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By Office of the Commission Secretary at 2:27 pm, Aug 16, 2017



FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 17-35-B
AGENDA ITEM
For meeting of August 17, 2017
SUBMITTED LATE

August 16, 2017

MEMORANDUM

TO: The Commission

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

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Acting Assistant General Counsel

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Attorney

Subject: AO 2017-06 (Stein/Gottlieb) Draft B

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 9:00 am (Eastern Time) on August 17, 2017.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

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

Attachment

1 ADVISORY OPINION 2017-06

2

3 Jonathan S. Berkon, Esq.

4 Tyler J. Hagenbuch, Esq.

5 Perkins Coie LLP

6 700 13th St. NW, Suite 600

7 Washington, DC 20005-3960

8

9 Dear Messrs. Berkon and Hagenbuch:

DRAFT B

10 We are responding to your advisory opinion request on behalf of Eli Stein and Jeremy
11 Gottlieb, concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-
12 46 (the “Act”), and Commission regulations to a proposed mobile app that will process users’
13 contributions to federal candidates. The Commission concludes that the proposal is permissible
14 and complies with all applicable provisions of the Act and Commission regulations.

15 **Background**

16 The facts presented in this advisory opinion are based on your advisory opinion request
17 received on June 22, 2017.

18 Mr. Stein and Mr. Gottlieb intend to create a for-profit LLC¹ (the “Project”) that will
19 develop and administer a mobile app (the “App”), which allows users to round up the change
20 from their credit card and debit card purchases and contribute that amount to federal candidates.
21 Advisory Opinion Request at AOR001. The Project aims to “help users easily identify races
22 where their contributions will have the most impact,” AOR001, by identifying the closest races
23 and candidates most in need of contributions. AOR002.

24 The Project will use data and analysis to identify swing districts in U.S. House of
25 Representatives and Senate elections, and from those swing districts the Project will select 20-30
26 candidates to include in the App as “Featured Candidates.” AOR001. There will be no way for

¹ The requestors state that for purposes of this advisory opinion, the Commission may presume that the Project will be a corporation for purposes of the Act. AOR003 n.3.

1 candidates to apply to be Featured Candidates. *Id.* The Project may add or remove candidates
2 from the App over time as it updates its research. AOR002. Decisions about which candidates
3 to include as Featured Candidates will not be made for the purpose of influencing any federal
4 election, but rather to increase user participation in the App. *Id.*

5 A user will begin the process of using the App by providing information to the Project,
6 through its website, about the credit cards, debit cards, and bank accounts the user plans to use to
7 make contributions. AOR003. The user will then download the App and choose one of three
8 ways of selecting candidates and distributing funds among the selected candidates:

9 (1) The “All Candidates” option: the App will distribute the user’s funds equally
10 among all of the Featured Candidates.

11 (2) The “Custom Basket” option: the user will choose which of the Featured
12 Candidates to support, and the App will distribute the user’s funds equally among the
13 chosen candidates.

14 (3) The “Project Basket” option: the user will select groups of candidates that the
15 App creates from the list of Featured Candidates based on criteria that the Project
16 determines are likely to encourage user participation, such as region, gender, type of
17 opponent (*e.g.* challengers or incumbents), or funds raised to date. AOR002-003.

18 In the future, the Project may consider other ways to distribute a user’s funds, such as
19 allowing users to opt for unequal divisions among candidates, but currently such a feature would
20 be too burdensome to implement. AOR002. If the Project adds or removes candidates from a
21 Project Basket, any user who has already selected that Project Basket will be notified and given a
22 chance to affirmatively opt-in to the new version of the Project Basket. If the user takes no

1 action, his or her funds will continue to be distributed to the candidates in the previous version of
2 the Project Basket. *Id.*

3 Next, any time the user makes a purchase with the card or account they have entered in
4 the App, the App will round up the amount of the purchase to the nearest whole dollar and treat
5 the difference between the original purchase amount and the rounded-up amount as a pledged
6 contribution to the candidates the user has selected. AOR001, AOR003. These amounts will be
7 treated as pledges until the combined pledges reach a certain minimum threshold, such as \$10, at
8 which time the Project will charge the user’s card or account for those pledges and deposit the
9 funds into a “merchant services account” — an account belonging to the Project but separate
10 from its general treasury account. AOR003. After the user is charged for those pledges, the
11 process will reset and the user will not be charged again until his or her combined pledges again
12 reach the minimum threshold. *Id.* If users withdraw from participation in the App before
13 reaching that threshold, their pledges will be cancelled and their card or account will not be
14 charged. *Id.*

