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By Office of the Commission Secretary at 4:21 pm, Jun 12, 2020



FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 20-01-A
AGENDA ITEM
For meeting of June 18, 2020
SUBMITTED LATE

June 12, 2020

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS*
Acting General Counsel

Neven F. Stipanovic *NFS*
Associate General Counsel

Robert Mark Knop *RMK*
Assistant General Counsel

Kevin M. Paulsen *kmp*
Attorney

Subject: Draft AO 2019-15 (NORPAC) - Draft A

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00 pm (Eastern Time) on June 17, 2020.

Members of the public may view the virtual Commission meeting at which the draft will be considered. The advisory opinion requestor may appear remotely via telephone before the Commission at this virtual meeting to answer questions.

For more information about how to submit comments or attend the virtual Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2019-15

2

3 Mr. Josef Schranz

4 NORPAC

5 P.O. Box 1543

6 Englewood Cliffs, NJ 07632

7

8

9 Dear Mr. Schranz:

DRAFT A

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

20 ***Background***

21 The facts presented in this advisory opinion are based on your letter received on
22 August 8, 2019 and on public disclosure reports NORPAC filed with the Commission.
23 NORPAC is a nonconnected committee¹ that solicits, processes, and forwards earmarked
24 contributions to candidate committees. Advisory Opinion Request at AOR001.
25 NORPAC proposes to deduct and retain a fee from earmarked contributions that it

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

1 forwards as follows. *Id.* NORPAC would solicit and collect contributions from
2 contributors via both credit and debit cards and personal checks. *Id.* Contributors would
3 identify the intended recipient using a paper or electronic form, in the case of a
4 contribution made via credit or debit card, or alternatively, contributors would indicate
5 the intended recipient of the contribution using the memo line of the check, if the
6 contribution was made by check. *Id.* At the time the contribution was made, NORPAC
7 would inform contributors “of the contribution limits and relevant necessary requirements
8 of making a political contribution” under the Act and Commission regulations. *Id.*
9 NORPAC would then deposit the contributed amount into its own account. AOR002.

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

1 specified recipient candidate committee within 10 days of the date the contribution was
2 received by NORPAC, along with “all relevant information” for each contributor.² *Id.*

3 ***Questions Presented***

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

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

10 ***Legal Analysis***

11 1. *May NORPAC deduct a flat-rate, fixed percentage Convenience Fee from*
12 *earmarked contributions that it forwards to candidate committees in order to pay the costs*

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.

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. § 103.

1 *of NORPAC's merchant processor and generate a profit to reimburse NORPAC for its*
2 *own administrative and solicitation costs?*

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

6 The Act defines a contribution as “any gift, subscription, loan, advance or deposit
7 of money or anything of value made by any person for the purpose of influencing any
8 election for Federal office.” 52 U.S.C. § 30101(8)(A)(i); *see also* 11 C.F.R. § 100.52(a).
9 The Act further provides that “all contributions made by a person, either directly or
10 indirectly, on behalf of a particular candidate, including contributions which are in any
11 way earmarked or otherwise directed through an intermediary or conduit to such
12 candidate, shall be treated as contributions from such person to such candidate.”
13 52 U.S.C. § 30116(a)(8); *see also* 11 C.F.R. § 110.6(a). “Earmarked” means “a
14 designation, instruction, or encumbrance, whether direct or indirect, express or implied,
15 oral or written, which results in all or any part of a contribution . . . being made to . . . a
16 clearly identified candidate or a candidate’s authorized committee.” 11 C.F.R.
17 § 110.6(b)(1). A “person who receives and forwards an earmarked contribution to a
18 candidate or a candidate’s authorized committee” is a “conduit or intermediary.”
19 11 C.F.R. § 110.6(b)(2). A forwarded earmarked contribution does not count against the
20 conduit’s contribution limits unless the conduit “exercises any direction or control over
21 the choice of the recipient candidate”; if that occurs, then the entire earmarked
22 contribution is treated as a contribution from both the original contributor and from the
23 conduit to the recipient. *See* 11 C.F.R. § 110.6(d).

