

September 11, 2015

Ezra W. Reese
Ereese@perkinscoie.com
D. +1.202.434.1616
F. +1.202.654.9109

OFFICE OF THE
GENERAL COUNSEL

2015 SEP 14 11:00 AM

BY HAND DELIVERY

Federal Election Commission
Office of the General Counsel
Attn: Adav Noti, Esq.
Acting Associate General Counsel for Policy
999 E Street N.W.
Washington, DC 20463

Re: Advisory Opinion Request

Dear Mr. Noti:

Pursuant to 52 U.S.C. § 30108, we request an advisory opinion on behalf of FYP, LLC seeking confirmation of the permissibility of its business plan under the Federal Election campaign Act of 1971 (the "Act").

RECEIVED
FEDERAL MAIL CENTER
2015 SEP 11 PM 3:11

FACTUAL DISCUSSION

MyChange is an app that automatically rounds up the spare change from a user's credit card or debit card transactions and contributes the resulting amounts to the user's designated nonprofit organization(s) or political committee(s). For example, if a user buys a cup of coffee for \$2.30, MyChange calculates a roundup of \$0.70 and transfers the rounded-up amount (net of relevant fees) to the user's chosen organization(s) and/or committee(s).

MyChange is a product of FYP, LLC, registered in New Mexico. MyChange and its users are concerned that traditional models of giving are confusing, time-consuming, and outmoded. MyChange lowers the barriers to entry in the realm of political speech and political participation by giving busy, forward-thinking people a simple way to engage in the political conversation, and to feel good by doing good.

User Direction and Control of Contributions

To make political contributions using MyChange, a user first downloads the MyChange app or accesses the MyChange website and inputs the relevant information regarding the user's credit cards and debit cards that the user wishes to have rounded-up, including the user's account credentials (i.e. user name and password) with each card issuer. Next, the user selects organizations and candidates of her interest and assigns a percentage of her monthly round-up donation to up to three recipients per card. At any time, the user may also set a monthly cap on

contributions; choose to double or triple their monthly round-up; or choose to add additional credit or debit cards.

All users who choose a political committee as a recipient organization will be required to agree to the following statement:

This contribution is made from my own funds, and funds are not being provided to me by another person or entity for the purpose of making this contribution. I am making this contribution with my own personal credit card and not with a corporate or business credit card or a card issued to another person. I am not a federal contractor. I am at least eighteen years old. I am a U.S. citizen or lawfully admitted permanent resident (i.e. green card holder).

If a user does not agree to this statement, the MyChange app will not accept the user's designations and the user will not be allowed to designate contributions to political committees. Users who select a political committee as a recipient organization will also be required to submit their occupation and employer.

Once each month, MyChange will populate its app with additional political committees¹ and nonprofit organizations from which users may choose to direct rounded-up funds. Political committees can request to do business with MyChange by submitting a request on MyChange's website. MyChange does not intend to work with any and all political committees that request to do business with it. Rather, MyChange will apply a standard set of commercially-based factors to determine whether it will work with the committee. These factors include whether the committee is in good standing with the Federal Election Commission ("FEC" or the "Commission") (or, because MyChange intends to include nonfederal candidates and committees on its platform, with the relevant state or local regulator), and the candidate or committee's ideology and values. MyChange will enter into terms of service with committees that meet MyChange's criteria for the limited purpose of facilitating the transfer of users' funds to the committees' accounts.

Transferring User Funds to Designated Political Committees

Once each month, MyChange works with a partner vendor to calculate the total round-up of the user's transactions. Next, MyChange's merchant service provider uses MyChange's software to charge the user's personal credit and/or debit card(s) for the total amount of the round-up. The merchant service provider sends that money to a merchant account. MyChange plans to establish a merchant account separate from its own treasury funds which will be used solely to deposit users' rounded-up funds as charged to the users' credit and/or debit cards.

¹ MyChange will allow users to designate authorized committees and committees that make contributions to authorized committees.