15 The Project will transfer contributions from its merchant services account to the
16 candidate committees selected by the user no later than ten days after the funds are placed in the
17 merchant services account. *Id.* The Project will not exercise any direction or control over users’
18 funds in the merchant services account, except that it will not process a contribution that exceeds
19 applicable contribution limits. *Id.*

20 The Project will charge users a fee for its services that will (1) cover the Project’s
21 overhead, research, programming, and other costs; (2) cover bank fees and processing fees
22 incurred in credit and debit card transfers; and (3) provide a commercially reasonable profit to

1 the Project.² AOR003-004. The Project will not contract with candidate committees to provide
2 contribution processing services, nor will it receive compensation from recipient committees.
3 AOR004. Rather, because the Project provides research, analysis, and contribution processing
4 services to users, the Project will cover its costs and earn a profit by charging fees to users. *Id.*
5 The Project's fee will be deducted from the user's contribution before it is transferred from the
6 merchant services account to the recipient committees; the fee will be transferred to the Project's
7 general treasury account and the remainder will be transferred to the recipient committees
8 selected by the user. *Id.*

9 When forwarding users' contributions to the recipient committees, the Project will also
10 provide committees with each contributor's full name, address, occupation, and employer, which
11 users will be required to provide before they can make contributions through the App.³ *Id.*
12 Users will receive electronic notice of their contributions to each recipient committee so that they
13 can monitor their contribution limits. *Id.*

14 In its first election cycle, the Project will market its App and services to Democratic
15 contributors, and the App will feature only Democratic candidates, due to "the current
16 groundswell in voter and donor interest in swinging the U.S. House of Representatives to

² If the Project decides in the future to add recipients other than federal candidates or political committees to the App, such as charitable organizations or non-federal candidates, it will charge the same fee for all contributions or donations, regardless of the type of entity to which users choose to donate their funds. AOR004 n.5.

³ The users also will be required to affirmatively agree to the following statement:

This contribution is made from my own funds. Funds are not being provided to me by another person or entity for the purpose of making political contributions. I am making this contribution with my own personal credit card or bank account and not with the credit card or bank account of a corporation, business, or another person. I am not a federal contractor. I am at least eighteen years old, and I am a U.S. citizen or lawfully admitted permanent resident.

1 Democratic control.” AOR002. The Project’s founders do not believe they could successfully
2 market the App as a bipartisan platform in the current political environment. AOR002-003.

3 **Questions Presented**

4 1. *May the Project provide users with analytics and data processing services and*
5 *charge users a fee for those services, without the fee amount being considered a contribution to*
6 *recipient political committees?*

7 2. *May the Project limit the available pool of recipient committees to which users*
8 *can make contributions without the services provided to users — or the fees paid for those*
9 *services — being considered a contribution to the recipient committees included on the App?*

10 3. *Would contributions made through the Project’s services be “direct contributions*
11 *to the candidate or candidate’s committee made via a commercial contribution processing*
12 *service,” rather than contributions earmarked through a conduit or intermediary?*

13 4. *Does the Project comply with the Act and Commission regulations in all other*
14 *respects?*

15 **Legal Analysis and Conclusions**

16 1. *May the Project provide users with analytics and data processing services and*
17 *charge users a fee for those services, without the fee amount being considered a contribution to*
18 *recipient political committees?*

19 Yes, the Project may provide analysis and contribution processing services to users for a
20 fee, without such fee being considered a contribution to the recipient committees.

21 The Act and Commission regulations prohibit corporations from making a contribution in
22 connection with a federal election. 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b). A

1 “contribution” includes any “direct or indirect payment, distribution, loan, advance, deposit, or
2 gift of money, or any services, or anything of value . . . to any candidate, campaign committee,
3 or political party or organization, in connection with any [federal] election.” 52 U.S.C.
4 § 30118(b)(2); 11 C.F.R. § 114.2(b); *see also* 52 U.S.C. § 30101(8)(A)(i); 11 C.F.R.
5 § 100.52(a). “Anything of value” includes in-kind contributions, such as the provision of goods
6 or services without charge or at a charge that is less than the usual and normal charge. 11
7 C.F.R. § 100.52(d)(1). Commission regulations define “usual and normal charge” as the price
8 of goods in the market from which they ordinarily would have been purchased at the time of the
9 contribution, or the commercially reasonable rate prevailing at the time the services were
10 rendered.” 11 C.F.R. § 100.52(d)(2).

