By Commission Secretary's Office at 4:19 pm, Nov 16, 2015



FEDERAL ELECTION COMMISSION

Washington, DC 20463

AGENDA DOCUMENT NO. 15-62-B AGENDA ITEM For meeting of November 17, 2015 SUBMITTED LATE

November 16, 2015

#### MEMORANDUM

TO:

FROM:

Daniel A. Petalas Dr Wy GmA Acting General Counsel Adav Noti AN Wy GmA Acting Associate C

Amy L. Rothstein Assistant General Counsel

Esther Gyory tek for EG Attorney

Subject:

AO 2015-11 (FYP, LLC) 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 November 17, 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 2015-11 2 3 Ezra W. Reese, Esq. **DRAFT B** 4 Tyler J. Hagenbuch, Esq. 5 Perkins Coie LLP 6 700 13th Street, N.W. 7 Suite 600 8 Washington, D.C. 20005-3960 9 10 Dear Messrs. Reese and Hagenbuch: 11 We are responding to your advisory opinion request on behalf of FYP, LLC concerning 12 the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-46 (the "Act"), and 13 Commission regulations to the requestor's proposal for processing contributions to political 14 committees as a service to its users. The Commission concludes that the proposal is permissible. 15 Background 16 The facts presented in this advisory opinion are based on your letter received on 17 September 14, 2015, and your email received on September 22, 2015 (collectively, "AOR"). 18 The requestor is a limited liability company registered in New Mexico. For purposes of 19 this advisory opinion, the requestor has asked the Commission to assume that it has elected to be 20 treated as a corporation for federal tax purposes. 21 The requestor is developing a contribution processing platform called MyChange. As 22 described in more detail below, MyChange will "round up" a participating user's credit card or 23 debit card transactions to the next whole dollar amount and provide the difference between the 24 original transactions and the resulting rounded-up amounts to political committees or other 25 nonprofit organizations designated by the user. For example, if a user uses an enrolled credit 26 card to charge a cup of coffee for \$2.30 and (separately) a newspaper for \$1.50, then at the end 27 of the billing cycle MyChange will charge \$1.20 (\$0.70 plus \$.50) to the user's card and send

- that amount, minus fees, to the user's designated recipients. *See* Advisory Opinion Request at
   AOR001.
- 3 Contribution Process

Users will access the MyChange platform through the MyChange website or by downloading the MyChange app. After entering information about the credit and debit cards that the user wishes to enroll in the round-up program, the user will select recipients from a list on the app or website. Each user will be able to designate up to three recipients for each credit or debit card and to assign a percentage of future round-ups to each recipient. Users who designate a political committee recipient will be required to verify their eligibility to make contributions under federal law and to submit information about their occupations and employers.<sup>1</sup>

11 The requestor will calculate and process user round-ups on a monthly basis. The 12 requestor will work with a vendor to calculate the total amount of the round-ups derived from 13 each user's credit and debit card transactions in a given month. The requestor's merchant service 14 provider will then use the MyChange software to charge each user's credit or debit card for that 15 total amount. At any time until the user's card is charged for that month, the user will be able to: 16 set a monthly cap on contributions and donations; instruct the requestor to charge the credit card 17 double or triple the monthly round-up; add additional credit or debit cards; cancel a round-up; or 18 withdraw from the program entirely.

<sup>1</sup> 

Users will be required to attest to the following statement:

<sup>&</sup>quot;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)."

21

1	The merchant service provider will transmit the user's monthly round-up funds to a
2	merchant account that the requestor plans to establish exclusively to accept deposit of those
3	funds and to keep them separate from the requestor's own treasury funds. Within one business
4	day after the user's credit or debit card is charged, the funds will be transferred from the
5	merchant account to the user's designated recipient (less the service fee, which is discussed
6	further below). The requestor states that it "[will] not exercise any direction or control" over the
7	transfers, except that it "may limit the amount of the transfer to avoid exceeding the relevant
8	contribution limit." AOR003. Shortly afterwards, the user will receive an email indicating the
9	total amount charged against his or her card.
10	When the merchant service provider charges a user's credit or debit card, MyChange's
11	software will produce a spreadsheet record of the user's itemized contributions and donations for
12	the month and the year-to-date. MyChange will also keep a separate accounting of the
13	contributions or donations sent to each recipient and will send each recipient a monthly itemized
14	spreadsheet of all users' contributions or donations to that recipient. The requestor represents
15	that this transmittal "will include all information that political committees will need to comply
16	with their reporting obligations" under the Act and Commission regulations, including each
17	user's address, occupation and employer. AOR003. Recipients will also be able to access the
18	MyChange website at any time to download this information.
19	At the end of each month, the requestor will reconcile the actual funds processed through
20	the merchant service account with its internal records to "ensure that the proper [amounts] have

been forwarded to the proper recipient, as designated by the user." Id. As part of the

