



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Miadich, Commissioners Baker, Cardenas, Wilson, Wood

From: Dave Bainbridge, General Counsel
Katelyn Greene, Commission Counsel

Subject: *In Re Leiderman* Opinion Request: Reporting Requirements of Payments Received from the Sale of Non-Fungible Token (“NFT”) Trading Cards

Date: February 3, 2022

Introduction

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”) regarding the Committee’s desire to fundraise by creating and selling non-fungible tokens (NFTs). An NFT is a digital asset that represents ownership of items such as artwork or video clips. NFTs use blockchain technology to create a unique identifier to assign and prove ownership of the asset. To date the Commission has not formally provided advice or an opinion regarding the use and reporting of such transactions under the Political Reform Act.¹

Procedure

The Commission can issue opinions with respect to the duties of any person under the Act upon request by the person. (Section 83114.) Opinions often involve an area of the law that is unsettled or susceptible to multiple interpretations. (Regulation 18329(b)(6)(E).) If the Commission’s Executive Director approves the opinion request, the Commission holds a hearing on an opinion request. (Regulations 18320 and 18322.) Subsequent to the hearing on the opinion request, the Commission may instruct staff to draft an opinion to be adopted by the Commission at a public meeting. (Regulation 18322(e).)

Staff presents this memo for the Commission’s consideration on the opinion request. Upon direction from the Commission, staff will prepare an opinion for Commission consideration at a subsequent meeting.

¹ 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 18110 through 18997 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.

Background on NFTs

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.² 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. Blockchains are best known for their crucial role in cryptocurrency systems for maintaining a secure and decentralized record of transactions. By being represented on the blockchain, NFTs are granted immutability and public verification of ownership. This means that you can track the ownership and transfers of the NFT. Even if the physical item is lost or destroyed, the NFT will endure and live on the blockchain for as long as the latter exists.³

NFTs can be stored, viewed, and transferred via an NFT-enabled wallet, similar to cryptocurrencies.⁴ However, the lack of interchangeability (fungibility) distinguishes NFTs from blockchain cryptocurrencies, such as Bitcoin.⁵ 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.⁶

Commonly, NFTs are connected to digital artwork. However, an NFT can take other forms. For example, Ellen DeGeneres sold an NFT of a monologue from an episode of "The Ellen DeGeneres Show" to raise money for charity.⁷ And former Twitter CEO Jack Dorsey sold the first tweet he ever posted as an NFT.⁸ As an example of the form of NFT the opinion requestor is asking about here, the requestor 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 oriented anti-racism nonprofit.⁹

The sale of NFTs have already made their way into congressional political campaigns and are being sold as campaign merchandise as a way to raise campaign funds.¹⁰ Although congressional candidates are currently selling NFTs as campaign merchandise, the Federal Elections Commission considers any payment made to a committee a contribution, even the entire amount of sale proceeds from selling campaign merchandise.¹¹ Currently, the Commission

² <https://www.forbes.com/advisor/investing/nft-non-fungible-token/>

³ <https://www.investopedia.com/terms/b/blockchain.asp>

⁴ <https://cointelegraph.com/news/nft-trading-cards-a-new-way-to-own-collectibles-or-an-asset-bubble>

⁵ https://en.wikipedia.org/wiki/Non-fungible_token

⁶ <https://www.merriam-webster.com/dictionary/non-fungible%20token>

⁷ <https://variety.com/2021/digital/news/ellen-degeneres-nft-sale-prices-1234961319/>

⁸ <https://www.cnbc.com/2021/03/22/jack-dorsey-sells-his-first-tweet-ever-as-an-nft-for-over-2point9-million.html>

⁹ <https://nft4good.com/>

¹⁰ <https://www.politico.com/news/2022/01/08/campaign-fundraising-nft-526787>

¹¹ <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/types-contributions/>

does not generally treat the full sale price of campaign merchandise as a contribution, as further discussed below.

Request

The Committee seeks guidance on the permissibility and campaign reporting obligations should it hire a vendor that specializes in NFTs to create and sell NFTs in the form of trading cards on behalf of the Committee, along with the underlying asset represented on the blockchain.