11 The Commission has previously concluded that “entities that process contributions as a
12 service to contributors without entering into agreements with — or receiving compensation
13 from — the recipient political committees are not making contributions because the entities are
14 not providing any services to the recipient political committees.” *See* Advisory Opinion 2015-
15 08 (Repledge) at 5; *see also* Advisory Opinion 2016-08 (eBundler.com); Advisory Opinion
16 2015-15 (WeSupportThat.com); Advisory Opinion 2014-07 (Crowdpac) at 6; Advisory Opinion
17 2012-22 (skimmerhat) at 4-6; Advisory Opinion 2011-19 (GivingSphere) at 7; Advisory
18 Opinion 2011-06 (Democracy Engine) at 5. In such instances, the Commission examines
19 whether the services are provided at the request of and for the benefit of the contributors, as
20 opposed to that of the recipient committees. *See, e.g.*, Advisory Opinion 2015-15
21 (WeSupportThat.com) at 4 (concluding that companies that process contributions as service to
22 contributors are “analog[ous] . . . to widely available delivery services, such as United Parcel

1 Service, or an electronic bill-pay service, such as those provided by banks” (internal quotation
2 marks omitted)). The Commission also considers whether the provided services relieve the
3 recipient committees of any financial burden or obligation they would otherwise incur, thereby
4 providing something of value that would constitute a contribution from the entity that provides
5 the service.

6 Here, as in the proposals the Commission has previously found to be permissible, the
7 Project will provide services to the App’s users: research and analysis of candidates and races,
8 and contribution processing. *See, e.g.*, Advisory Opinion 2015-15 (WeSupportThat.com) (web
9 platform to learn about, make contributions to, and send messages to candidates); Advisory
10 Opinion 2015-12 (Ethiq) (mobile app to help users identify candidates and corporations that
11 align with their views); Advisory Opinion 2014-07 (Crowdpac) (web platform to provide
12 information about candidates to users and link to an external site to make contributions). Like
13 prior requestors, the Project will charge users a fee for its services that will cover its costs and
14 generate a profit. The Project will not enter into any relationships with candidates or
15 committees beyond that required to forward the contributions and contributor information.
16 And, importantly, the App will provide no mechanism by which candidates can apply to be
17 Featured Candidates in the Project’s analysis of competitive races. This restriction on candidate
18 participation distinguishes a similar proposal that the Commission previously approved but for
19 which it could not agree on a rationale. *Cf.* Advisory Opinion 2015-11 (FYP) (similar proposal
20 to contribute rounded-up amounts of users’ purchases to candidates, but recipient committees
21 could apply to be included in the platform and requestor retained discretion to accept or reject
22 such applications on ideological basis).

1 The Project’s contribution processing service also is similar to other contribution
2 processing platforms the Commission has approved in the past. *See, e.g.*, Advisory Opinion
3 2015-15 (WeSupportThat.com); Advisory Opinion 2011-06 (Democracy Engine) (web-based
4 payment service that offered ability to make contributions to political committees). Like these
5 prior requestors, the Project proposes to charge its users fees for collecting and forwarding their
6 contributions to recipient committees. According to the request, the Project’s fees are intended
7 to cover its operating costs and to generate a “commercially reasonable profit.” AOR006. The
8 Project will not be providing a service to the committees other than the processing of payments,
9 and will not relieve the recipient committees of any expenses they would otherwise incur.
10 Therefore, as the Commission concluded in previous advisory opinions, the fees that users will
11 pay are not contributions to the Project because they are not gifts or donations to the Project but,
12 rather, commercial payments in exchange for its processing services. *See, e.g.*, Advisory
13 Opinion 2015-08 (Repledge) at 8-9; Advisory Opinion 2012-22 (skimmerhat) at 6; Advisory
14 Opinion 2011-06 (Democracy Engine) at 6; *see also* Advisory Opinion 2006-08 (Brooks) at 4.
15 Nor will the users’ fees be contributions to the recipient committees, because those amounts will
16 be retained by the Project and not transferred to the committees, and they will not relieve the
17 recipient committees of a cost they would otherwise incur.

18 2. *May the Project limit the available pool of recipient committees to which users*
19 *can make contributions without the services provided to users — or the fees paid for those*
20 *services — being considered a contribution to the recipient committees included on the App?*

1 Yes, the Project may limit the possible recipient committees to which users can make
2 contributions through the App without the services provided or the fees paid for those services
3 being considered a contribution to the recipient committees.

