71 Fed. Reg. at 18,605.

The broad reach of the voluntary internet activities exemption is further supported by contemporaneous comments by Commissioners:

- Commissioner Weintraub explained that she did not “think, at the end of the day, this commission is going to do *anything that affects what somebody sitting at home, on their home computer, does.*” *See* Anne E. Kornblut, *F.E.C. to Consider Internet Politicking*, N.Y. Times, Mar. 6, 2005, <https://www.nytimes.com/2005/03/06/politics/fec-to-consider-internet-politicking.html> (last accessed December 4, 2018) (emphasis added).
- Former Commissioner Toner reaffirmed this position in comments he made shortly after the rule was finalized, saying the rule gave “*categorical and unqualified*” exemption to all activity on the internet. *See FEC Won’t Regulate Most Online Political Activity*, NBC News, Mar. 27, 2006, [http://www.nbcnews.com/id/12034995/ns/technology\\_and\\_science-tech\\_and\\_gadgets/t/fec-wont-regulate-most-online-political-activity/](http://www.nbcnews.com/id/12034995/ns/technology_and_science-tech_and_gadgets/t/fec-wont-regulate-most-online-political-activity/) (last accessed December 4, 2018) (emphasis added).

Consistent with both Commissioners’ comments, the Government Publishing Office’s short summary of the rule notes that the rule exempted “Internet activities *and communications* that qualify as individual activity.” *See Internet Communications*, Gov’t Publ’g Office, *available at* <https://www.gpo.gov/fdsys/granule/FR-2006-04-12/06-3190> (last accessed December 4, 2018) (emphasis added). If the voluntary internet activity exemption was limited to communicative activity, the words “and communications” would be redundant.

In short, the text of Section(8)(B)(i) of the Act, the text and administrative history of Section 100.94(b), contemporaneous comments from the Commissioners, and other authority all demonstrate that the voluntary internet activities exemption is not limited to activities that the Draft Opinion has defined as strictly communicative or expressive.

### C. The Draft Opinion Would Have Unintended Consequences

Lastly, to construe Section 100.94(b) as establishing a distinction between communicative and non-communicative volunteer activity would erect an artificial barrier to voluntary political activity. Imposing such a constraint would give rise to difficult line-drawing exercises for the Commission and limit its ability to adapt the law to future advances in technology, which is precisely the problem the Commission intended to avoid in broadly drafting Section 100.94. *See* 71 Fed. Reg. at 18,605.

As explained above, the line-drawing problem is most directly raised by the activities identified in Section 100.94’s illustrative list. Some of those examples are multiple steps removed from an individual’s expression of ideas over the internet, and are not meaningfully

Federal Election Commission  
December 4, 2018  
Page 6

distinguishable from OsiaNetwork's proposal. If the Commission adopted the Draft Opinion's logic, its consideration of future proposals would entail arbitrarily determining which online activities that further political communications are contributions, and which are exempted under Section 100.94(b).

Another example of such difficult line-drawing exercises is how to treat an individual who simply accesses a website. Accessing any website—including [www.fec.gov](http://www.fec.gov) or any political committee's website—involves using the processing power of the visitor's internet enabled device. Even the most basic website requires processing power to load, and a more modern website may have complex animations that, without explicit permission from the user, can use much of the processing power of the user's internet enabled devices. A committee website can also collect data about that individual, including the individual's location, how often they visit the site, what buttons they click, which pages they visit, and what information they input into forms. This data may be extremely valuable to a political committee. Different websites have different code and different graphics that all require processing power to run and render, and the Commission has not previously stated whether the use of particular code would determine whether a visitor to the site makes a contribution.

Just as the Commission has not concluded that an individual contributes to a committee when it visits a committee's website, it should not conclude that OsiaNetwork's proposal results in an individual contribution. The Commission should instead follow the mandate of Section(8)(B)(i) of the Act and Section 100.94 and treat individuals who participate in OsiaNetwork's proposal as volunteers engaging in exempted internet activity.