At the same time the merchant service provider charges the user's card(s), MyChange's software automatically produces a spreadsheet record of all users' itemized contributions for the month and year-to-date, and all user's itemized contributions separated by recipient organization or committee for the month and year-to-date. MyChange keeps a separate accounting of the contributions designated to each committee and nonprofit organization, and sends each recipient political committee and nonprofit organization a monthly spreadsheet of all users' itemized contributions to the organization. This transmittal to political committees will include all information that political committees will need to comply with their FEC reporting obligations, such as each user's address, occupation and employer. Committees and organizations can also access the MyChange website at any time to download itemized contribution information on an on-demand basis.

Within one business day of the monthly charge of users' cards, the merchant account processes an automated transfer of contributions as designated by the users to the applicable recipient committee or organization, less a fee that is deducted from the user's funds before the funds are transferred to the recipient committee(s). All transfers are made according to users' designations; MyChange does not exercise any direction or control over the transfers, except that MyChange may limit the amount of the transfer to avoid exceeding the relevant contribution limit. The merchant account transfers the fee to FYP, LLC. The amount of the fee will represent the relevant fees for MyChange to cover its vendor and operational costs associated with transferring users' funds, as well as a reasonable profit.

At the end of each month, MyChange will reconcile the merchant services account to ensure the proper contributions have been forwarded to the proper recipient, as designated by the user. As part of the monthly reconciliation, MyChange will (1) reconcile the total amount in the merchant services account with its own internal record of rounded up funds received; (2) reconcile the amount paid out of the merchant services account to the total amount paid to each political committee and nonprofit organization with MyChange's internal record or designated contributions to each recipient; and (3) calculate an overall account reconciliation to ensure the amount received each month equals the total amount distributed to recipients and the fees distributed to MyChange.

Finally, also at the end of each month, MyChange automatically emails a statement to each user describing the user's total round-up. Users have the ability to add or remove cards and to adjust their designations at any time.

LEGAL ANALYSIS

All aspects of MyChange's business plan are consistent with the Act and Commission regulations. Specifically, none of MyChange's planned operations results in an impermissible contribution by MyChange to political committees, as explained below. We respectfully request

that the Commission confirm that MyChange's business plan complies with federal campaign finance law.

1. Costs Paid by MyChange Users Represent the Normal and Usual Charge for MyChange's Services

The Act and Commission regulations generally prohibit corporations and LLCs taxed as corporations from making a contribution in connection with a federal election, and place limits on the amounts that permissible sources may contribute. *See* 52 U.S.C. § 30118; 11 C.F.R. 114.2(b)(1). A contribution includes "anything of value made by any person for the purpose of influencing any election for federal office." 11 C.F.R. § 100.52(a). "Anything of value," in turn, includes all in-kind contributions, including the provision of goods or services at less than the usual and normal charge. *Id.* § 100.52(d)(1). "Usual and normal charge" is defined as the price of goods in the market from which they ordinarily would have been purchased at the time of the contribution, or the commercially reasonable rate at the time services were rendered. *Id.* § 100.52(d)(2).

a. ~~The Commission has Approved Programs Similar to MyChange's~~

In its previous advisory opinions, the Commission has permitted vendors to offer programs similar to MyChange's (which the Commission often refers to as "affinity programs") provided two conditions are met ensuring that no prohibited contribution has taken place: First, that the vendor and the political committee enter into a commercially reasonable transaction in which the user or the political committee pays the usual and normal charge for services provided; and second, that the amounts transferred to the political committee are from the individual customer's funds and not from the corporation's funds. *See, e.g.,* Advisory Opinions 2014-09 (REED Marketing); 2010-06 (Famos LLC); 2010-21 (ReCellular); 2006-34 (Working Assets); 2003-16 (Providian National Bank).

MyChange's proposed operations meet the Commission's two-part test for permissible affinity-like programs. First, MyChange's users (rather than the recipient political committees) will pay a fee to MyChange for MyChange's services rendered in rounding up users' purchases and transferring rounded-up funds to the users' designated committee. The fee is calculated to cover all costs incurred by MyChange in providing the services, including transaction processing fees and other bank fees, and to provide MyChange with a reasonable profit. The fee therefore represents the "normal and usual charge" for MyChange's services as the Commission has interpreted this requirement *See, e.g.,* Advisory Opinion 2007-04 (Atlatl).