4 The Commission has previously concluded that a commercial vendor, providing services
5 to political committees under 11 C.F.R. § 114.2(f)(1), need not make its services available to
6 committees representing all political ideologies, but rather may establish objective business
7 criteria to protect the commercial viability of its business without making contributions to the
8 committees that meet those criteria. *See* Advisory Opinion 2012-28 (CTIA — The Wireless
9 Association) at 3, 8-9 (no contribution to committee where “wireless service providers may
10 decide, due to commercial considerations, to accept proposals from some political committees
11 and not others”); Advisory Opinion 2012-26 (Cooper for Congress *et al.*) at 10 (no contribution
12 to committee where its participation was subject to “objective and commercially reasonable”
13 criteria); Advisory Opinion 2006-34 (Working Assets) at 2-3 (describing requestor’s proposed
14 use of “common commercial principles” to determine partner entities’ commercial viability).

15 Similarly, businesses that provide services to contributors, such as those that process
16 payments for contributions or provide information about candidates and elections, may also rely
17 on commercial considerations to target customers and limit the range of services provided,
18 without making any contributions themselves. Here, the Project proposes to select only
19 Democratic candidates as Featured Candidates, and plans to market its App and services to
20 Democratic users, based on its determination that this is the best way to attract users and
21 promote the Project’s commercial success in the current political environment. Although the
22 Project will allow users to make contributions only to the Featured Candidates, it will not

1 consider offers or proposals from candidates who wish to be featured on the App, but rather will
2 select candidates it believes will increase user participation and use of the App, based on its own
3 research and analysis and user feedback. The Project has determined that featuring Democratic
4 candidates in swing districts on the App is the most marketable way for it to provide a service to
5 users, by helping them identify which candidates will benefit most from their contributions.

6 AOR007. Limiting the pool of recipient committees as proposed thus does not raise concerns
7 that the Project is selecting the committees to influence the outcome of an election.

8 The Commission concludes that because the Project will use commercially reasonable
9 criteria to attract users and encourage user participation and thereby grow as a business, limiting
10 the possible candidates to whom users can contribute through the App will not cause the
11 services provided or the fee charged to users to constitute a contribution to recipient
12 committees.

13 3. *Would contributions made through the Project's services be "direct contributions*
14 *to the candidate or candidate's committee made via a commercial contribution processing*
15 *service," rather than contributions earmarked through a conduit or intermediary?*

16 Yes, a contribution made through the App would be a direct contribution from the user to
17 the recipient committee, and not a contribution earmarked through a conduit or intermediary.

18 For purposes of the contribution limitations, "all contributions made by a person, . . .
19 including contributions which are in any way earmarked or otherwise directed through an
20 intermediary or conduit to such candidate," are treated as contributions from the person to the
21 candidate. 52 U.S.C. § 30116(a)(8). "Earmarked" means "a designation, instruction, or
22 encumbrance, whether direct or indirect, express or implied, oral or written, which results in all

1 or any part of a contribution . . . being made to . . . a clearly identified candidate.” 11 C.F.R.
2 § 110.6(b)(1). A “conduit or intermediary” is “any person who receives and forwards an
3 earmarked contribution to a candidate.” 11 C.F.R. § 110.6(b)(2). A forwarded earmarked
4 contribution does not count against the conduit’s contribution limits unless the conduit
5 “exercises any direction or control over the choice of the recipient candidate.” 11 C.F.R.
6 § 110.6(d)(1). If the conduit does exercise such direction or control, then the entire earmarked
7 contribution is treated as a contribution from both the original contributor and the conduit to the
8 recipient. 11 C.F.R. § 110.6(d)(2).

9 Persons prohibited from making contributions and expenditures are prohibited from being
10 conduits or intermediaries. 11 C.F.R. § 110.6(b)(2)(ii). Because corporations may not make
11 contributions to candidate committees, *see* 52 U.S.C. § 30118(a), they may not permissibly
12 serve as conduits. The Commission has recognized, however, that certain electronic
13 transactional services that assist a contributor in making a contribution — even when provided
14 by a corporation — do not run afoul of the prohibition on corporations acting as a conduit or
15 intermediary for earmarked contributions because they are akin to “widely available delivery
16 services, such as United Parcel Service or an electronic bill-pay service, such as those provided
17 by banks.” Advisory Opinion 2015-15 (WeSupportThat.com) at 4 (citing Advisory Opinion
18 2012-22 (skimmerhat); internal quotation marks omitted); *see also* Advisory Opinion 2015-08
19 (Repledge) at 7; Advisory Opinion 2011-06 (Democracy Engine) at 5-6.

