MYL PAC and MYL C4
% Nick Staddon, Secretary
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Federal Election Commission
Office of General Counsel
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Re: AO 2013-15 Conservative Action Fund

November 12, 2013

Dear Commissioners:

Please accept this comment regarding AO 2013-15 Conservative Action Fund on behalf of Make Your Laws PAC, Inc. (MYL PAC) and Make Your Laws Advocacy, Inc. (MYL C4).[1]

In its request, Conservative Action Fund PAC (CAF) asks how Bitcoin-based contributions should be treated under the Federal Election Campaign Act (FECA).

In principle, we support the use of Bitcoin as contribution method, especially for recipients to whom unlimited anonymous contributions are permitted. We too would like to enable our users to contribute to us using Bitcoin. However, the substantive and legal issues underlying CAF's questions raise some very serious problems, which we discuss below.[2]

Re. CAF's original request and BitPay and Bitcoin Foundation's initial comments[3]

1. *Bitcoin is not a 'currency', and contributions of Bitcoin are in-kind contributions*

CAF describes Bitcoin as a 'currency', 'cash', and 'money'. While these are terms used *informally* to describe Bitcoin, under the FECA they are incorrect as a matter of law.

2 USC 441g limits "contributions of currency of the United States or currency of any foreign

[1] The full MYL group consists of MYL PAC (a non-connected 527 hybrid Super PAC, FEC #C00529743), MYL C4 (a 501(c)4), and Make Your Laws, Inc. (MYL C3, a 501(c)3). All are non-partisan. Currently, only MYL PAC is financially active. However, this comment is on behalf of both MYL PAC and MYL C4, as the issues discussed affect each in different ways; see parts 5 & 6.

[2] We discuss this in terms of PACs, as requester CAF is one. However, the same restrictions would apply to any entity permitted to accept money to influence elections, e.g. parties, candidates, etc., and all of the considerations discussed apply equally to both independent-expenditure and contribution accounts.

[3] This section was written before draft AO 13-45 was published; our legal analysis here is completely independent. We respond to the draft AO separately, below.

country to or for the benefit of any candidate … with respect to any campaign of such candidate for nomination for election, or for election, to Federal office". 11 CFR 110.4(c)(3), implementing that statute, defines 'cash' as "currency of the United States, or of any foreign country". 11 CFR 100.52(c) defines 'money' as "currency of the United States or of any foreign nation, checks, money orders, or any other negotiable instruments payable on demand".

The Financial Crimes Enforcement Network (FinCEN) is the US agency that regulates the Bank Secrecy Act (BSA). FinCEN regulates how currency may be transacted, with a primary focus on preventing money laundering but also touching on the federal government's exclusive sovereignty over the issuance of currency. FinCEN defines 'currency' as the "coin and paper money of the United States or of any other country that is designated as legal tender and that circulates and is customarily used and accepted as a medium of exchange in the country of issuance".[4]

FinCEN has recently addressed Bitcoin in its interpretive guidance letter FIN-2013-G001, saying that "in contrast to real currency, "virtual" currency is a medium of exchange that operates like a currency in some environments, but does not have all the attributes of real currency. In particular, virtual currency does not have legal tender status in any jurisdiction". FinCEN's definition of "de-centralized virtual currency" accurately describes Bitcoin as something "(1) that has no central repository and no single administrator, and (2) that persons may obtain by their own computing or manufacturing effort".

It is clear above that Bitcoin is *not,* to quote FinCEN, a "'real' currency", and contrary to CAF's argument, it does *not* meet the FECA definitions of (real) 'cash', 'money', or 'currency'.

Rather, Bitcoin is a *commodity*. Much like gold bullion, oranges, and baseball cards,[5] it has no

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[4] 31 CFR 1010.100(m). Note the 'and's. Although Bitcoin *is* a "medium of exchange", it is not "customary", "legal tender", nor "coin or paper money … of [a] country", and is therefore not currency.