Second, the funds transferred to the recipient committees represent users' funds, not MyChange's. Once each month, MyChange charges a user's credit card or debit card for the total amount of rounded-up funds on the card for that month. The user's issuing bank then transfers

funds to a merchant account established by MyChange. The merchant account will be separate from MyChange's treasury funds and is used only to hold users' funds designated for political committees and nonprofit organizations. The merchant account then transfers the users' funds to the recipient organizations (less the fee). At no point in this process does MyChange exercise any direction or control over any funds transferred to political committees. Accordingly, all amounts transferred are from the individual user's funds, not from MyChange's funds. *See* Advisory Opinion 2006-34 (Working Assets) (concluding that transfer of rebated and rounded-up amounts to political committees were contributions by customers, rather than the vendor, where the rebates and round-ups occurred in the ordinary course of the entity's business and the user, not the entity, controlled the disposition of rebated and rounded up funds).

MyChange is therefore similar in all material respects to several affinity programs the Commission has approved in the past. The example with facts closest resembling MyChange is Advisory Opinion 2006-34, where the Commission approved a program offered by Working Assets, Inc., allowing its phone and wireless service customers to designate a rebate valued at 10% of their monthly service charges as a contribution to a political committee. Customers were also allowed to contribute by rounding up monthly charges and designating the rounded-up amount as a contribution. Customers made their designations at the time of enrollment; could change their designations at any time; and received an annual notice allowing them to affirm or change their designations. Working Assets deposited users' funds in a separate merchant account, and exercised no discretion or control over the disposition of the funds. Under those similar facts, the Commission ruled that Working Asset's rounding-up proposal complied with the Act and FEC regulations.

b. The Commission Allows the User, Rather than the Recipient Political Committee, to Pay the Normal and Usual Charge

The Commission has also made clear that no contribution from a vendor to a political committee results when an entity engages with the user who wishes to utilize the entity's services and the user pays (rather than a beneficiary political committee) the entity's fees. In such situations, the Commission has taken the view that the vendor is offering services to its users; it is not providing services to the recipient committee. *See* Advisory Opinions 2014-07 (Crowdpac); 2011-06 (Democracy Engine); 2006-08 (Brooks) (comparing such services to "delivery services, bill paying services, or check writing services."). Where an entity "is providing services only to the [user], and not to any political committee" the Commission has found that the services do "not result in impermissible contributions . . ." Advisory Opinion 2011-06 (Where services are provided "at the request and for the benefit of the contributors, not of the recipient political committees," then the services do not "relieve the recipient political committees of a financial burden they would otherwise have to pay for themselves. For this reason the services provided to contributors were not considered to be contributions to the recipient political committees.").

2. MyChange Does Not Make an Impermissible Contribution by Declining to Work with Certain Political Committees

As discussed, MyChange provides contribution rounding and transfer services to its users, and those users will pay the normal and usual fee for such services. Because the normal and usual charge is paid, and because the funds are those of MyChange's users' funds, MyChange does not make a contribution to the political committees it transfers contributions to. This is true even if MyChange chooses not to work with all political committees that request access to MyChange's app, and it is true even if MyChange excludes certain committees based on ideological factors.

The Commission has long held that a vendor does not need to work with any and all political committees in order to avoid making an in-kind contribution to the committees it does work with. In Advisory Opinion 2012-28, for example, the Commission allowed CTIA to set various criteria important to CTIA's business to determine a committee's eligibility to contract for CTIA's services. In that opinion, the Commission ruled that "a vendor may establish and apply eligibility criteria to political committees in order to protect the commercial viability of the vendor's program." Advisory Opinion 2012-28 (CTIA – The Wireless Association). Similarly, in Advisory Opinion 2006-34, the Commission permitted a vendor to (A) work exclusively with party committees and nonconnected PACs, and not provide services to authorized candidate committees or separate segregated funds; and (B) further limit the parties and PACs it would work with based on criteria important to the vendor's business such as the potential for long-term customer commitment and the customer's credit rating. Advisory Opinion 2006-34 (Working Assets).