22 reconciliation, the requestor will (1) compare the total amount received in the merchant account

with MyChange's internal record of funds received; (2) compare the amount paid out of the 23

1 merchant account with MyChange's internal record of the total amount paid to each recipient; 2 and (3) perform an overall account reconciliation to ensure that the amount received equals the 3 total amount distributed to all recipients and the fees distributed to the requestor. 4 In addition to processing funds from permissible sources under the Act, the requestor 5 expects the merchant account sometimes to "process funds from users who are prohibited sources under the Act, such as federal contractors or corporations, who are making [donations] to 6 7 organizations other than political committees." AOR007. The requestor will use the 8 recordkeeping system described above to "ensure that only funds from permissible sources flow 9 to political committees" and that the merchant account "will never be in a position where it does 10 not have sufficient permissible funds to transfer to political committees." Id. 11 List of Recipients 12 The requestor proposes to process user contributions through the MyChange platform to 13 candidates, political committees, and non-profit organizations that meet certain "commercially-14 based" eligibility requirements. AOR002, AOR006. The MyChange platform will not include, 15 for example, committees that "are not in good standing with the Commission," nor will it include 16 committees that do not share requestor's "users' ideology and values." Id. The requestor has 17 elected to brand the MyChange service in this manner in furtherance of its "relationships with its 18 individual users who use the [MyChange] service to make contributions and donations" and 19 requestor represents that the "commercial viability" of its business plan "hinges on" these 20 limitations. AOR006, AOR010. 21 Consistent with these criteria, once each month, the requestor "will populate its app with

22 additional political committees and nonprofit organizations from which users may choose to

direct rounded-up funds."<sup>2</sup> Political committees can request to be added to the MyChange
 platform, and users can ask MyChange to add committees to the list of recipients. AOR002.
 Ultimately, the requestor will make eligibility determinations by applying the "standard set of
 commercially-based factors" described above. AOR002.

5 The requestor states that the only business relationships it will have with the political 6 committees that receive contributions through MyChange will be entering into terms of service 7 with them "for the limited purpose of facilitating the transfer of users' funds to the committees' 8 accounts." AOR002, AOR010. The requestor plans to advertise its program to the public and 9 does not plan to work with political committees to market the program directly to the 10 committees' contributors.

11 User Fees

12 The requestor will assess each user a fee for using the MyChange program. The fee will 13 be calculated as a percentage of the total funds charged to the user's credit or debit card in a 14 given transaction. The requestor expects the fee to cover all of its costs in providing the services 15 described above, including "its vendor and operational costs associated with transferring users' 16 funds," AOR003, "transaction processing fees and other bank fees," AOR004, and the cost of 17 "collecting the users' information and transmitting such information to the recipient," AOR010. 18 The fee will also provide the requestor with "a reasonable profit." AOR003, AOR004. The 19 requestor states that the fee will "represent[] the normal and usual charge" for its services. 20 AOR004 (internal citations omitted). The fee will be drawn from the funds charged to the user's 21 credit or debit card before the remainder of those funds is provided to the designated recipients.

 $<sup>^2</sup>$  The requestor states that it will include on its list of eligible recipients "authorized committees and committees that make contributions to authorized committees," as well as nonfederal candidates and committees. AOR002 & n.1.

1 The fee "will be the same regardless of whether the recipient of the funds is a political committee

2 or [another] nonprofit organization." AOR010.

# 3 **Question Presented**

4 Does requestor's proposed business plan comply with federal campaign finance law?

# 5 Legal Analysis and Conclusion

- 6 Yes, as discussed below, the requestor's proposed business plan complies with federal7 campaign finance law.
- 8 A. Processing User Contributions

9 The Act and Commission regulations prohibit corporations from making a contribution in

10 connection with a Federal election. See 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b)(1). A

11 "contribution" includes any "direct or indirect payment, distribution, loan, advance, deposit, or

12 gift of money, or any services, or anything of value . . . to any candidate, campaign committee,

13 or political party or organization, in connection with any [federal] election." 52 U.S.C.