[5] The Bitcoin Foundation has repeatedly, publicly, *unequivocally* characterized Bitcoin as a *commodity* (as has virtually all of the Bitcoin community). Quoting from an *American Banker* article written by Jon Matonis, the Bitcoin Foundation's Executive Director (links as in original):

"Bitcoin's price can exhibit extreme volatility and its value is not supported by any government's legal decree. … So, do regulatory bodies like the Financial Crimes Enforcement Network believe that virtual Bitcoin sufficiently resembles real money for its exchange to be regulated under Money Services Business guidelines or money transmitter rules? Would Fincen also want to regulate the commodity-based exchange of rare gems and Tide detergent?

Bitcoin falls most appropriately into the property category of commodity, although it is an intangible commodity supported by mathematics and a distributed computing network driven by social consensus. Regulating an intangible commodity with unprovable existence places the burden of proof on the regulator since there is sufficient plausible deniability in the system for someone to deny holding Bitcoin or even access to the private key required to send them from a given address on the network. …

Treating Bitcoin as a monetary instrument for purposes of regulation fails to understand the nature of math-based commodities that rely on reusable "proof-of-work" to verify and record transfers of ownership. In the general classification of commodity, Bitcoin's trade is similar to any other collectible item, such as

face value and is not issued by any government. It is *traded for* currency on open markets and thus easily *convertible to* real currency. It is a 'good' and a "thing of value" under 11 CFR 100.52(d)(1), and a contribution of Bitcoins is therefore an "in-kind contribution".

Using Bitcoin transaction intermediaries does not alter the outcome

Previous FEC opinions have found that for-profit companies which assist in transactions (such as BitPay or Coinbase) are generally not regulated by the FECA unless they make an in-kind contribution, which they can avoid doing by simply giving PACs the same services and prices that they give to any non-political entity as part of their normal business.

Intermediaries such as BitPay and Coinbase offer two distinct services:

A. the merchant receives and holds Bitcoins, which it can later to convert to currency
B. the intermediary converts Bitcoins to currency, which it then gives to the merchant

Under the FECA, service (a) would clearly result in an in-kind contribution.

Service (b) requires a more nuanced analysis, because although the PAC would be *receiving* currency, the contributor would be *contributing* a commodity.

11 CFR 110.4 says that "no person shall *make contributions … of* currency" over certain limits. 11 CFR 100.52(a) defines 'contribution' as a "*gift … of* money or anything of value *made by* any person". 100.52(d) refers to the "*provision of* any goods or services".

Since the FECA defines contributions based on what is given *by the contributor*,[6] even service (b) is a contribution *of* Bitcoins, and thus an in-kind contribution.

CAF's interpretations of law on this question are completely without merit

CAF errs in its interpretation of *SEC v Shavers*. That court held that Bitcoin was 'money' in a completely different context, namely investment fraud under the Securities Act.

Shavers asked whether Bitcoin is 'money' in the sense of the Supreme Court's holding in SEC v. WJ Howey Co., 328 US 293 that "an investment contract *for purposes of the Securities Act* means a contract … whereby a person invests his money" (emphasis added). The Court's usage of 'money' was based on State v. Gopher Tire & Rubber Co., 146 Minn. 52, 56, 177 N.W. 937, 938, which defined an 'investment' as including "the laying out of money in a way intended to secure income or profit". In that context, 'money' is "broadly construed … so as to afford the

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antique diamonds, celebrity autographs, moon rocks, Buddha figurines, and baseball cards."

http://www.americanbanker.com/bankthink/in-person-Bitcoin-exchanges-are-thriving-10661-1.html

[6] Even if this were not true, other policy considerations apply (see parts 4 and 5 below) which would override this in an as-applied analysis, as it is *source* based restrictions that curtail illegal activity. We also note that both BitPay and Coinbase *are* FinCEN-registered MSBs.

investing public a full measure of protection" (*WJ Howey*).

Neither the *WJ Howey* nor *Shavers* interpreted 'money', 'cash', or 'currency' in the narrow senses used by the FECA and the BSA. Where the FECA explicitly seeks to treat contributions of currency and in-kind contributions of other goods *differently, Shavers* and *WJ Howey* use a much broader interpretation of 'money' to encompass *all* investment fraud. Both interpreted 'money' under the *Securities Act*, which is unrelated to the FECA.

