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BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of:)	
)	No. O-22-001
)	March 17, 2022
Opinion requested by)	
Jane Leiderman)	
)	
_____)	

BY THE COMMISSION: Jane Leiderman, on behalf of the Teddy Kapur for City Attorney 2022 Committee (“Committee”), has requested an opinion of the Fair Political Practices Commission (“Commission”) on the following question:

QUESTION

What are the campaign reporting requirements when a committee hires a vendor to create and sell non-fungible token (“NFT”) trading cards for the committee along with the underlying asset represented on the blockchain?

CONCLUSION

When a committee hires a vendor to create and sell NFT trading cards, the entire purchase price of the NFT must be reported as a contribution on the committee’s campaign statements.

FACTS

The Committee seeks to hire a vendor that specializes in NFTs to create and sell NFT trading cards on behalf of the Committee, along with the underlying asset represented on the blockchain.

An NFT is a digital representation of an object like artwork, music, or videos. The object can either be tangible or intangible, and while typically the object is digital, it can also be a physical item. NFTs are bought and sold online, frequently with cryptocurrency, and they are generally encoded with the same underlying software as many cryptocurrencies. NFTs are also, in general, one of a kind and have unique identifying codes.¹ NFT’s are asset-backed tokens, which means they are digital tokens based on blockchain technology that derive their value from something that does not exist on the blockchain and are a representation of ownership of a physical or digital asset.² NFTs can be stored, viewed, and transferred via an NFT-enabled

¹ <https://www.forbes.com/advisor/investing/nft-non-fungible-token/>

² <https://www.pwc.com/gx/en/audit-services/ifrs/publications/ifrs-16/cryptographic-assets-related-transactions-accounting-considerations-ifrs-pwc-in-depth.pdf>

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wallet, similar to cryptocurrencies.³ However, the lack of interchangeability (fungibility) distinguishes NFTs from blockchain cryptocurrencies, such as Bitcoin.⁴ NFTs have unique identification codes and metadata that distinguishes one from another that cannot be replicated. While NFTs can be sold or traded, each NFT has its own distinct value, which makes it so they are not tradable on like-to-like value basis. This differs from cryptocurrencies, which are identical to each other and therefore can be used on a regular basis for commercial transactions like other currencies.⁵

The Committee has provided that they will hire a vendor to create and sell NFT trading cards specifically for the Committee. These NFTs may be sold using the vendor's platform. The Committee may also send out an email to supporters and/or have the NFTs available on the Committee's website for purchase. The Committee provided that it will collect all required donor information and certification, evidencing that the committee acted in good faith in receiving the payment before processing the order, in accordance with Los Angeles Municipal Code Section 49.7.16.⁶ The NFT vendor will charge the Committee a percentage of the sale proceeds as a fee that will cover the costs of creating, minting, and selling the NFTs on their platform. This is the same method the vendor uses to charge its other clients for the same services. The proceeds of the sale will go to the Committee. The price of the NFTs that will be sold by the Committee will not fluctuate. When asked what the fair market value of the NFTs would be, the Committee provided that the fair market value would be the price at which the Committee decides to sell the NFTs.

The Committee cannot control and will not receive any proceeds from any trading or reselling of the NFTs. The Committee has not yet created the NFTs, but it intends to structure the sale with various editions. For example, the Committee might structure the sale along these lines:

- Sell twenty "Champion" versions of an NFT for \$1,000;
- Sell fifty "Friend" versions of an NFT for \$500; and
- Sell one hundred "Supporter" versions of an NFT for \$50.

The Committee has not provided specifically what will be displayed on the NFTs or what the underlying assets will be. However, the Committee has provided that some considerations for the NFT display are to use images of the candidate, endorsers, or candidate

³ <https://cointelegraph.com/news/nft-trading-cards-a-new-way-to-own-collectibles-or-an-asset-bubble>

⁴ https://en.wikipedia.org/wiki/Non-fungible_token

⁵ <https://www.merriam-webster.com/dictionary/non-fungible%20token>

⁶ Los Angeles Municipal Code Section 49.7.16 requires contributors to certify under penalty of perjury that: (1) the contribution is not being made under a false name, is not being made under someone else's name, and has not been reimbursed, and will not be reimbursed; (2) the contribution does not cause the contributor to cumulatively or in the aggregate exceed the applicable contribution limit; (3) the contributor is a U.S. citizen or a lawfully admitted permanent resident; (4) the contribution is not from a lobbyist or lobbying firm that is prohibited from making it; and (5) the contribution is not from a bidder, subcontractor, principal, or underwriting firm that is prohibited from making it.

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statements and to mail a trading card similar to a baseball card, or similar memorabilia, as the underlying asset.

