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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 15-38-C
AGENDA ITEM
For meeting of August 11, 2015
SUBMITTED LATE

August 7, 2015

MEMORANDUM

TO: The Commission

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

Adav Noti *AN by LJS*
Acting Associate General Counsel

Amy L. Rothstein *AR by LJS*
Assistant General Counsel

Anthony T. Buckley *ATB*
Attorney

Subject: AO 2015-03 (Democracy Rules) Draft C

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 5:00 pm (Eastern Time) on August 10, 2015.

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 <http://www.fec.gov/law/draftaos.shtml>.

Attachment

1 ADVISORY OPINION 2015-03
2
3 Ray Cashman
4 Executive Director
5 Democracy Rules, Inc.
6 P.O. Box 410356
7 San Francisco, CA 94141-0356
8
9 Dear Mr. Cashman:

DRAFT C

10 We are responding to your advisory opinion request on behalf of Democracy Rules, Inc.
11 concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-46, and
12 Commission regulations to a proposal by Democracy Rules to transmit political contributions to
13 candidates on behalf of its members. The Commission concludes that the proposal is not
14 permissible under the Act and Commission regulations.

15 ***Background***

16 The facts presented in this advisory opinion are based on your letter received on June 4,
17 2015, your email dated June 29, 2015, and supplemental submission received on July 22, 2015,
18 and on publicly available information on the Democracy Rules website (the “website”), at
19 <https://democracyrules.org>.

20 Democracy Rules is a California corporation exempt from federal taxation under section
21 501(c)(4) of the Internal Revenue Code. It is an “issue oriented” “non-partisan” “citizen’s
22 lobbying organization,” whose mission is “to enable each American to directly affect every
23 social welfare issue through lobbying efforts.” Advisory Opinion Request (“AOR”) at AOR001.
24 To accomplish this goal, Democracy Rules established the website. The website enables
25 members to vote for their most important issues and their positions on the issues and “to pledge
26 funds to support the reelection of legislators they believe will act in a generally responsive and
27 representative manner” or to advocacy groups. *Id.* As described below, Democracy Rules

1 aggregates and forwards its members' funds to the principal campaign committees of federal
2 officeholders based on the results of online membership polls.

3 As a first step, to become a member of Democracy Rules, an individual must register on
4 the website by providing his or her name, address, occupation, and employer, and must deposit
5 funds into the "Members Account." The Members Account is a PayPal account into which all
6 member funds are deposited. PayPal deducts 2.9% plus 30 cents from each member's deposit as
7 a processing fee; Democracy Rules deducts 10 cents from each deposit to cover its
8 administrative expenses. Democracy Rules deposits its fees into a "corporate" account that it
9 segregates from the Members Account and uses to pay its expenses. The member may use his or
10 her remaining funds on deposit to participate in Democracy Rules activities, including the
11 presentation cycles described below. To complete the registration process, each member must
12 attest to a number of statements that are intended to ensure that the member may legally make
13 contributions to federal candidates.¹

14 To determine the recipients of the funds in the Members Account, Democracy Rules
15 hosts four-week "presentation cycles" on the website. Through these presentation cycles,
16 members identify the issues that are most important to them, their positions on the issues, and
17 recipients (whom Democracy Rules refers to as "trustees") of member funds.

¹ Democracy Rules requires each registrant to attest to the following statements:

- a) This contribution is made from my own funds and not from another.
- b) This contribution is not from the general treasury funds of a corporation, labor organization or national bank.
- c) I am not a federal government contractor.
- d) I am not a foreign national who lacks permanent resident status in the United States.
- e) I am over the age of 18, and if not, I am a minor making this contribution of my own volition, and not at the request or direction of another individual.
- f) I understand contributions to individual legislator's reelection campaigns must not exceed \$2,700 per election.

1 Democracy Rules has organized 355 social welfare issues into 24 categories, each with
2 several subcategories.² During the first week of each presentation cycle, Democracy Rules
3 presents a number of these issues to its members, who may vote on which issues in each
4 subcategory are the most important to them, and indicate whether they support or oppose those
5 issues. The issue positions in each subcategory that receive the greatest number of votes move
6 on to the second round, which takes place during the second and third weeks of a presentation
7 cycle.

8 During the second round, members may pledge funds online to any of the winning issue
9 positions, using some or all of the funds that they have deposited in the Members Account. The
10 minimum pledge is one dollar.