CAF errs in its interpretation of AO 1982-08 BARTERPAC, which said that "[a]lthough the value of credit units is realized *only once they are exchanged*, the fact that credit units may immediately be converted into goods or services clearly renders them a *'thing of value'*" (as in 11 CFR 100.52(d)(1); emphasis added).

AO 1982-08 did not hold BARTERPAC's proposed "credit units" to be currency. To the contrary, its "central question" was the pragmatic issue of how to value "credit units". Because no open market existed for them, their market value "could not be determined unless and until they are ultimately used by a candidate".

This is not true of Bitcoins, which have clear market value in US Dollars (a real currency). The very *question* of "market value" could only apply to a good or service, not currency.

CAF errs in basic statutory interpretation. Although 11 CFR 100.52's use of 'includes' does imply that the list is not exclusive, the principles of *ejusdem generis*[7] and *noscitur a sociis*[8] govern the interpretation of any ambiguous or implied elements of 100.52's list.

100.52 has very specific context: "currency of the United States or of any foreign nation". This makes any more general terms or implied elements restricted to the same class of thing, i.e., *currencies* of a recognized nation. CAF even admits this, in saying that "[m]onetary contributions *of other currencies* are specifically contemplated" (emphasis added).

100.52 *cannot* be read to include things of value that are not denominated in *currency*. "Checks, money orders, or any other negotiable instruments" are monetary equivalents, only because they are worth exactly their face value in (real) currency.

CAF's statement that "Bitcoins can be converted to U.S. Dollars", while true, argues *against* their claim that Bitcoins are 'monetary' or 'currency'. *Real* currency does not need to be *'converted'.* The fact that Bitcoins' value is *only* clear "upon conversion", rather than on its face (as with

[7] "Where general words follow an enumeration of … things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to … things of the same general kind or class as those specifically mentioned." *Black's Law Dictionary*, 8th ed.

[8] "An unclear word or phrase should be determined by the words immediately surrounding it." *Black's Law Dictionary*, 7th ed.

cash, currency, checks, money orders, and all other traditional "negotiable instruments"), shows that Bitcoin is a market-traded *commodity* and not a *currency*.

CAF errs in its interpretation of AO 1980-125 Cogswell. *Cogswell* involved silver dollars, which are *official currency* (coins), issued by the United States, with a *face value* of $1. Silver dollars also have market value *as a commodity* when melted (i.e. as silver bullion).

In *Cogswell*, the Commission held that "the value put upon a contribution of *currency*, which has the potential to be treated as either a contribution of money *or an in-kind contribution with a different value*, is to be determined by the manner in which the currency is treated" (emphasis added). This common-sense holding prevented a loophole: if Cogswell were to really use silver coins only at their *currency value* of $1, they could; but if they were to ever use the coins at their *commodity value* (which is rather more plausible), they would be in-kind contributions valued at the market price.

Cogswell does not support the CAF's claim that they can choose freely whether to treat Bitcoin as monetary or as a commodity. Quite the opposite: the Commission held that Cogswell was *obliged* to treat silver dollars as in-kind contributions they were to use them in any way at their market value. Cogswell merely had the (implausible) option to treat silver coins at their face value as *real US $1 coins* (i.e. as currency).

Bitcoin is not a *currency* and *has* no face value, and therefore *Cogswell* doesn't apply.

In short, CAF errs in *all* of its characterizations of court and Commission precedent in section I of its request, and its legal claims therein are completely without merit.

Accepting CAF's argument would permit PACs to ignore the FECA's different regulations for in-kind contributions, merely because a commodity market exists where they are *convertible to* currency. This would be completely inconsistent with the Commission's rulings that contributions of *anything* other than currency are in-kind contributions.

The Commission cannot avoid reaching the question of whether Bitcoin is or is not 'currency' for the purposes of the FECA. The Act regulates contributions very differently depending on which is the case,[9] and answering *any* of CAF's questions mandates such a determination.

