



FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 18, 2020

ADVISORY OPINION 2019-15

Mr. Josef Schranz, Treasurer
NORPAC
P.O. Box 1543
Englewood Cliffs, NJ 07632

Dear Mr. Schranz:

We are responding to your advisory opinion request on behalf of NORPAC, concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and Commission regulations to NORPAC’s proposal to deduct a flat-rate, fixed percentage fee from earmarked contributions that it forwards in order to reimburse its merchant processing costs as well as its solicitation and administrative costs. The Commission concludes that NORPAC may deduct the fee as proposed, however, the entirety of the fee would constitute a contribution from the contributor to NORPAC. The Commission also clarifies how each component of the proposed transaction must be reported by NORPAC as well as what information it must disclose to the recipient candidate committee.

Background

The facts presented in this advisory opinion are based on your letter received on August 8, 2019 and on public disclosure reports NORPAC filed with the Commission. NORPAC is a nonconnected committee¹ that solicits, processes, and forwards earmarked contributions to candidate committees. Advisory Opinion Request at AOR001. NORPAC proposes to deduct and retain a fee from earmarked contributions that it forwards as follows. *Id.* NORPAC would solicit and collect contributions from contributors via both credit and debit cards and personal checks. *Id.* Contributors would identify the intended recipient using a paper or electronic form, in the case of a

¹ NORPAC, Statement of Organization, Amend., FEC Form 1 (April 2, 2012), <https://docquery.fec.gov/cgi-bin/forms/C00247403/772904/>.

contribution made via credit or debit card, or alternatively, contributors would indicate the intended recipient of the contribution using the memo line of the check, if the contribution was made by check. *Id.* At the time the contribution was made, NORPAC would inform contributors “of the contribution limits and relevant necessary requirements of making a political contribution” under the Act and Commission regulations. *Id.* NORPAC would then deposit the contributed amount into its own account. AOR002.

Before forwarding the earmarked contribution to the recipient, NORPAC would deduct and retain a flat-rate, fixed percentage of the contributed amount, which NORPAC characterizes as a convenience fee (the “Convenience Fee”), “to help [NORPAC] recuperate fees incurred [for] credit card merchant processing” (typically between two and three percent of the total contribution) “as well as generate a small profit which would help [NORPAC] pay its administrative and solicitation costs.” AOR001. This Convenience Fee would reimburse NORPAC for “overhead expenses,” including staff, website, office supplies, advertising, office rental costs, and phone bills. *Id.* NORPAC states that the Convenience Fee would also reimburse the costs paid to its staff to organize and attend fundraising events for candidates, and to collect and distribute contributions received at such events. *Id.* NORPAC further represents that contributors would be notified prior to making a contribution that the Convenience Fee would be deducted and retained by NORPAC. *Id.* Finally, NORPAC would forward all earmarked contributions, less the Convenience Fee, in the form of a check from NORPAC to the specified recipient candidate committee within 10 days of the date the contribution was received by NORPAC, along with “all relevant information” for each contributor.² *Id.*

² NORPAC provided the following example to illustrate how the proposed Convenience Fee would operate in practice: “NORPAC would process a \$100 contribution from Person A, using a personal American Express credit card, earmarked to Campaign A. NORPAC would deduct an 8% fee from the contribution that [it] received from Person A, 3% of which would go to [its] credit card merchant processor, and 5% would be profit for NORPAC to pay its general operating costs. The remaining 92% would be sent to the recipient [candidate] committee.” AOR001.

Questions Presented

1. *May NORPAC deduct a flat-rate, fixed percentage Convenience Fee from earmarked contributions that it forwards to candidate committees in order to pay the costs of NORPAC's merchant processor and generate a profit to reimburse NORPAC for its own administrative and solicitation costs?*³

2. *If the Commission answers Question #1 in the affirmative, how would NORPAC report these transactions?*

Legal Analysis

1. *May NORPAC deduct a flat-rate, fixed percentage Convenience Fee from earmarked contributions that it forwards to candidate committees in order to pay the costs of NORPAC's merchant processor and generate a profit to reimburse NORPAC for its own administrative and solicitation costs?*

Yes, NORPAC may deduct the Convenience Fee from earmarked contributions that it forwards as proposed, however, the full amount of the Convenience Fee would constitute a contribution to NORPAC from the original contributor.