Although the vendor will likely sell the NFT trading cards on its platform, the Committee may send out an email to supporters and/or have the item available on the Committee's website for purchase. The Committee provided that it will collect all required donor information and certification, evidencing that a committee acted in good faith in receiving the payment before processing the order.¹² 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 NFT trading cards on their platform. The Committee provided that 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 sold by the Committee will not fluctuate.

The Committee views the creation and sale of NFTs as similar to the sale of other traditional campaign merchandise, such as tee shirts and caps. As with the sale of other campaign memorabilia (e.g., hats, buttons, bumper stickers, etc.), the Committee cannot control and will not receive any proceeds from any trading or reselling of the NFTs after they are sold to the buyer. The Committee has not created the NFTs at this time, but it intends to structure the sale with various editions. For instance, 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.

Since the Committee has not had any NFTs created, 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 display are to use images of the candidate, endorsers, or candidate statements and to mail a trading card similar to a baseball card, as the underlying asset. 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.

¹² 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.

Law

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 82105, Regulation 18215.) 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 the payment is 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.) Further, prior Commission advice has provided that 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].)¹³

FPPC Guidance

A committee selling NFTs to raise campaign funds is a novel issue for the Commission but is similar to other circumstances where Commission staff have advised committees that provided tangible items in exchange for payments. Depending on the circumstance, Commission staff have advised the payment either resulted in a contribution for the full amount paid, or, resulted in a contribution only to the extent the payment exceeded the value of the item provided by the committee in exchange for the payment. These different scenarios are discussed below.

Merchandise Sold by a Committee

As it relates to reporting payments received from an item sold by a committee, the Commission has long advised that if merchandise is being sold by a committee at its fair market value, payments received are full and adequate consideration and therefore are not contributions under the Act. If the item is sold for an amount above its fair market value, the amount received over the fair market value is a reportable contribution. (*Crain* Advice Letter, No. A-02-275;

¹³ See *Miller* Advice Letter, No. I-97-143.

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.) For example, where a candidate provides artwork to contributors in exchange for contributions, the amount an individual pays above the fair market value of the artwork would be a contribution to the committee. (*Miller* Advice Letter, No. A-01-263.)

Item Given as an Incentive in Exchange for a Contribution

Commission staff have previously advised that when an item is given to a contributor as a gift, incentive, or in appreciation for making a contribution, the entire payment amount received by a committee is a reportable contribution. (*Driscoll* Advice Letter, No. A-06-059; *Wold* Advice Letter, No. A-91-062; *Bagatelos* Advice Letter, No. I-95-248.) In *Driscoll*, a candidate gave out a self-published book to individuals who made a payment of \$100 or more to the candidate's committee. The committee was advised to report the entire payment received. In *Wold*, the entire payment received by the committee was a reportable contribution when the committee gave individuals a belt buckle as a gift in exchange for contributions of \$1,000. Lastly, in *Bagatelos*, we advised 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. However, we advised that if the calling card was given "in appreciation" for a contribution of \$100 without the prior knowledge of the contributor, it resulted in the full \$100 payment being a reportable contribution.

Tickets to a Political Fundraiser

Similar to advice provided regarding an incentive or gift given in exchange for a contribution, Commission staff have also advised that the full payment for a ticket to a fundraising event is considered a contribution. Individuals who purchase tickets to a dinner that is advertised as a political fundraiser for a particular candidate or committee are deemed to be making contributions to the candidate or committee in the amount of the tickets purchased. (*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.)

Analysis and Staff Recommendation

The sale of NFTs by the Committee is more similar to a gift or incentive for making a contribution than merchandise sold by a committee. This is largely due to doubt that the proposed NFT trading cards would have any fair market value, let alone approach the amount proposed by the Committee. Further, 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 unique NFT trading cards have no determinable value and are not available on the open market. The Committee itself will be setting the price. If the transfer of NFTs were treated like the sale of campaign merchandise at fair market value, the amount paid for the NFTs would

not be reported as contributions and would not be subject to contribution limits. Given the unknown and speculative value of such NFTs, the opportunity to evade contribution and reporting limits through the “sale” of NFTs is considerable.

For these reasons, staff recommends the Commission issue an opinion concluding that payment received by the Committee in exchange for an NFT would constitute a campaign contribution from the payor to the Committee for the full amount of the payment for the NFT.