14 § 30118(b)(2); 11 C.F.R. § 114.2(b)(1); see also 52 U.S.C. § 30101(8)(A)(i); 11 C.F.R.

15 § 100.52(a). "Anything of value" includes in-kind contributions, such as the provision of goods

16 or services without charge or at a charge that is less than the usual and normal charge. See 11

17 C.F.R. § 100.52(d)(1). Commission regulations define "usual and normal charge" as "the price

18 of those goods in the market from which they ordinarily would have been purchased at the time

- 19 of the contribution," or "[the] commercially reasonable rate prevailing at the time the services
- 20 were rendered." 11 C.F.R. § 100.52(d)(2).

	vice to contributors without entering into agreements with <sup>3</sup> — or receiving compensation m — the recipient political committees are not making contributions because the entities are providing any services to the recipient political committees. <i>See, e.g.</i> , Advisory Opinion
3 from	
	providing any services to the recipient political committees. See, e.g., Advisory Opinion
4 not	
5 201	5-08 (Repledge) at 6 (distinguishing between companies that process contributions as service
6 to c	ontributors and companies that process contributions as service to recipient political
7 com	nmittees); Advisory Opinion 2014-07 (Crowdpac) at 6 (same); Advisory Opinion 2012-22
8 (ski	mmerhat) at 4-6 (same); Advisory Opinion 2011-19 (GivingSphere) at 7 (same); Advisory
9 Opi	nion 2011-06 (Democracy Engine et al.) at 5 (same). Critical to this analysis is whether the
10 serv	vice is provided "at the request and for the benefit of the contributors, not of the recipient
11 com	mmittees." Advisory Opinion 2011-06 (Democracy Engine) at 5; see also Advisory Opinion
12 2012	2-22 (skimmerhat) at 6. In these situations, the Commission has analogized the services that
13 the	companies provide to "widely available delivery services," like United Parcel Service or an
14 elec	ctronic bill-pay service, which are also used to transmit contributions to their intended
15 recip	pients. Advisory Opinion 2012-22 (skimmerhat) at 5-6, 10 (citing Advisory Opinion 2011-
16 06 (	(Democracy Engine) at 5 (internal quotation marks omitted)).
17	Requestor's MyChange platform resembles those approved by the Commission in these
18 prio	or advisory opinions. As in those opinions, the requestor here is a commercial entity that
19 prop	poses to establish a widely available web-based platform that will enable individuals to make
19 prop	poses to establish a widely available web-based platform that will enable individuals to make

20 contributions to political committees that the individuals designate. In particular, MyChange

<sup>&</sup>lt;sup>3</sup> Processors providing a service to contributors may nevertheless enter into agreements with recipient political committees "for the limited purpose of facilitating the transfer of users' funds to the committees' accounts." Advisory Opinion 2015-08 (Repledge) at 2 (providing its processing service to users but contracting with recipient committees on a limited basis solely to facilitate the electronic transfer of funds); Advisory Opinion 2014-07 (Crowdpac) at 4 (same); Advisory Opinion 2011-06 (Democracy Engine) at 4 (same).

1 will serve as a clearinghouse for its users, ensuring that the committees included on the 2 MyChange platform match those users' values and ideology. AOR006; see Advisory Opinion 3 2014-07 (Crowdpac) at 5-6 (approving use of search and matching functions to assist users in 4 identifying like-minded candidates); see also Advisory Opinion 2012-22 (skimmerhat) at 6-7 5 (same); Advisory Opinion 2011-19 (GivingSphere) at 9-10 (concluding that provision to users of factual information about candidates did not constitute contributions to candidates). In addition, 6 7 MyChange will provide its "busy, forward-thinking" users "a simple way" to collect and transfer 8 "roundup" funds – thereby "lower[ing] the barriers to entry into the realm of political speech 9 and political participation." AOR001; see Advisory Opinion 2014-07 (Crowdpac) at 6 (transfer 10 of contributions to recipient committees a service to customer); Advisory Opinion 2012-22 11 (skimmerhat) at 5 (same); see also 2015-08 (Repledge) at 6 (matching of offsetting political 12 contributions a service to individual members). Also as in prior opinions, the requestor will 13 charge a transaction fee that will cover its costs and provide it with a profit. AOR003; see 14 Advisory Opinion 2015-08 (Repledge) at 6 (noting that users will be charged fee to cover 15 processor's costs and provide it with a profit); Advisory Opinion 2012-22 (skimmerhat) at 5 16 (same). Critically, the MyChange platform will operate – and, in particular, process 17 contributions – "at the request and for the benefit of the [MyChange users], not of the recipient political committees."<sup>4</sup> Advisory Opinion 2011-06 (Democracy Engine) at 5; see also Advisory 18