The Act defines a contribution as “any gift, subscription, loan, advance or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.” 52 U.S.C. § 30101(8)(A)(i); *see also* 11 C.F.R. § 100.52(a). The Act further provides that “all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate.” 52 U.S.C. § 30116(a)(8); *see also* 11 C.F.R. § 110.6(a). “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 or a candidate’s authorized committee.” 11 C.F.R. § 110.6(b)(1). A “person who receives and forwards an earmarked contribution to a candidate or a candidate’s authorized committee” is a “conduit or intermediary.”

³ The Advisory Opinion Request also contained an additional question (Question 2) specifically asking whether, in the case of earmarked contributions made via NORPAC (as intermediary) in the form of a contributor’s personal check (as opposed to a credit or debit card), NORPAC may deposit the full amount into its account, retain the Convenience Fee, and forward the remainder of the contribution to the designated recipient committee. The distinction between forwarded contributions made via personal check and credit or debit card is immaterial for purposes of the present analysis because in all instances the contributor would designate the intended recipient of the contribution and NORPAC would treat contributions received by check in the same manner as those received via credit or debit card. The analysis undertaken herein applies uniformly to transactions whereby the Convenience Fee is deducted from contributions made via personal check or credit or debit card. The Commission assumes, however, for purposes of this advisory opinion, that NORPAC would deposit all funds in an official committee depository pursuant to 52 U.S.C. § 30102(h)(1) and 11 C.F.R. part 103.

11 C.F.R. § 110.6(b)(2). A forwarded earmarked contribution does not count against the conduit's contribution limits unless the conduit "exercises any direction or control over the choice of the recipient candidate"; if that occurs, then the entire earmarked contribution is treated as a contribution from both the original contributor and from the conduit to the recipient. *See* 11 C.F.R. § 110.6(d).

NORPAC proposes to split, with the contributor's permission, a contribution between itself and the recipient candidate committee designated by the contributor, with the Convenience Fee being contributed to NORPAC and the remainder forwarded on to the recipient. AOR001. The portion of the contribution allocated to the designated candidate committee would constitute an earmarked contribution that NORPAC must forward to the recipient along with certain information regarding the contributor within applicable time periods set forth at 11 C.F.R. § 102.8.⁴ Because there is no indication that NORPAC would exercise any direction or control concerning the choice of the recipient candidate, NORPAC would be acting as a conduit or intermediary under Commission regulations. *See* 11 C.F.R. § 110.6(b)(2). Accordingly, the earmarked contribution forwarded by NORPAC would constitute a contribution from the original contributor to the candidate committee and not from NORPAC, and would not count against NORPAC's contribution limit to the recipient candidate committee. *See* 11 C.F.R. § 110.6(d)(1).

The issue before the Commission is the appropriate treatment of the Convenience Fee deducted by NORPAC. As described by NORPAC, the Convenience Fee would, in effect, be comprised of two components: (1) the portion used by NORPAC to pay fees charged to NORPAC by its merchant processor, in the case of credit or debit card transactions (typically between two and three percent of the total contribution depending on the type of card used),⁵ and (2) the remaining portion that would generate "a small profit" for NORPAC and be used to "help pay its administrative and solicitation costs." AOR001.

With respect to the first component, the Commission has long held that funds paid to a committee for expenses that it incurs to process a contribution are themselves a contribution. In Advisory Opinion 1995-09 (NewtWatch PAC), the Commission considered how a political committee would report processing fees charged by the committee's financial services company to process online credit card contributions. *See* Advisory Opinion 1995-09 (NewtWatch PAC) at 2-3. The Commission concluded that "the [c]ommittee must treat the full amount of a donor's contribution as the contributed amount for purposes of the limits and reporting provisions of the Act," even though the

⁴ The request states that earmarked contributions would be forwarded to the recipient political candidate committees(s) within 10 days following the date the contribution is received. This representation is consistent with the applicable forwarding requirements under 52 U.S.C. §§ 30102(b)(1)-(2) and 11 C.F.R. § 102.8.

