



STATE OF CONNECTICUT
STATE ELECTIONS ENFORCEMENT COMMISSION

May 16, 2023

Alyson Heimer
Administrator, New Haven Democracy Fund
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Opinion of Counsel 2023-02: Transaction Fees of Online Contributions

Dear Ms. Heimer,

You are the Administrator of the New Haven Democracy Fund (“NHDF”), a public finance program that provides matching funds to qualified candidates running for mayor in New Haven, and are seeking guidance from staff of the State Elections Enforcement Commission (the “Commission”) related to the processing fees charged for online contributions to candidate committees participating in the NHDF. Specifically, you have asked:

1. If credit card processing fees, whether paid by the campaign (considered an automatic fundraising expenditure) or by the contributor (considered an in-kind contribution), are eligible for a match by the New Haven Democracy Fund, is this consistent with SEEC rules?
2. How should these amounts be reported on the SEEC Form 20 by candidate committees; and what is the SEEC’s official designation for these fees; and if it does, why does this designation change based on who makes the payment to the credit card processor?
3. What can the Democracy Fund do this year to ensure compliance with the SEEC and state law? What needs to be done to ensure equal treatment for campaigns who use online contributions and enable opt-in/opt-out for fees, but who all reported these differently with the SEEC?
4. What changes to the NHDF candidate contract or NHDF ordinance (if any) does the SEEC recommend that the Democracy Fund program embrace to avoid this confusion in the future?

General Statutes § 9-601a (a) (1) broadly defines contribution as: “Any gift, subscription, loan, advance, payment or deposit of money or anything of value, made to promote the success or defeat of any candidate seeking the nomination for election, or election or for the purpose of aiding or promoting the success or defeat of any referendum question or the success or defeat of any political party”

A monetary contribution occurs when an individual gives money directly to a campaign, whether it be through cash, check, or by credit card. An in-kind contribution occurs when an individual gives something of value to a campaign for the use of the campaign or makes a payment on behalf of the campaign that is not reimbursed. For example, if a committee worker pays for lawn signs and does not seek reimbursement, this would be an in-kind contribution. In-kind contributions, like monetary contributions, count toward the contribution limits applicable to the contributor.

In most circumstances, with most campaigns, committees may accept in-kind contributions, within limits. It is different when a candidate for a statewide office or General Assembly campaign chooses to participate in the Commission's voluntary Citizens' Election Program (the "CEP" or the "Program"). In 2007, the Commission explained that contributions to a candidate committee participating in the CEP must be monetary. Declaratory Ruling 2007-03: *Citizens' Election Program: Qualifying Contributions*. Participating candidates are permitted to take only small dollar monetary contributions from individuals as potentially qualifying contributions. In-kind contributions are not allowed.¹

For municipal campaigns, all contributions and expenditures are reported using the SEEC Form 20. Monetary contributions are reported in Section B, though campaigns are permitted to lump small contributions together in Section A without itemizing the contributor's information, if the contributor's aggregate contributions are \$50 or less. All in-kind contributions are reported in Section M, regardless of the value. Expenditures are reported in Section P, Expenses Paid by Committee, of the SEEC Form 20 and generally speaking, they must be paid by check or credit card. General Statutes §§ 9-607 (e) (1), 9-608 (c) (1) (B).

The Commission has long advised that a committee cannot circumvent contribution limits by having contributors pay the vendor directly to cover costs of a fundraiser such as to a restaurant for dinner and then pay the committee a separate contribution, with the committee only reporting the latter payment and not the first. Both payments, coordinated by the committee, are contributions. The monetary payment to the committee would be reported in section B of the SEEC Form 20 and the payment to the restaurant owner would be reported as an in-kind in

¹ There are limited exceptions to this rule but such exceptions are built into the definition of "contribution"—they are exceptions to that definition. The allowance of house parties is an example, as well as the provision of organization expenditures from party committees. They are substantively akin to in-kind contributions but are not considered to be contributions at all due to the explicit exception written into the statute. See General Statutes § 9-601a (b) (5) and (16).

section M. The aggregate of the monetary contribution and the in-kind contribution would need to be within the applicable contribution limits. *See* Advisory Opinion 1-3: *Testimonial Affairs – Contribution and Expenditure Limits*; Advisory Opinion 1991-1: *Propriety of a Candidate Committee which has a Deficit to Purchase and Sell Sweatshirts to their Supporters after the Election* (opining that committee must report \$22 contribution where purchaser paid \$22 for sweatshirt that cost the committee \$10 and included \$2 for shipping and handling as well as \$10 net profit for committee).

Regarding credit card transaction fees, at the start of the Program, staff provided advice on reporting credit card contributions and the associated fees charged to the committee.² *A Guide for 2008 General Assembly Candidates Participating in the Citizens' Election Program*, pg. 74 (“Remember that expenses and fees charged by merchant account processors in connection with the processing of contributions by credit card are expenses of fundraising and do count towards the committee’s expenditure limits.”). Using the new technology it was possible for the credit card processors to take in the contribution for the candidate’s account and simultaneously take their fee out. The records reflected the transactions, they were traceable and reportable, and so we advised that for these credit card transactions we would not require the entire contribution to be deposited into the committee’s bank account and a check written to the vendor in periodic payments as long as the contributions and processing fees were properly reported on the financial disclosure statement as if this had happened. In other words, the full amount of the contribution and fee were reported on the financial disclosure statement in Section B, and the fee was reported as being paid by the committee as an expense.