D. Under the Draft Opinion's Analysis, OsiaNetwork's Proposal Involves Voluntary Communicative and Expressive Acts

Even if the Draft Opinion's proposed limitation is correct—and we believe it is not—individuals who avail themselves of OsiaNetwork's platform should be considered volunteers, not contributors. As explained in the AOR, OsiaNetwork's proposal would permit an individual to volunteer by visiting a political committee's website and clicking a button through which he or she would agree to provide processing power in support of that committee. Under the Draft Opinion's analysis, such activity would be communicative and expressive, and is not materially different from some of the examples the Draft Opinion cites from the regulation—"maintaining . . . a Web site," or "paying a nominal fee for the use of another person's Web site." Draft Op. at 8 (citing 11 C.F.R. § 94(b)).

The activity contemplated by OsiaNetwork's proposal and these examples from Section 100.94(b) are all actions in furtherance of a political message. To the extent that the Draft Opinion would treat the activities listed in Section 100.94(b) as "amplifying another person's message," the same can be said of OsiaNetwork's proposal, which would allow individuals to support a preferred political committee and, through that support, amplify the committee's message. Indeed, visiting a committee's website and clicking a button to support the committee

Federal Election Commission  
December 4, 2018  
Page 7

is a more straightforward and unequivocal method of amplifying a political message than many of the examples listed in Section 100.94(b). If the Draft Opinion views these examples as communicative, so should the Commission view the individual activity contemplated by OsiaNetwork's proposal. And to the extent that a volunteer incurred any additional costs as a result of volunteering, those costs are hard to distinguish from "paying a nominal fee for the use of another person's Web site," which is explicitly exempted by Section 100.94(b).

\* \* \*

OsiaNetwork's proposal would permit millions of people—essentially, anyone with a working internet connection—to volunteer in support of candidates. Because many of these individuals may not have the financial wherewithal to support candidates with monetary contributions, OsiaNetwork's proposal would help empower ordinary citizens to have a greater voice in the electoral process. As a matter of policy, the Commission should not stifle this simple, straightforward and uncompensated expression of political support from grassroots volunteers.

## II. OsiaNetwork's Proposal Does Not Result in a Contribution by OsiaNetwork

The Draft Opinion is also mistaken in concluding that OsiaNetwork's proposal would result in a contribution from OsiaNetwork. In analyzing OsiaNetwork's proposal, the Draft Opinion applies a two-part test explained in Advisory Opinion 2010-121 (*ReCellular*): "1) whether the revenue or rebate is offered to individual customers or users in the ordinary course of business; and 2) whether the revenue is the property of the individual customer who—rather than the corporate affinity partner—controls the disposition of the revenue." See Draft Op. at 11:21-12:4; Adv. Op. 2010-21 at 5. In our view, *ReCellular* does not apply to OsiaNetwork's proposal but, even if it does, OsiaNetwork's proposal satisfies both parts of the test.

As an initial matter, it is not clear that the *ReCellular* test, which considers whether "revenue or rebate[s]" are offered to individual customers, is relevant to a proposal like OsiaNetwork's which does not involve rebates or revenue sharing. The Draft Opinion quotes language from *ReCellular* regarding proposals in which "a company transmits . . . a portion of the revenues that the company charges and collects." See Draft Opinion at 13:1-2; Adv. Op. 2010-21 at 5. But the funds that OsiaNetwork will send to political committee are not "a portion of the revenues that [OsiaNetwork] charges and collects," but are instead the result of individuals volunteering the processing power of their computers.

However, even if the *ReCellular* test applies, OsiaNetwork's proposal clearly satisfies both elements. First, as explained in the AOR, OsiaNetwork's services can and will be offered to non-political persons interested in fundraising. See AOR at 4-5, 8. In endorsing *ReCellular*'s proposal, the Commission emphasized the fact that *ReCellular* allowed its customers "to donate their sale proceeds to charities," and planned to "extend to political committees this same

Federal Election Commission  
December 4, 2018  
Page 8

program without making any changes beyond those necessary to recoup costs incurred by ReCelluar.” Adv. Op. 2012-21 at 6. The same is true of OsiaNetwork.

As to the second element, the Draft Opinion’s conclusion—that “individuals who participate in the mining pool will not receive or exercise any control over the disposition of the funds,” *see* Draft Op. at 12:20-22—is mistaken. OsiaNetwork’s disbursement of funds to political committees is entirely nondiscretionary, and it will be done solely based on which committees volunteers choose to support. OsiaNetwork’s agreements with the committees will make clear that it does not exercise discretion in determining how to allocate mining rewards, as will its volunteer-facing policies.