11 The third and final round takes place during the last week of a presentation cycle. For
12 each issue position that received pledges in the second round, Democracy Rules selects two
13 possible trustees, and the members who have made pledges to an issue position can vote on
14 which trustee will be the recipient of all of the funds pledged to that issue position. Democracy
15 Rules “unilateral[ly] deci[des]” the trustee candidates, although it accepts suggestions from
16 members on “worthy trustees” and states that its decision “is constrained by the requirement to
17 best affect legislation associated with an issue, leaving little to the discretion of administrators.”
18 AOR004; *see also Frequently Asked Questions*, DEMOCRACY RULES,

² The subcategories under the category “energy,” for example, include clean energy, electricity, and energy extraction. *Issues*, DEMOCRACY RULES, <https://democracyrules.org/dr3/issues/categories> (last visited June 23, 2015). The issues under the subcategory “clean energy” include geothermal power, solar power, and wind power. *Id.*

1 https://democracyrules.org/user_faq.php (last visited June 18, 2015).³ Specifically, if the
2 majority of voting members supports an issue with pending legislation, the choice of trustees is
3 usually between the principal campaign committee of the chair of the full legislative committee
4 to which the legislation was assigned when the presentation cycle began,⁴ or an advocacy group.
5 If the majority supports an issue not tied to pending legislation, the choice of trustees is usually
6 between the principal campaign committee of a legislator with a demonstrated interest in the
7 issue or an advocacy group. If the majority opposes an issue, the choice is usually the principal
8 campaign committee of either the Speaker of the House or the Senate Majority Leader.⁵

9 The Democracy Rules website identifies all potential candidate trustees on a given issue
10 before members pledge funds on that issue. But because the actual trustee is not determined
11 until members vote in the third round of the presentation cycle, members can cancel, or
12 “rescind,” their pledges if they wish to do so “from the moment funds are pledged until 24 hours
13 after” the trustee has been selected by majority vote. Democracy Rules FAQ. Rescinded
14 pledges are returned to the Members Account.

15 Democracy Rules transmits funds to the trustee within 10 days of the conclusion of the
16 trustee vote. If the trustee is a campaign committee, Democracy Rules provides it with the

³ The website further explains that legislators’ responsiveness to the wishes of Democracy Rules’s members “could affect the degree to which they are considered as future trustee candidates.” Democracy Rules FAQ.

⁴ Ten percent of the total pledge amount is designated for the campaign committee of the sponsor of the legislation if pledges exceed \$1,000.

⁵ The process differs somewhat for “longterm campaigns,” which Democracy Rules conducts for issues that require “unusually prolonged support.” AOR003. If the winning issue after the first round of a presentation cycle lends itself to a longterm campaign — such as, for example, amending the Constitution — members can vote during the third round to have the issue so designated. Such campaigns remain active for as long as they receive donations or until their issue is resolved. Members may donate to a variety of recipients, including the principal campaign committee of a legislator chosen by Democracy Rules. Rather than having members vote to select a trustee for the issue, Democracy Rules transmits the funds to the designated recipient. If the designated recipient is a principal campaign committee, Democracy Rules transmits the funds within 10 days.

1 contributors' names, contribution amounts, and identifying information, including address,
2 occupation, and employer. Once a presentation cycle for an issue has ended, the cycle starts all
3 over again for that issue.

4 Democracy Rules states that it operates on a commercial basis and expects the 10-cent
5 fee assessed against each member's deposit to cover its costs and expenses and yield an adequate
6 profit. But if the 10-cent fee, online merchandise sales, and member donations do not generate
7 sufficient revenue, Democracy Rules will charge either membership fees or a commission on its
8 members' pledges. Democracy Rules plans to dispose of any surplus revenue consistent with the
9 wishes of its membership as determined through online opinion polls. Democracy Rules does
10 not propose to enter into any contractual relationship with any recipient political committees.

11 ***Question Presented***

12 *May Democracy Rules transmit contributions to federal candidates as proposed?*

13 ***Legal Analysis and Conclusion***

14 No, Democracy Rules may not transmit contributions to federal candidates as proposed.

15 The Act and Commission regulations prohibit a corporation from making a contribution
16 in connection with a federal election. *See* 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b)(1). In this
17 context, a "contribution" includes any "direct or indirect payment, distribution, loan, advance,
18 deposit, or gift of money, or any services, or anything of value . . . to any candidate, [or]
19 campaign committee . . . in connection with any [federal] election." 52 U.S.C. § 30118(b)(2); 11
20 C.F.R. § 114.2(b)(1); *see also* 52 U.S.C. § 30101(8)(A)(i); 11 C.F.R. § 100.52(a). "Anything of
21 value" includes in-kind contributions, such as the provision of goods or services without charge
22 or at a charge that is less than the usual and normal charge. *See* 11 C.F.R. § 100.52(d)(1).

1 Commission regulations define “usual and normal charge” as the price of goods in the market
2 from which they ordinarily would have been purchased at the time of the contribution, or the
3 commercially reasonable rate prevailing at the time the services were rendered. *See* 11 C.F.R.
4 § 100.52(d)(2).