MyChange's business plan hinges on working with candidates and committees that meet MyChange's eligibility requirements. For example, MyChange will not enter into terms of service with committees that are not in good standing with the Commission or with relevant state regulators. It is also vital to MyChange's business that MyChange enter into terms of service only with political committees that share MyChange's users' ideology and values. If MyChange were obligated to work with committees with competing values, the company's business relationships with its core base of like-minded political committee clients would be harmed. In other words, applying an ideological criterion to potential committee partners preserves the commercial viability of MyChange's program. Therefore, under the FEC's past precedents MyChange can choose as a business matter to exclude committees of a certain political party or candidates who hold a certain policy position without making an in-kind contribution to the committees MyChange does choose to work with.

3. MyChange's Contribution Processing System Meets Commission Requirements

MyChange users can designate political committees and other nonprofit organizations as recipients of the users' rounded-up funds. MyChange plans to process all rounded-up funds

through a single merchant account, and, accordingly, anticipates the account will sometimes process funds from users who are prohibited sources under the Act, such as federal contractors or corporations, who are making contributions to organizations other than political committees. The Commission has required that amounts a vendor transfers to a political committee must be from individual customers' funds and not from impermissible sources such as the vendor's own treasury funds. *See, e.g.*, Advisory Opinion 1990-01 (Digital Corrections). MyChange believes the merchant account complies with Commission regulations because (1) MyChange has specific recordkeeping systems in place to ensure that only funds from permissible sources flow to political committees, while funds designated by an impermissible source for a nonprofit organization flow only to the nonprofit and not to a political committee; and (2) the payment process through the merchant account is substantially similar to the normal credit card payment process first approved by the Commission in 1978.

When a political committee accepts credit card contributions, the committee receives the funds before the individual contributor pays his or her credit card bill. While the payments from the issuing bank are direct proxies for the donor's political contributions, the payments do not consist of the donor's actual funds, they consist of the issuing bank's own corporate treasury funds. The Commission approved this payment process in 1978. Advisory Opinion 1978-68 (Seith). At that time, the Commission made no comment on the fact that the funds flowing to the political committee originated from the corporate treasury funds of the issuing bank and did not require the issuing bank to segregate funds from permissible donors from other funds.

While some of the Commission's past precedents generally disallowed an affinity program vendor from commingling permissible and impermissible funds, those opinions appear to be overruled in Advisory Opinion 2012-17 (m-Qube I). In that opinion, the Commission did not require the requestor to establish a separate account, in part because the requestor established a sufficient tracking system to "ensure[] that political contributions are properly accounted for." *Id.* In this opinion, the Commission explicitly overruled its prior advisory opinions regarding the comingling prohibition when vendors have established adequate systems to track contributions. Subsequently, the Commission reaffirmed this position in Advisory Opinion 2012-30 (Revolution Messaging).

As explained above, MyChange keeps such separate records for all entities it works with, whether political committees or other types of nonprofit organizations. MyChange will conduct several reconciliation processes on an ongoing, monthly basis to ensure funds are properly accounted for and distributed according to users' designations. In other words, MyChange has tracking systems and preventative measures in place such that (1) it will only transfer to political committees the permissible funds designated to those committees; and (2) the merchant account will never be in a position where it does not have sufficient permissible funds to transfer to political committees and must instead transfer impermissible funds. Given such measures,

MyChange's payment processing system does not result in prohibited contributions to any political committee.

Conclusion

FYP, LLC requests the Commission's confirmation that all aspects of its MyChange business plan described above comply with federal campaign finance law.

If the Commission cannot provide such confirmation, FYP, LLC alternatively requests confirmation that the MyChange business plan would comply with federal campaign finance law if MyChange required *all* users (rather than just users who designated their rounded-up funds to political committees) to certify that they are qualified to contribute to federal political committees, such that MyChange would not process any contributions from a user who failed to certify that he or she is not a federal contractor or foreign national, and was using only a personal credit card.