20

1 As noted above, the Project will be a corporate, commercial entity⁴ that proposes to
2 establish a web-based platform that its users can voluntarily choose to employ to make
3 contributions to political committees. The Project will operate on a commercial basis and will
4 charge its users a fee for its services that will cover its costs and provide it with a profit.
5 Further, the Project will process and transmit its users' contributions to political committees in
6 the ordinary course of business and only at the request of its users. The Project's actions in
7 calculating and processing user contributions constitute an electronic transactional service akin
8 to "widely available delivery services, such as United Parcel Service or an electronic bill-pay
9 service, such as those provided by banks." Advisory Opinion 2015-15 (WeSupportThat.com) at
10 4 (citing Advisory Opinion 2012-22 (skimmerhat); internal quotation marks omitted).

11 The Commission notes that the Project will require that a user's pledge be split equally
12 among the candidates to whom the user chooses to contribute, because at this time it is not
13 feasible for the Project to allow users to have finer control over how their contributions are
14 distributed, but this element does not transform the Project into a conduit. In Advisory Opinion
15 2015-08 (Repledge), the Commission approved a proposal concerning a payment processing
16 platform where the ultimate distribution of a contributors' funds was similarly subject to criteria
17 set by the platform, because the criteria were clearly communicated to the contributor at the
18 outset and could not be changed. In that advisory opinion, a for-profit corporation proposed to
19 establish a web-based platform through which users could pledge money to a federal candidate
20 while at the same time designating a charity to receive the funds if they were matched by

⁴ Although the Project will be an LLC, for purposes of this advisory opinion, the requestors have asked the Commission to presume that the Project will be treated as a corporation for purposes of the Act. AOR003 n.3.

1 pledges from supporters of the candidate's opponent. Advisory Opinion 2015-08 (Repledge) at
2 1-2. A user would not know at the time he or she made the pledge how much of it, if any,
3 would ultimately be forwarded to the candidate, and the amount would be partially dependent
4 on the actions of other users. Nonetheless, the Commission concluded that because Repledge
5 would establish in advance and clearly communicate to users the way in which the pledged
6 amount would be distributed between the selected candidate and the charity, and that method
7 was not subject to change, Repledge continued to act as a commercial payment processor. *Id.* at
8 6.

9 Similarly, the Project will communicate clearly to users at the time they make their
10 pledges that contributions will be split equally among the selected candidates, and therefore
11 users will choose to make pledges subject to that equal division in order to benefit from the
12 Project's services. Accordingly, the Commission concludes that a contribution made through
13 the App and forwarded by the Project to the recipient committees will be a direct contribution
14 from the user through a commercial payment processing service, not a contribution earmarked
15 through a conduit or intermediary.

16 4. *Does the Project comply with the Act and Commission regulations in all other*
17 *respects?*

18 Yes, the Project complies with the Act and Commission regulations in all other respects.

19 The proposed methods of information collection, recordkeeping, and handling funds are
20 consistent with the Act and Commission regulations, and with previous advisory opinions. The
21 Project will keep the users' funds in an account separate from the Project's own treasury funds,
22 which will prevent any commingling of contributions and corporate funds. *See, e.g.,* Advisory

1 Opinion 2015-08 (Repledge); Advisory Opinion 2012-22 (skimmerhat); Advisory Opinion
2 2011-06 (Democracy Engine). The Project will forward all contributions to recipient
3 committees within ten days after the users' funds are transferred to the Project's merchant
4 services account, in accordance with Commission regulations. 11 C.F.R. § 102.8(a). The
5 Project will also collect users' names, addresses, occupations, and employers to provide to the
6 recipient committees, to enable them to meet their own reporting obligations under the Act and
7 Commission regulations. *Id.*; *see also* 11 C.F.R. § 100.12. The Project will also screen for
8 impermissible and excessive contributions, and will require users to affirm that they are using
9 their own, permissible funds for their contributions.

10 Accordingly, the Commission concludes that the Project will comply with all applicable
11 requirements of the Act and Commission regulations.

12 This response constitutes an advisory opinion concerning the application of the Act and
13 Commission regulations to the specific transaction or activity set forth in your request. *See*
14 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or
15 assumptions presented, and such facts or assumptions are material to a conclusion presented in
16 this advisory opinion, then the requestors may not rely on that conclusion as support for their
17 proposed activity. Any person involved in any specific transaction or activity which is
18 indistinguishable in all its material aspects from the transaction or activity with respect to which
19 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.
20 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
21 affected by subsequent developments in the law including, but not limited to, statutes,
22 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available

1 on the Commission's website.

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On behalf of the Commission,

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Steven T. Walther,
Chairman

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