Therefore, the Commission should rule that Bitcoin is a 'good' and not 'currency' for the purposes of the FECA, completely deny CAF on its questions 1 ("May CAF lawfully accept Bitcoins as a monetary contribution?") and 3 ("May CAF decide how to treat these contributions?"), and treat questions 5-11 as moot.

[9] See part 4 below for an example, not discussed by previous commenters, of a very serious case thereof.

2. *Determining the market value of Bitcoin for FEC reporting purposes*

In section III and questions 12-13, CAF asks how it should value Bitcoin if it is permitted to accept Bitcoins as an in-kind contribution.

Here, its interpretation of *Cogswell* and the FECA is more apt. CAF can choose to keep something it receives as an in-kind contribution. If it does, it must value the contribution at its fair market value, within one day of receipt, in US dollars, on whatever major market (e.g. mtgox.com) that CAF or its intermediaries (e.g. BitPay) primarily use.

The price could be determined at midnight (at the organization's location), or at transaction confirmation; both are reasonable choices, and CAF should be free to pick whichever is most convenient. So long as their method is reasonable, consistent, documented, and within one day of receipt, we see no need for the Commission to mandate a specific time.

Of course, if CAF converts Bitcoins to currency earlier than their regular daily valuation time (e.g. immediately before or after receipt), then their value is the actual buy/sale price. For later expenditures (e.g. to purchase goods or services with Bitcoin), the new price applies.

3. *Bitcoin refunds or exchanges to currency violate the FECA and possibly the BSA*

CAF says that it in some cases it "intends to refund the contributor … in a monetary amount".

Because of inherent issues[10] with Bitcoin, Bitcoins cannot be reliably returned to their contributor, and therefore any Bitcoin refund would violate the FECA.

The Commission and CAF should also be aware that FinCEN's regulations may apply here.

Quoting again from FinCEN's guidance (all emphasis original): "A user of virtual currency is **not** an MSB under FinCEN's regulations and therefore is not subject to MSB [money services business] registration, reporting, and recordkeeping regulations. However, an … exchanger is an MSB under FinCEN's regulations, specifically, a money transmitter, unless a limitation to or exemption from the definition applies to the person…

A *user* is a person that obtains virtual currency to purchase goods or services. An *exchanger* is a person engaged as a business[11] in the exchange of virtual currency for real currency, funds, or other virtual currency…

[A] person is an exchanger and a money transmitter if the person accepts … de-centralized convertible virtual currency from one person and transmits it to another person as part of the

[10] See part 5.

[11] It is possible that 527 non-profit PACs may not be "engaging as a business", but this is unclear.

acceptance and transfer of currency, funds, or other value that substitutes for currency."

Generally, PACs are not "money transmitters" if they are merely acting as FECA-regulated conduits (under 11 CFR 110.6 and 102.8). Likewise, anyone merely using Bitcoins to purchase goods, or using a third party MSB to exchange them to currency, is also exempt.

However, if CAF accepts Bitcoins from someone and returns it (possibly to a third party) as real currency, FinCEN may deem that 'exchange' subject to MSB registration. FinCEN has not given clearer guidance about this situation. However, failure to register if one is required to do so is a felony (31 CFR 1022.380(e), 18 USC 1960).

FinCEN's website[12] shows that no PAC (including CAF) has *ever* has registered as an MSB.

Considering the above problems, we urge the Commission not to sanction or permit *any* reimbursement of Bitcoins, or treatment of overage, other than transfer to a recipient permitted to receive unlimited anonymous contributions.[13]

4. *Treating Bitcoin as 'cash' would allow unlimited, anonymous, hard money contributions*

The FECA requires PACs to report the source of *all* contributions, with one narrow exception: 11 CFR 110.4(c)(3) permits "anonymous cash contribution"s less than $50. If the Commission were to permit Bitcoins to be treated as 'cash', then this would apply.