In fact, OsiaNetwork’s proposal is comparable to the proposal the Commission approved in Advisory Opinion 2012-09, in which Points for Politics proposed to offer a platform for individuals to convert corporate loyalty points into dollar equivalents for political contributions, but did “not itself offer an affinity-type arrangement or generate reward points for consumers.” *See* Adv. Op. 2012-09 at 5. In the same way, OsiaNetwork is not mining cryptocurrency or providing processing power to political committees, but merely offering individuals a platform through which they can engage in voluntary internet activity to support those committees.<sup>3</sup>

The Draft Opinion compares OsiaNetwork’s proposal to other advisory opinions in which the Commission concluded that a corporation’s proposal would result in a political contribution. *See* Adv. Op. 2008-18 (*Mid-Atlantic Benefits*), Adv. Op. 1992-40 (*Leading Edge Communications*), Adv. Op. 1988-12 (*Empire of America Federal Savings Bank*). But a review of those advisory opinions makes clear that these other proposals are distinguishable from OsiaNetwork’s.

In each of these proposals, an individual would have purchased a good or service from the requestor or another third party, and a portion of the revenue generated from those sales would have been forwarded to a political party or committee: *Empire of America* involved a bank using a political committee’s list of registered voters to sell affinity group credit cards, and paying a portion of the cards’ annual fees to the committee, *see* Adv. Op. 1988-12 at 1; *Leading Edge* involved political committees marketing the services of a long-distance telephone provider to supporters in exchange for a commission from the provider, *see* Adv. Op. 1992-40 at 1-2; and *Mid-Atlantic* involved political committees promoting and distributing drug discount cards, and receiving a transaction fee for drugs that were purchased using the cards, *see* Adv. Op. 2008-18 at 2. In each case, a company used a political party or political committee to generate additional business, and compensated the parties or committees for the additional business they would help generate.

---

<sup>3</sup> Points for Politics involved contributors, whereas the present proposal involves voluntary internet activity, as explained above. This distinction does not change the analysis of whether OsiaNetwork’s activity should be viewed as a contribution.

Federal Election Commission  
December 4, 2018  
Page 9

In rejecting these proposals, the Commission emphasized the fact that the political party or committee was “sell[ing], or otherwise us[ing] in a business of commercial venture, some form of committee asset.” See Adv. Op. 1998-12 at 2; Adv. Op. 1992-40 at 2; Adv. Op. 2008-18 at 5. In *Leading Edge*, the Commission noted that “LEC wishes to profit from the political party’s goodwill and party identification and to gain access to its membership.” See Adv. Op. 1992-40 at 3. In *Mid-Atlantic*, the Commission explained that “party committee sponsors would lend their resources in promoting and distributing the cards,” and said that the proposal involved “a corporation’s use of a political committee’s assets to generate income through an ongoing business venture.” See Adv. Op. 2008-18 at 5.

OsiaNetwork’s proposal bears no resemblance to these proposals. OsiaNetwork is not selling a product or service to customers and forwarding a portion of its profit to the committees, nor is it using the committee’s name and goodwill to generate sales, and then paying a commission. It is simply providing a platform that will allow political committees to aggregate their supporters’ voluntary, uncompensated internet activities.

The Draft Opinion attempts to deal with this important distinction by analogizing OsiaNetwork’s proposal to the aforementioned advisory opinions insofar as “a percentage of the funds it collects as a result of the individuals’ participation will pass directly to the client political committees.” See Draft Op. at 12:19-20. But that analysis cannot be squared with the numerous advisory opinions that conclude that payment processors—which keep a percentage of political contributions as fees and forward the remainder to political committees—do not make political contributions. See Adv. Ops. 2018-05 (*CaringCent*), 2016-08 (*eBundler.com*), 2012-09 (*Points for Politics*), and 2007-04 (*Atlatl*). In the same way that payment processors do not make contributions, OsiaNetwork, acting at the direction of volunteers, is not a contributor.

\* \* \*

For these reasons, and the reasons set forth in the AOR and our comment to the AOR on October 17, 2018, OsiaNetwork respectfully requests that the Commission issue an advisory opinion concluding that neither OsiaNetwork nor volunteers using its platform will be deemed to have made a contribution under the Federal Election Campaign Act.

Very truly yours,



Jonathan S. Sack

cc: Joanna Waldstreicher, Esq. (By email)  
Robert Knop, Esq. (By email)