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

14 The issue before the Commission is the appropriate treatment of the Convenience
15 Fee deducted by NORPAC. As described by NORPAC, the Convenience Fee would, in
16 effect, be comprised of two components: (1) the portion used by NORPAC to pay fees
17 charged to NORPAC by its merchant processor, in the case of credit or debit card
18 transactions (typically between two and three percent of the total contribution depending

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.

1 on the type of card used),⁵ and (2) the remaining portion that would generate “a small
2 profit” for NORPAC and be used to “help pay its administrative and solicitation costs.”
3 AOR001.

4 With respect to the first component, the Commission has long held that funds paid
5 to a committee for expenses that it incurs to process a contribution are themselves a
6 contribution. In Advisory Opinion 1995-09 (NewtWatch PAC), the Commission
7 considered how a political committee would report processing fees charged by the
8 committee’s financial services company to process online credit card contributions. *See*
9 Advisory Opinion 1995-09 (NewtWatch PAC) at 2-3. The Commission concluded that
10 “the [c]ommittee must treat the full amount of a donor’s contribution as the contributed
11 amount for purposes of the limits and reporting provisions of the Act,” even though the
12 committee would ultimately receive less than that amount after the merchant processor
13 deducted its fees. *Id.* at 3; *see also* Advisory Opinion 1999-08 (Specter) at 3 (same),
14 Advisory Opinion 1994-33 (VITEL) at 4 (same), Advisory Opinion 1991-01 (Deloitte &
15 Touche PAC) at 4 (same). Considering a similar fact pattern in Advisory Opinion 1978-
16 68 (Seith for Senate), the Commission stated that:

17 The amount of any contribution made by credit card is the amount
18 authorized by the contributor and may not be reduced by any
19 discounts or service charges deducted by the credit card issuer
20 when remitting contribution proceed[sic] to the committee.
21 [internal citation omitted] Any deductions or set offs by the credit
22 card issuer against the proceeds of contributions made by credit
23 card are considered expenditures of the Committee and must be

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.

1 reported as expenditures as of the date the Committee receives
2 notice that the deduction or set-off is being taken.

3

4 Advisory Opinion 1978-68 (Seith for Senate) at 2. It follows here that, because

5 NORPAC intends to use a portion of the Convenience Fee to defray its credit and debit

6 card processing costs, that amount would constitute a contribution from the contributor to

7 NORPAC.⁶

8 The second component of the Convenience Fee would be used by NORPAC to

9 pay its own administrative and solicitation costs. AOR001. Funds transmitted to a

10 political committee to pay these types of costs have also been deemed to be contributions

11 to that committee. *See* Advisory Opinion 2012-18 (National Right to Life Committee) at

12 2-3 (finding that a non-profit entity's payments for the establishment, administration, and

13 solicitation costs of its independent expenditure-only political committee constitute

14 reportable contributions because the recipient committee was not a separate segregated

15 fund).⁷ The costs of hiring staff, organizing fundraisers, and maintaining an office and

16 website are some of the most essential expenses incurred by a political committee. Funds

17 raised by a political committee to pay those expenses fall squarely within the definition of

18 contribution under the Act and Commission regulations. *See* 52 U.S.C. § 30101(8)(A)(i);

19 *see also* 11 C.F.R. § 100.52(a).

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.

1 Consequently, the entirety of the Convenience Fee (including both the portion
2 used to reimburse credit and debit card processing fees and the amount in excess of those
3 costs that would yield a “profit” for NORPAC) would constitute a contribution from the
4 original contributor to NORPAC. NORPAC has stated that it will inform contributors
5 “of the contribution limits and relevant necessary requirements of making a political
6 contribution” under the Act and Commission regulations when it solicits contributions.
7 AOR001. Because the Convenience Fee will constitute a contribution to NORPAC, the
8 Commission assumes that NORPAC will provide this information to contributors with
9 respect to both the Convenience Fee contributions that NORPAC will receive and the
10 earmarked contributions that NORPAC will forward to the designated candidate
11 committees.