As an example of what the Committee is considering, the Committee identified a project called NFT4Good that sold Asian celebrity NFT trading cards for \$88 each, raising \$80,000 for #HateIsAVirus, an Asian American and Pacific Islander anti-racism nonprofit.⁷

ANALYSIS

A “contribution” is a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment except to the extent that full and adequate consideration is received, unless it is clear from the surrounding circumstances that it is not made for political purposes. (Section 82015, Regulation 18215.)⁸ The term “contribution” includes the purchase of tickets for events such as concerts, dinners, rallies, and similar fundraising events. (Section 82015.) A payment is presumed to be made for political purposes if received by a candidate or controlled committee. (Regulation 18215.) The term “full and adequate consideration” means “fair market value” throughout the Act. (Section 82025.5; *Smith* Advice Letter, No. A-98-117.) “Fair market value” is whatever it would cost the candidate or committee to obtain the same or similar goods or services on the open market. (*Sremaniak* Advice Letter, No. A-03-092; *Zakson* Advice Letter, No. A-00-182; *Miller* Advice Letter, No. I-96-243; *In re Hopkins* (1977) 3 FPPC Ops. 107.)

The Act’s definition of fair market value contemplates the common understanding of California law. (*Ordos* Advice Letter, A-96-296.) The definition of fair market value generally applied in California derives from condemnation law:

“The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing . . .”

(*City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 756; see also *Freeport McMoran Partners v. County of Lake* (1993) 12 Cal.App.4th 634, 641 [tax assessment].)⁹

Under the Act, whether a committee is required to report an entire payment received as a contribution when given in exchange for an item from the committee generally depends on how the item is characterized. For a merchandise item sold by a committee to an individual with a determinable fair market value, only the amount given above the item’s fair market value is

⁷ <https://nft4good.com/>

⁸ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18109 through 18998 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

⁹ See *Miller* Advice Letter, No. I-97-143.

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treated as a reportable contribution. (*Crain* Advice Letter, No. A-02-275; *McGrath* Advice Letter, No. I-97-228; *Zerbe* Advice Letter, No. I-95-146; *Sepulveda* Advice Letter, No. I-89-428; *Moniz* Advice Letter, No. A-88-028.) However, when a payment is made for a ticket to an event categorized as a political fundraiser the entire payment for the ticket is treated as a contribution. (*Raper* Advice Letter, No. I-97-282; *Bott* Advice Letter, No. I-92-540.) Generally, the entire amount of the purchase price of a fundraising ticket is considered to be a contribution because persons who purchase such tickets are not receiving full and adequate consideration for their payment even though they may be receiving some consideration in the form of food or entertainment. (*Miller* Advice Letter, No. I-92-482; *Lippert* Advice Letter, No. A-86-256.)

Similarly, when an item is given as a gift, incentive, or in appreciation for making a contribution, the entire amount received is a reportable contribution. (*See, e.g., Wold* Advice Letter, No. A-91-062 [the entire amount paid to the committee was a reportable contribution even though contributors received belt buckles as gifts in exchange for contributions in the amount of \$1,000 or more]; *Bagatelos* Advice Letter, No. I-95-248 [determining that giving contributors a calling card worth \$20 in exchange for a \$100 contribution resulted in an \$80 reportable contribution if the contributor knew that a calling card would be received and resulted in a \$100 reportable contribution if the calling card was given “in appreciation” for a contribution of \$100 without the prior knowledge of the contributor]; *Driscoll* Advice Letter, No. A-06-059 [concluding that giving the candidate’s self-published book to individuals who contributed \$100 or more resulted in a reportable contribution of the full amount contributed].)

The transactions described by the Committee are akin to a payment made for attendance at a political fundraiser, or an item given as a gift, incentive or in appreciation for a contribution. When purchasing a ticket to a political fundraising event, the buyer is purchasing something from the committee at a price that is set by the Committee. The ticket is being sold mainly for the purpose of raising campaign funds and is not available on the open market elsewhere. The proposal to offer different levels of NFT based on the amount paid resembles a common fundraising structure employed for political fundraising events rather than a determination of the fair market value of each NFT. The Committee will also set the price of the NFTs just the same as it does when holding a typical fundraising event. Further, any physical asset that is provided, like a baseball card, is similar to food or entertainment provided at a political fundraising event because it would generally be valued far below the payment made to a committee.

Additionally, when an individual makes a payment to the Committee in exchange for the NFTs, they are not receiving full and adequate consideration for their payment because their payment is not closely tied to a fair market value of the NFT, but rather more closely tied to how much money the Committee would like to raise and how much a person would like to contribute to the Committee in the same fashion as a payment for a fundraising event or gift or incentive for a contribution.

Unlike merchandise with a discernable value independent of the committee that sells it, NFTs created by the Committee would not have a determinable fair market value but rather would be sold at a price set by the Committee. Permitting a committee to establish the value of an item it sells would create a potential avenue for circumventing contribution limits and reporting requirements. Therefore, the Commission concludes NFTs created and sold by the

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Committee are more analogous to fundraising efforts such as attendance at fundraising events and gifts or incentives provided in exchange for a contribution.

For these reasons, the entire amount of the payments received in exchange for the NFTs are reportable contributions and the individuals that purchase the NFTs are the source of those contributions.

WE CONCUR:

[Concurring Commissioners]