⁵ The request indicates that contributions transmitted by check would be charged the same Convenience Fee as those made by a credit or debit card even though contributions by check would not incur a processing fee. AOR001. The Commission presumes that the entire Convenience Fee charged to contributions made by check would be used to help pay NORPAC's administrative and solicitation costs.

committee would ultimately receive less than that amount after the merchant processor deducted its fees. *Id.* at 3; *see also* Advisory Opinion 1999-08 (Specter) at 3 (same), Advisory Opinion 1994-33 (VITEL International) at 4 (same), Advisory Opinion 1991-01 (Deloitte & Touche PAC) at 4 (same). Considering a similar fact pattern in Advisory Opinion 1978-68 (Seith for Senate), the Commission stated that:

The amount of any contribution made by credit card is the amount authorized by the contributor and may not be reduced by any discounts or service charges deducted by the credit card issuer when remitting contribution proceed[sic] to the committee. [internal citation omitted] Any deductions or set offs by the credit card issuer against the proceeds of contributions made by credit card are considered expenditures of the Committee and must be reported as expenditures as of the date the Committee receives notice that the deduction or set-off is being taken.

Advisory Opinion 1978-68 (Seith for Senate) at 2. It follows here that, because NORPAC intends to use a portion of the Convenience Fee to defray its credit and debit card processing costs, that amount would constitute a contribution from the contributor to NORPAC.⁶

The second component of the Convenience Fee would be used by NORPAC to pay its own administrative and solicitation costs. AOR001. Funds transmitted to a political committee to pay these types of costs have also been deemed to be contributions to that committee. *See* Advisory Opinion 2012-18 (National Right to Life Committee) at 2-3 (finding that a non-profit entity's payments for the establishment, administration, and solicitation costs of its independent expenditure-only political committee constitute reportable contributions because the recipient committee was not a separate segregated fund).⁷ The costs of hiring staff, organizing fundraisers, and maintaining an office and website are some of the most essential expenses incurred by a political committee. Funds raised by a political committee to pay those expenses fall squarely within the definition of contribution under the Act and Commission regulations. *See* 52 U.S.C. § 30101(8)(A)(i); *see also* 11 C.F.R. § 100.52(a).

Consequently, the entirety of the Convenience Fee (including both the portion used to reimburse credit and debit card processing fees and the amount in excess of those costs that would yield a "profit" for NORPAC) would constitute a contribution from the original contributor to NORPAC. NORPAC has stated that it will inform contributors

⁶ The appropriate methods for reporting these receipts and disbursements are addressed in greater detail below.

⁷ A limited exemption from the definition of "contribution" and "expenditure" under the Act exempts the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by certain corporations and membership groups. *See* 52 U.S.C. § 30118(b)(2). Because NORPAC is not a separate segregated fund, no such exemption is applicable here. *See* Advisory Opinion 2012-18 (National Right to Life Committee) at 2-3.

“of the contribution limits and relevant necessary requirements of making a political contribution” under the Act and Commission regulations when it solicits contributions. AOR001. Because the Convenience Fee will constitute a contribution to NORPAC, the Commission assumes that NORPAC will provide this information to contributors with respect to both the Convenience Fee contributions that NORPAC will receive and the earmarked contributions that NORPAC will forward to the designated candidate committees.

2. *If the Commission answers Question #1 in the affirmative, how would NORPAC report these transactions?*

The transactions proposed in Question #1 trigger multiple reporting requirements under the Act and Commission regulations applicable to NORPAC. Each of these is addressed in turn below.

A. *Reports Filed by NORPAC*⁸

The Act and Commission regulations require political committees to file reports of all receipts and disbursements. 52 U.S.C. § 30104(a)-(b); 11 C.F.R. §§ 104.1, 104.3(a)-(b). As noted above, the full amount of the Convenience Fee must be reported as a contribution to NORPAC on NORPAC’s Form 3X filing. If a Convenience Fee is paid to NORPAC by a political committee, NORPAC must itemize such receipt on Schedule A of its Form 3X filing, noting the full amount of the Convenience Fee, the date of the contribution, and the full name and address of the contributing political committee. 11 C.F.R. §§ 104.2(e)(3), 104.3(a)(4)(ii). In the case of a contribution from an individual or entity other than a political committee, NORPAC is only required to itemize such receipt on Schedule A of its Form 3X filing if that contributor has made one or more contributions to NORPAC during the calendar year aggregating in excess of \$200 — which aggregate amount includes Convenience Fee(s) as well as any other contributions to NORPAC made by the same contributor. 11 C.F.R. §§ 104.2(e)(3), 104.3(a)(4)(i). NORPAC must also note the date and amount of the contribution, and should report the full name, address, occupation and name of employer (if applicable), and aggregate year-to-date total contributions by the contributor, for such itemized contributions on Schedule A of its Form 3X filing. *Id.* Any contribution from a person other than a political committee that does not meet this \$200 threshold must be reported, but need not be itemized, on NORPAC’s Form 3X filing. *Id.* Additionally, any credit or debit card processing fee payable by NORPAC to its merchant processor(s) would be an operating expenditure that must be reported as a disbursement on Schedule B of NORPAC’s Form 3X filing. *See* 11 C.F.R. § 104.3(b)(1)(i); Advisory Opinion 1978-68 (Seith for Senate) at 2. Finally, the Commission assumes that NORPAC will comply with all applicable recordkeeping requirements under 11 C.F.R. § 102.9(c) and § 104.14(b).