110.4 was not meant for truly *anonymous* contributions, but rather for *pseudonymous,* real-world, physical cash currency contributions where the recipient knows the contribution has come from a single person because they met the contributor, but doesn't know (or chooses not to report) the contributor's identity. Otherwise, the recipient would risk violation of the FECA, if they receive an aggregate cash contribution of more than $50/year/person.

With Bitcoin, by contrast, transactions can be made extremely hard to trace to a real person.[14]

Furthermore, by splitting a payment into multiple Bitcoin transactions, a single person can make an *unlimited* number of "separate" Bitcoin contributions that *individually* have a market value of less than $50, in a way that is extremely difficult to trace. The core Bitcoin protocol enables such splitting[15], and online services make doing so (with further anonymization) trivially easy even for

[12] http://www.fincen.gov/financial_institutions/msb/msbstateselector.html

[13] See part 6.

[14] https://en.Bitcoin.it/wiki/Anonymity

[15] https://en.Bitcoin.it/wiki/Transactions#Output

non-technical users.[16]

Unlike contributions made by text message, which are limited by the difficulty of obtaining unique cellphones *en masse* and which are registered to phone companies with information that can be traced to a real-world identity, Bitcoin has no such restrictions. Anyone can create *thousands* of new Bitcoin addresses in a matter of minutes.

If the Commission were to allow Bitcoin to be treated as 'cash', 'currency', or 'money', this would effectively allow PACs to receive *completely unlimited, anonymous, hard money contributions* (if contributors just split and launder their contributions appropriately).

This result is completely unacceptable as a matter of policy, and is a further reason why the Commission should completely deny CAF on its questions 1, 3, and 5-11.

5. *Bitcoin transactions can be made untraceable, and attributing Bitcoin contributions is inherently problematic; therefore, Bitcoin contributions require special restrictions*

Bitcoin transactions cannot easily be traced.[17] There are no centralized, authoritative records of who owns what Bitcoin address, as there are with a bank knowing who owns every account. Knowing that a given Bitcoin transaction comes from a specific person depends primarily on asking them and just trusting their response.

The standard method that Bitcoin merchants (including BitPay) use to attribute incoming Bitcoin transactions to a given user is to create a distinct Bitcoin receiving address owned by the merchant that is disclosed to that user (a "linked address"). When *anyone* sends Bitcoins to the linked address, the merchant credits the associated user's account. The user can disclose their linked address to third parties if they want. If it receives any Bitcoins, the linked address

[16] e.g. http://app.bitlaundry.com/ or in general https://en.Bitcoin.it/wiki/Category:Mixing_Services

[17] As the Bitcoin Foundation points out, the block chain is public, and in that sense, all transactions are publicly traceable. But as they also point out, "Bitcoin users can choose whether to reveal their identity". Bitcoin users can remain extremely difficult to identify, using techniques specifically designed to *prevent* the nominally transparent public block chain from revealing real underlying transactions or ownership. (In computer security terms, Bitcoin users are technically *pseudonymous*, not *anonymous*, but we use 'anonymous' in the FECA's legal sense.)

This is an evolving area of cryptography. There have been recent presentations within the security community about ways to counteract attempts at Bitcoin anonymity — e.g. by Kay Hamacher & Stefan Katzenbeisser: http://www.mdpi.com/1999-5903/5/2/237, http://youtube.com/watch?v=hlWyTqL1hFA.

Given the substantive national policy issues that are affected, the FEC must rule based on a maximally conservative approach, and should read any uncertainty in a negative light.

The question is not whether Bitcoins can be traced under naïve or cooperative use, but rather whether they can be *reliably* traced to a *specific person* intentionally trying to *thwart* restriction or detection, using only information available to an FEC auditor of ordinary technical skill. The answer is clearly 'no'.

automatically becomes *public* knowledge. It is impossible to prevent third parties from anonymously sending Bitcoins to a linked address if they know what it is.

For normal merchants, this is not a problem; they don't care *who* pays them, so long as *someone* does. However, in the context of the FECA, this uncontrollable activity by third parties would be "contribution in the name of another", which is illegal under 11 CFR 110.4(b). PACs have a duty to take reasonable steps to prevent this (lest they be liable). Unlike normal bank transactions of traceable currency, even *detecting* this is very difficult.