<sup>&</sup>lt;sup>4</sup> Requestor intends to include on the MyChange platform committees that meet "a standard set of commercially-based [eligibility] factors," including whether the recipient committee is in good standing with the Commission and whether the committee shares MyChange users' "ideology and values." AOR002, AOR006. These eligibility factors do not affect the Commission's conclusion that the MyChange service will be provided only "at the request and for the benefit of the [MyChange users], not of the recipient political committees." The eligibility factors enhance the clearinghouse and matching services MyChange provides to its users; indeed, without them the business relationship between the requestor and its base of like-minded users "would be harmed." AOR010. Additionally, as with other processing platforms approved by the Commission, MyChange will only enter into terms of service with recipient committees "for the limited purpose of facilitating the transfer of users' funds to the committees' accounts." AOR002; *see supra* n.3. Though recipient committees may, in some instances, request

1 Opinion 2012-22 (skimmerhat) at 6.

2	Given these similarities, the Commission concludes that requestor's MyChange platform
3	will provide a service to contributors and not the recipient political committees. Accordingly,
4	the requestor's processing and forwarding of its users' contributions would not result in
5	impermissible contributions from requestor to the recipient political committees.
6	B. Users' Payment of Fees
7	As noted above, a "contribution" includes "any gift of money or anything of value
8	made by any person for the purpose of influencing any election for Federal office." 52 U.S.C.
9	§ 30101(8)(A)(i); 11 C.F.R. § 100.52(a); see also 52 U.S.C. § 30118(b)(2); 11 C.F.R.
10	§ 114.2(b)(1). "Anything of value" includes in-kind contributions, such as the provision of
11	services without charge or at a charge that is less than the usual and normal charge. See 11
12	C.F.R. § 100.52(d)(1). Thus, the question presented here is whether a MyChange user's payment
13	of fees for the processing of a contribution to a political committee constitutes either a monetary
14	contribution to the requestor under section 100.52(a) or an in-kind contribution to the recipient
15	committee under section 100.52(d).
16	As discussed above, requestor will provide contribution-processing services to its users.
17	Like any other vendor, requestor proposes to charge its users fees for use of the MyChange

18 platform. According to the request, the proposed fees will cover all of the costs associated with

to be added to the MyChange platform, AOR002, the requestor will grant such requests only if the requesting committee shares its users' values and ideology and will only transmit funds to the recipient committees at the direction of its users. Moreover, none of the proposed eligibility factors, including the ideological screen, undermine the fact that MyChange is a commercial venture. To the contrary, requestor represents that the eligibility criteria are necessary to "preserve the commercial viability of MyChange's program" — namely, to solidify its brand with its targeted users — and not merely to influence the outcome of an election. AOR006; *see* Advisory Opinion 1994-30 (CCI) at 6-7 (concluding that "there is nothing in the Act requiring a business entity to target its business toward clients or individuals that represent all parties or ideologies"). Indeed, the use of an ideological screen to enhance MyChange's commercial viability is unremarkable in the political realm, where vendors frequently market themselves to one side of the political spectrum.