5 In several recent advisory opinions, the Commission concluded that companies that
6 process contributions as a service to contributors are not making contributions because they are
7 not providing services or anything of value to the recipient committees. In Advisory Opinion
8 2014-07 (Crowdpac), for example, the Commission concluded that a commercial entity that
9 established a website to help users identify like-minded candidates and enabled users to make
10 contributions from which the processor deducted fees did not make contributions to the recipient
11 political committees. *See also* Advisory Opinion 2012-22 (skimmerhat) (distinguishing between
12 companies that process contributions as service to contributors and companies that process
13 contributions as service to political committees); Advisory Opinion 2011-19 (GivingSphere) at 7
14 (same); Advisory Opinion 2011-06 (Democracy Engine) at 4-6 (same). The Commission has
15 analogized these processors to “widely available delivery services, such as United Parcel
16 Service,” or “an electronic bill-pay service, such as those provided by banks.” Advisory Opinion
17 2012-22 (skimmerhat) at 5-6; *see also* Advisory Opinion 2014-07 (Crowdpac) at 6 (same);
18 Advisory Opinion 2011-06 (Democracy Engine) at 5 (analogizing company’s contribution
19 processing services to “delivery services, bill-paying services, or check-writing services for its
20 subscribers”).

21 Several aspects of the Democracy Rules proposal are similar to those previously
22 approved by the Commission. Like the requestors in Advisory Opinion 2014-07 (Crowdpac),

1 Advisory Opinion 2012-22 (skimmerhat), Advisory Opinion 2011-19 (GivingSphere), and
2 Advisory Opinion 2011-06 (Democracy Engine), Democracy Rules has developed a web-based
3 platform that individuals can use to make contributions to political committees. Also like those
4 requestors, Democracy Rules will forward contributions to the political committees but will not
5 enter into contracts with, or receive payments from, the committees. Democracy Rules will
6 charge members a fee for its services that it expects to cover its costs and generate a profit, as did
7 the prior requestors. Finally, Democracy Rules will require users to certify their eligibility to
8 make contributions to federal candidates, provide contributor identification information to
9 recipient political committees, and maintain users' contributions in a separate bank account from
10 corporate treasury funds.

11 But a key difference between the Democracy Rules proposal and those approved
12 previously is that Democracy Rules will allow its members to make contributions only to
13 candidates whom Democracy Rules has vetted and approved, based on whom it considers best
14 able to accomplish its members' policy goals. The ultimate recipient is then chosen through a
15 process that Democracy Rules itself controls: by vote of its members, conducted under its
16 auspices, pursuant to rules that it has established. *See, e.g.*, AOR004 (describing selection of
17 "trustee candidates" as "unilateral decision [of] Democracy Rules administrators"); Democracy
18 Rules FAQ ("Over time, representatives will demonstrate how responsive they are to the wishes
19 of the majority, and this could affect the degree to which they are considered as future trustee
20 candidates."). By contrast, Crowdpac allowed users of its website to search for and contribute to
21 any candidate who had registered an authorized committee with the Commission, as well as
22 prospective candidates and eventual party nominees. Advisory Opinion 2014-07 (Crowdpac) at

1 2, 4. Similarly, skimmerhat allowed users to contribute to any federal candidate. Advisory
2 Opinion 2012-22 (skimmerhat) at 2. GivingSphere’s website enabled users to contribute to “all
3 active political committees registered with the Commission.” Advisory Opinion 2011-19
4 (GivingSphere) at 2. And if a subscriber wished to make a contribution to a political committee
5 not already in Democracy Engine’s directory of potential recipients, Democracy Engine would
6 add it to the directory. Advisory Opinion 2011-06 (Democracy Engine) at 2.

7 By making a “unilateral decision” about which candidates can be the ultimate recipients
8 of members’ funds, Democracy Rules would be providing something of value to the recipient
9 candidates—and operating in a way that does not resemble a widely-available delivery or bill-
10 paying service. Accordingly, Democracy Rules does not qualify for the commercial service
11 exception that the Commission has recognized to the prohibition on corporate contributions in 52
12 U.S.C. § 30118(a) and 11 C.F.R. § 114.2(b)(1). The Commission therefore concludes that
13 Democracy Rules’s proposal to transmit contributions to candidate committees is inconsistent
14 with the Act and Commission regulations.

15 The Commission expresses no opinion regarding any implications of the requestor’s
16 proposal under the Internal Revenue Code or any other state or federal law because those issues
17 are outside the Commission’s jurisdiction.

18 This response constitutes an advisory opinion concerning the application of the Act and
19 Commission regulations to the specific transaction or activity set forth in the advisory opinion
20 request. *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of
21 the facts or assumptions presented, and such facts or assumptions are material to a conclusion
22 presented in this advisory opinion, then the requestor may not rely on that conclusion as support

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

8 On behalf of the Commission,

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Ann M. Ravel
Chair