Bitcoin payments can have multiple inputs which are *intentionally* hard to attribute.[18]

They can also (and frequently do) originate from an intermediary's address (e.g. MtGox's "green address"[19]), rather than an individual's. It is not viable to refund such transactions reliably, such that the Bitcoins return to the control of the person originally owning them.[20]

These problems make Bitcoin-based transactions impossible to reliably attribute or refund.

We believe that in principle, Bitcoin *should* be permitted as a means of in-kind contribution for identified contributors, as it is (albeit unusual) a useful and valuable medium of exchange.

Therefore, we suggest that the Commission strike a balance and *permit* Bitcoin-based in-kind contributions to PACs, ameliorating the above problems with a few simple restrictions:

A. PACs must *only* accept contributions made through a linked address,[21] and must use any given linked address only once. Repeated contributions by the same contributor must go through a new linked address each time.
B. PACs must collect complete identification from *all* Bitcoin contributors in accordance with 11 CFR 100.12 (i.e. name, address, occupation, and employer), regardless of the amount involved.
C. Contributors must explicitly affirm that every Bitcoin-based contribution attributed to them originates solely from Bitcoins owned by them.
D. PACs must maintain a record of the linked Bitcoin address for each transaction.

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[18] E.g. using CoinJoin: https://bitcointalk.org/index.php?topic=279249.0

[19] https://en.bitcoin.it/wiki/Green_address

[20] There are currently proposals for higher-level refund mechanisms, e.g. https://en.bitcoin.it/wiki/BIP_0070. However, they are not currently widely implemented, and are not built to prevent "refunds" actually going to a third party, which would be illegal under the FECA. This might change in the future; if it does, the Commission should revisit the question.

[21] e.g., they must not publish a general Bitcoin address, and must dispose of any Bitcoins sent to one outside of known linked-address transactions only by transfer to a recipient permitted to accept unlimited anonymous contributions

E. Bitcoin-based contributions must be limited to $100 per year[22] per recipient per contributor, by an *as applied* interpretation 11 CFR 110.4(c)(1-2) (which is intended to limit similarly attributed-but-untraceable contributions).
F. Bitcoin-based contributions must not be refunded, ever.
G. Any overage must go only to a recipient permitted to receive unlimited anonymous contributions.[23]

To the extent that third party intermediaries such as BitPay know that they are serving a PAC, or their cooperation is necessary, they should be required to help enforce the above restrictions, under the same reasoning governing text message based contributions.

6. Unlimited Bitcoin contributions for exclusive use in issue advocacy should be permitted

Bitcoin is designed to be an *anonymously tradeable* commodity.

Under the FECA, anonymous contributions (other than *cash* up to $50) are completely forbidden "for the purpose of influencing any election for Federal office" (11 CFR 100.52(a)). McConnell v. FEC, 540 U.S. 93 extended this to state and local elections as well, because to do otherwise would permit *indirect* violation of 100.52(a).

However, the Supreme Court has long upheld that for pure *issue advocacy,* anonymity is an essential right, and foreign nationals have a right to participate. This makes Bitcoin an ideal medium for issue advocacy contributions.

Furthermore, it is easily possible for an anonymous third party to find out one of a PAC's Bitcoin addresses and send Bitcoins to that address. Because a PAC is not permitted to receive any anonymous contributions of Bitcoin, it would be required by the FECA to dispose of that anonymous contribution to a permitted recipient. This is completely unavoidable, and therefore, the Commission should give clear guidance about what recipients are permitted to receive such anonymous contributions, so that a PAC is not stuck illegally possessing an anonymous contribution without being able to dispose of it.

Therefore, although CAF has not asked this question directly, we urge the Commission to rule that a 501(c)4 organization *is* permitted to receive Bitcoins for genuine issue advocacy, provided that any such contributions must not, directly or indirectly, be used for the purpose of influencing any election (e.g. by being re-transmitted to a Super PAC's independent expenditures account or by being used in the kinds of 'sham' issue advocacy the Supreme Court condemned in

[22] in aggregate of the fair market value at the time of each contribution

[23] See part 3 above and part 6 below.