1	providing the MyChange service, including the "vendor and operational costs associated with
2	transferring users' funds," AOR003, "transaction processing fees and other bank fees," AOR004,
3	and the cost of "collecting the users' information and transmitting such information to the
4	recipient," AOR010. The fee will also provide the requestor with "a reasonable profit."
5	AOR003, AOR004. The requestor states that the fee will "represent[] the normal and usual
6	charge" for its services. Thus, as the Commission has concluded in prior advisory opinions, the
7	fees that MyChange's users will pay are not contributions to the requestor because they are not
8	gifts or donations to the requestor but, rather, commercial payments in exchange for its
9	processing services. See, e.g., Advisory Opinion 2015-08 (Repledge) at 8; Advisory Opinion
10	2012-22 (skimmerhat) at 6; Advisory Opinion 2011-06 (Democracy Engine) at 6.
11	Nor would the fees paid to requestor be contributions to recipient political committees.
12	Because these fees "are [to pay] for services rendered 'for the benefit of the contributors, not of
13	the recipient political committees,' such fees '[do] not relieve the recipient political committees
14	of a financial burden they would otherwise have had to pay for themselves." Advisory Opinion
15	2015-08 (Repledge) at 9; Advisory Opinion 2014-07 (Crowdpac) at 6 (quoting Advisory Opinion
16	2012-22 (skimmerhat)); Advisory Opinion 2011-06 (Democracy Engine) (internal quotations
17	omitted). In other words, the users' fees will not result in recipient political committees
18	receiving the MyChange payment-processing services at less than the usual rate because the
19	requestor is not providing those services to the committees in the first instance. Thus, the users'
20	fee payments are not in-kind contributions to the recipient committees.

21 C. Corporate Conduits

For purposes of the Act's contribution limitations, "all contributions made by a person,
... including contributions which are in any way earmarked or otherwise directed through an

1	intermediary or conduit to such candidate," are treated as contributions from the person to the
2	candidate. 52 U.S.C. § 30116(a)(8). "Earmarked" means "a designation, instruction, or
3	encumbrance, whether direct or indirect, express or implied, oral or written, which results in all
4	or any part of a contribution being made to a clearly identified candidate." 11 C.F.R.
5	§110.6(b)(1). A "conduit or intermediary" is "any person who receives and forwards an
6	earmarked contribution to a candidate." 11 C.F.R. § 110.6(b)(2). Persons prohibited from
7	making contributions are prohibited from being conduits or intermediaries. 11 C.F.R.
8	§ 110.6(b)(2)(ii).
9	Here, the requestor proposes to process contributions to candidates' authorized
10	committees (as well as to other political committees). Because the requestor asks the
11	Commission to treat it as a corporation for purposes of this advisory opinion, AOR009, and
12	corporations may not make contributions, see 52 U.S.C. § 30118, the requestor would not be
13	permitted to act as a "conduit" for contributions earmarked for candidates. See 52 U.S.C.
14	§ 30116(a); 11 C.F.R. §§ 110.6(b)(2)(ii), 114.2(b)(1).
15	The Commission has recognized, however, that "certain electronic transactional services
16	that assist a contributor in making a contribution" — even when provided by a corporation —
17	"do not run afoul of the prohibition on corporations acting as a conduit or intermediary for
18	earmarked contributions" because they are "so essential to the flow of modern commerce
19	that they are akin to delivery services, bill-paying services, or check writing services." Advisory
20	Opinion 2012-22 (skimmerhat) at 10 (internal quotations omitted); see also Advisory Opinion
21	2015-08 (Repledge). Instead, the Commission has treated these contributions as "direct
22	contributions to the candidate or authorized committee made via a commercial processing
23	service." Id.

1 The MyChange platform, like other commercial, electronic transactional services that are 2 essential to the flow of modern commerce, merely assists a user in making a contribution. In 3 that regard, contributions processed on the MyChange platform are direct contributions to 4 recipient committees. Accordingly, the processing and forwarding of members' contributions to 5 federal committees through the MyChange platform would not violate the prohibition on a 6 corporation "acting as a conduit for contributions earmarked to candidates" in 11 C.F.R. § 7 110.6(b)(2)(ii).

8 The Commission expresses no opinion regarding the potential application of federal tax 9 law or other state or local laws to the proposed activities because those questions are not within 10 the Commission's jurisdiction.

11 This response constitutes an advisory opinion concerning the application of the Act and 12 Commission regulations to the specific transaction or activity set forth in this advisory opinion 13 request. See 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of 14 the facts or assumptions presented, and such facts or assumptions are material to a conclusion 15 presented in this advisory opinion, then the requestor may not rely on that conclusion as support 16 for its proposed activity. Any person involved in any specific transaction or activity which is 17 indistinguishable in all its material aspects from the transaction or activity with respect to which 18 this advisory opinion is rendered may rely on this advisory opinion. See 52 U.S.C. 19 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be

- 20
- 21
- 22
- 23

- 1 affected by subsequent developments in the law including, but not limited to, statutes,
- 2 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available

3 on the Commission's website.

4	On behalf of the Commission,
5	
6	
7	
8	Ann M. Ravel
9	Chair
10	