We appreciate the Commission's consideration of this request.

Very truly yours,



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



RE: FYP LLC pre-AOR: follow-up to telephone conversation
Reese, Ezra (Perkins Coie)

to:
EGyory@fec.gov
09/22/2015 10:50 AM

Cc:
"Hagenbuch, Tyler J. (Perkins Coie)", "ARothstein@fec.gov"

Hide Details

From: "Reese, Ezra (Perkins Coie)" <Ereese@perkinscoie.com>

To: "EGyory@fec.gov" <EGyory@fec.gov>,

Cc: "Hagenbuch, Tyler J. (Perkins Coie)" <THagenbuch@perkinscoie.com>,
"ARothstein@fec.gov" <ARothstein@fec.gov>

History: This message has been forwarded.

Ms. Gyory,

The information below is accurate.

Very truly yours,

Ezra Reese

Ezra W. Reese | Perkins Coie LLP

PARTNER

700 Thirteenth Street, N.W. Suite 800

Washington, DC 20005-3960

D. +1.202.434.1616

F. +1.202.654.9109

E. ereese@perkinscoie.com

From: EGyory@fec.gov [<mailto:EGyory@fec.gov>]

Sent: Monday, September 21, 2015 3:47 PM

To: Reese, Ezra (Perkins Cole)

Cc: Hagenbuch, Tyler J. (Perkins Cole); ARothstein@fec.gov

Subject: FYP LLC pre-AOR: follow-up to telephone conversation

Dear Mr. Reese,

Thank you for taking the time to talk with us Friday and today and to answer our questions regarding the pre-AOR submitted on behalf of FYP LLC. Below is a summary of information that you provided to us. Please either confirm that the information below is accurate, or respond with any necessary corrections or clarifications.

1. For the purposes of the advisory opinion request, the Commission should assume that FYP LLC has elected to be treated as a corporation for federal tax purposes.
2. The requestor asks that the Commission opine on whether the fees paid by a contributor to FYP LLC would have to be included in the total amount of the contribution to a recipient political committee.
3. A contributor participating in the MyChange program will be able to cancel or withdraw from the program at any time, and the cancellation will be effective immediately. If a contributor cancels or withdraws before funds are deducted from his or her credit or debit card, then the credit or debit card will not be charged.
4. The requestor will notify contributors of the total amount charged to their credit or debit cards shortly after charging the cards. The requestor will not notify contributors in advance of charging their credit or debit cards.
5. Each potential recipient political committee and nonprofit organization will be assigned a unique URL to enable the requestor and its merchant services provider to track donations and contributions to each recipient.

6. The requestor does not plan to arrange with political committees to market the MyChange program to the political committees' members or contributors, although political committees may wish to market the program themselves. The requestor plans to advertise the program to the public, rather than marketing only to a targeted group.

7. The requestor will charge users a flat fee, calculated as a percentage of the total funds deducted from the user's credit or debit card. The fee will cover the cost of collecting the user's information and transmitting such information to the recipient political committee or nonprofit organization. The amount of the fee will be the same regardless of whether the recipient of the funds is a political committee or a nonprofit organization.

8. The requestor's business relationships are with the individuals who use MyChange to make donations and contributions, and not with the political committee recipients of contributions (apart from the limited contractual relationships necessary to effectuate transfers). The reference in the request to "the company's business relationships with its core base of like-minded political committee clients" (AOR at 6) is intended to refer to the requestor's relationships with its individual users who use the service to make contributions and donations.

9. If a user wishes to make a contribution to a political committee or nonprofit organization not currently among those offered by the MyChange program, MyChange will consider that request and will apply the same set of standards to determine whether the political committee or nonprofit organization shares MyChange users' ideology and values.

We would appreciate your response by email. Your response may be considered to be part of your advisory opinion request; if so, it will be posted as such on the Commission's website.

Sincerely,

Esther Gyory
Attorney, Policy Division
Office of General Counsel
Federal Election Commission
(202) 694-1650

NOTICE: This communication may contain privileged or other confidential information. If you have received it in error, please advise the sender by reply email and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.