⁸ The Commission notes that the political committees that receive earmarked contributions forwarded by NORPAC would also be subject to specific reporting requirements pursuant to the Act and Commission regulations. *See* 11 C.F.R. § 110.6(c)(2).

The Act and Commission regulations also require intermediaries or conduits of contributions earmarked to candidates or their authorized committees to report the original source of such contributions and the identity of the recipient candidate or authorized committee to the Commission. 52 U.S.C. § 30116(a)(8); 11 C.F.R. § 110.6(c)(1). As discussed above, NORPAC would be acting as an intermediary or conduit with respect to each earmarked contribution forwarded to a candidate committee as designated by the original contributor. NORPAC must, therefore, report the total amount of the forwarded contribution as a receipt on Schedule A of its regularly scheduled Form 3X filing with the Commission.⁹ In addition to the amount of the forwarded contribution, NORPAC must report the name and mailing address of the original contributor, the date NORPAC received the contribution, the intended recipient as designated by the contributor, the election designated by the contributor, if any, and, if the forwarded contribution exceeds \$200, the occupation and employer of the original contributor. 11 C.F.R. §§ 110.6(c)(1)(iv), 110.1(b)(2)(i).

When NORPAC forwards the earmarked contribution to the designated recipient, NORPAC must also report the total amount of the forwarded contribution as a disbursement on Schedule B of its regularly scheduled Form 3X filing with the Commission, along with the name of the designated recipient, the date that the contribution was forwarded, the name of the original contributor, the election designated by the contributor, if any, and a notation that the contribution was forwarded in the form of a check drawn on NORPAC's account. *Id.*

B. Information Transmitted by NORPAC to Recipient Candidate Committees

The Act and Commission regulations provide that, at the same time that a conduit or intermediary forwards an earmarked contribution that exceeds \$50 to a recipient committee, 11 C.F.R. § 102.8(a)-(b), it must also forward the name and address of the contributor, the amount of the earmarked contribution, the date that the earmarked contribution was received by the conduit or intermediary, and, if the contribution is over \$200, the contributor's occupation and the name of his or her employer. 52 U.S.C. § 30102(b); 11 C.F.R. § 110.6(c)(1). This information must be transmitted to the recipient committee for purposes of filing its own reports with the Commission. As stated above, because NORPAC would be acting as a conduit or intermediary with respect to the forwarded earmarked contribution, NORPAC must transmit the aforementioned information to the recipient committee simultaneously with transmittal of the funds, provided that the amount thresholds described herein are met.

⁹ A conduit or intermediary's reporting requirements vary depending on whether the forwarded contribution was deposited in its bank account or was passed directly to the recipient. *See* 11 C.F.R. § 110.6(c)(1)(iv). NORPAC indicates that forwarded contributions would first be deposited in its account before earmarked funds would be forwarded to the designated recipient. AOR002.

Conclusions

The Commission concludes that NORPAC may deduct the Convenience Fee as proposed, however, the entirety of the Convenience Fee would constitute a contribution from the original contributor to NORPAC. The Commission also clarifies how each component of the proposed transaction must be reported by NORPAC as well as what information it must disclose to the recipient candidate committee.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your 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,

A handwritten signature in black ink that reads "J. E. Trainor, III". The signature is written in a cursive style with a distinct "III" at the end.

James E. "Trey" Trainor III
Chairman