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

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

17 A. *Reports Filed by NORPAC*⁸

18 The Act and Commission regulations require political committees to file reports
19 of all receipts and disbursements. 52 U.S.C. § 30104(a)-(b); 11 C.F.R. §§ 104.1,
20 104.3(a)-(b). As noted above, the full amount of the Convenience Fee must be reported

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).

1 as a contribution to NORPAC on NORPAC's Form 3X filing. If a Convenience Fee is
2 paid to NORPAC by a political committee, NORPAC must itemize such receipt on
3 Schedule A of its Form 3X filing, noting the full amount of the Convenience Fee, the date
4 of the contribution, and the full name and address of the contributing political committee.
5 11 C.F.R. §§ 104.2(e)(3), 104.3(a)(4)(ii). In the case of a contribution from an
6 individual or entity other than a political committee, NORPAC is only required to itemize
7 such receipt on Schedule A of its Form 3X filing if that contributor has made one or more
8 contributions to NORPAC during the calendar year aggregating in excess of \$200—
9 which aggregate amount includes Convenience Fee(s) as well as any other contributions
10 to NORPAC made by the same contributor. 11 C.F.R. §§ 104.2(e)(3), 104.3(a)(4)(i).
11 NORPAC must also note the date and amount of the contribution, and should report the
12 full name, address, occupation and name of employer (if applicable), and aggregate year-
13 to-date total contributions by the contributor, for such itemized contributions on Schedule
14 A of its Form 3X filing. *Id.* Any contribution from a person other than a political
15 committee that does not meet this \$200 threshold must be reported, but need not be
16 itemized, on NORPAC's Form 3X filing. *Id.* Additionally, any credit or debit card
17 processing fee payable by NORPAC to its merchant processor(s) would be an operating
18 expenditure that must be reported as a disbursement on Schedule B of NORPAC's Form
19 3X filing. *See* 11 C.F.R. § 104.3(b)(1)(i); Advisory Opinion 1978-68 (Seith for Senate)
20 at 2. Finally, the Commission assumes that NORPAC will comply with all applicable
21 recordkeeping requirements under 11 C.F.R. § 102.9(c) and § 104.14(b).

22 The Act and Commission regulations also require intermediaries or conduits of
23 contributions earmarked to candidates or their authorized committees to report the

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

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

20

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.

1 *B. Information Transmitted by NORPAC to Recipient Candidate Committees*

2 The Act and Commission regulations provide that, at the same time that a conduit
3 or intermediary forwards an earmarked contribution that exceeds \$50 to a recipient
4 committee, 11 C.F.R. § 102.8(a)-(b), it must also forward the name and address of the
5 contributor, the amount of the earmarked contribution, the date that the earmarked
6 contribution was received by the conduit or intermediary, and, if the contribution is over
7 \$200, the contributor's occupation and the name of his or her employer. 52 U.S.C. §
8 30102(b); 11 C.F.R. § 110.6(c)(1). This information must be transmitted to the recipient
9 committee for purposes of filing its own reports with the Commission. As stated above,
10 because NORPAC would be acting as a conduit or intermediary with respect to the
11 forwarded earmarked contribution, NORPAC must transmit the aforementioned
12 information to the recipient committee simultaneously with transmittal of the funds,
13 provided that the amount thresholds described herein are met.

14 ***Conclusions***

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

20 This response constitutes an advisory opinion concerning the application of the
21 Act and Commission regulations to the specific transaction or activity set forth in your
22 request. *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change
23 in any of the facts or assumptions presented, and such facts or assumptions are material to

1 a conclusion presented in this advisory opinion, then the requestor may not rely on that
2 conclusion as support for its proposed activity. Any person involved in any specific
3 transaction or activity which is indistinguishable in all its material aspects from the
4 transaction or activity with respect to which this advisory opinion is rendered may rely on
5 this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B). Please note that the analysis or
6 conclusions in this advisory opinion may be affected by subsequent developments in the
7 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
8 Any advisory opinions cited herein are available on the Commission's website.

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On behalf of the Commission,

Caroline C. Hunter
Chair