The most recent iteration of the CEP Guide states, “A committee receiving contributions by credit card must report the full (gross) amount of each contribution before the payment of any

² SEEC’s advice largely mirrored the FEC advice published at the time. *See* FEC Advisory Opinion 2007-04. “The Commission concludes that, for FECA purposes, there is no distinction between a contributor paying processing fees through a deduction from the amount of the contribution authorized by that contributor and paying such processing fees in a separate transaction. Both are contributions. . .” In various other FEC opinions a distinction has been made between vendors who contract with the contributor (solely) versus vendors who contract with the committee. “The Commission has previously concluded that companies that process contributions to political committees as a service to the political committees must be compensated for those services to avoid making in-kind contributions. *See* Advisory Opinion 2007-04 (*Atlal*). Companies that process contributions as a service to contributors, however, do not need to be compensated for these services by the recipient political committees because the companies are not providing any services or anything of value to the recipient political committees. *See, e.g.,* Advisory Opinion 2011-19 (*GivingSphere*).” Advisory Opinion 2012-22. Here, with SEEC as with the Democracy Fund, the situation is most akin to the facts found in *Atlal* (AO 2007-04).

fees or deductions to any third party.” *See A 2022 Guide for Statewide Office and General Assembly Candidates Participating in the Citizens’ Election Program*, pg. 100. It goes on to state, “The fees charged (typically per transaction) by the merchant should be reported in Section N: Expenses Paid by Committee. Use the purpose of expenditure code, ‘WEB,’ as these are money processing related charges. The charges should be reported as a lump sum on a quarterly or monthly basis.” So, for example, when a contributor makes a \$100 contribution, and the merchant account provider takes a \$1 processing fee and instantaneously then deposits \$99 into the candidate committee’s account, the treasurer would report the \$100 contribution in section B and the \$1 fee charged in the expense section.

More recently, credit card processors have developed a new method of collecting credit card contributions (and fees) that committees may choose. Contributors are first asked for a credit card contribution and then, after they have made the contribution, they are asked if they would like to pay the processing fee so that the committee that they are contributing to does not have to. If the contributor says no, the merchant account provider charges the credit card \$100, takes the \$1 fee and deposits \$99 in the committee account—this is like previous practice, as described above. However, if they say yes, their credit card is charged a total of \$101, with the merchant account provider depositing \$100 in the candidate’s account and taking \$1. This option allows committees to have their contributors pay the fees involved with collecting credit card contributions just as they had contributors pay restaurants directly for their plate at a fundraiser in the 1970s and pay for shipping and handling in the 1990s. Both payments made to or on behalf of the candidate committee through the credit card site are contributions to the committee: the \$100 is a monetary contribution and the \$1 fee is an in-kind contribution.

SEEC staff has advised that committees choosing to set up their online contribution sites this way must claim the full amount from the contributor as a contribution. They may report the \$100 in section B and the \$1 fee paid separately as an in-kind contribution in Section M. As stated above, CEP committees may not accept in-kind contributions at all, but other committees may. Those committees just need to aggregate the monetary and in-kind contributions from a single contributor and ensure that total value remains within applicable contribution limits.

We understand that online contributions have created problems for campaigns participating in the Democracy Fund who were unaware of these nuances. Some have not reported contributors’ payment of fees anywhere; some would like them to be matched as contributions. Ultimately, your Board must decide whether to match the processing fees. That is not something we can answer.

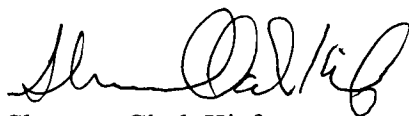
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We can, however, say that if a Democracy Fund campaign committee sets up its website to give contributors the option to pay the fee owed by the committee and then reports the original contribution and the fee as one item in section B of the form (as it does when the fee is taken out of the initial contribution), we do not believe the Commission would find a reporting violation. For example, if the contributor made a \$100 contribution and paid a \$1 fee out of pocket, that could be permissibly reported as a \$101 contribution. Alternatively, candidates may report the fees as in-kind contributions separately from the monetary contribution. A committee that has not reported the fees at all may amend their reports, choosing either method, as the Democracy Fund chooses to direct the candidates, accordingly. Reporting is an essential element to campaign finance law; it appraises the public of how campaigns are funded and how money is spent. With respect to these credit card fees there is more than one way to properly accomplish this end.

The foregoing advice is an Opinion of Counsel and not a formal Declaratory Ruling or Advisory Opinion of the Commission. An Opinion of Counsel differs in effect from the latter in that it is not binding on the Commission; however, the person to whom an Opinion of Counsel is rendered may rely upon the opinion with respect to any matter brought before the Commission based upon the same facts and circumstances. The Commission emphasizes that if there is an omission or change in any of the facts or assumptions presented, and such omission, fact or assumption is material to the conclusion or conclusions presented in this Opinion of Counsel, then the requestor may not rely on that conclusion as support for its proposed activity.

Please contact me if you have any additional questions or if we can be of further assistance. I may be reached via telephone at 860.256.2975.

Very truly yours,



Shannon Clark Kief
Legal Compliance Director