McConnell).

If the Commission does not reach this question, we will have to ask it ourselves in a separate AOR. It would be more efficient for the Commission to address the question now, as it is necessarily implied by the questions on the record which force its resolution.

Answering this question would also address another implied aspect of CAF's questions — namely whether CAF, as a Super PAC, would be permitted to accept Bitcoin-derived contributions from a 501(c)4.

We urge the Commission to unequivocally rule that they may not, as allowing them to do so would create a giant loophole in the FECA permitting unlimited, anonymous, foreign-national originating contributions to be used (albeit 'independently') to influence elections, which is unquestionably illegal under a *McConnell* analysis of 100.52.

Re. the draft Advisory Opinion, Agenda Document 13-45

We concur almost completely with the draft AO, and especially with its analysis of Bitcoin's status as a commodity.

However, we disagree on a few points, and believe it has overlooked some serious special considerations the Commission should apply to Bitcoin, as we discuss below.

1. *Valuation*

We believe the draft AO gives one example of a very reasonable valuation method. However, as discussed in part 2 above, if CAF elects to hold on to Bitcoins[24] rather than to convert them immediately into currency, we believe it would *also* be reasonable to permit them to make valuations at a set time every day or some similar method.

We suggest that the Commission exercise judicial restraint, requiring only that a reasonable and consistent method be used that is specified in CAF's written policy, and that the market rate be based on a proper choice of exchange (as the draft AO describes).

The Commission should also address how to report Bitcoins that CAF has itself mined.

2. *Refunds*

As discussed in part 3 above, we believe that it would be very unwise for the Commission to sanction *any* exchange of Bitcoins to currency, as proposed in the draft AO, p 12. Allowing this might sanction violation of the FECA's mandate that refunds be made only to the contributor, and felony violation of FinCEN's money services business regulations.[25]

PACs, unless they are also FinCEN registered MSBs (which CAF is not), may not be permitted under FinCEN regulation to 'exchange' Bitcoins for currency. If FinCEN decides that they are not, and if CAF refunds in currency a contribution that it received as Bitcoins, it would be committing a felony. If the Commission allows currency-denominated refunds, it would implicitly sanction such felonies.

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[24] We note that investment income from holding Bitcoin is taxable; see Internal Revenue Manual 7.27.11.1.

[25] We do not mean to imply any intent by CAF to commit these crimes.

Rather, we believe the draft AO has overlooked these loopholes and FinCEN regulations in suggesting that Bitcoins may be treated in the same manner as normal goods, which *can* be legally refunded at their dollar value at the time received. We want to ensure that the Commission's rules do not create loopholes for unlawful activity, sanction violation of the BSA, or violate public policy.

Even if not an 'exchange', *any* refund of Bitcoin opens many loopholes (see part 5 above).

PACs could effectively act as money laundering services, if a contributor claims as theirs a third party's contribution of Bitcoins which is then "refunded" to the supposed contributor in dollars — violating both the BSA and FECA.

By fixing the market value at the time of contribution (as the draft AO proposes), and later demanding a refund, a contributor could effectively use a PAC to hedge their Bitcoin investments. Even worse, the draft AO proposes that a PAC may issue a refund in Bitcoins *or* currency. Supposing that a PAC complies with a user's request either way, the contributor can *directly* exploit the PAC for Bitcoin based financial speculation — contributing a certain amount of Bitcoins and then withdrawing either their original market value (in currency) or their current value (in Bitcoins), whichever is higher (or lower, to make a stealth contribution).

Someone could contribute Bitcoins, wait for the market price to rise, and then demand the same amount of Bitcoins in return, costing the PAC money if it has liquidated the Bitcoins in the meantime. Done the other way around — asking for a "refund" in Bitcoins after they have *depreciated* in value — this would effectively give the PAC an unreported contribution equal to the difference in market price (equivalent to a loan of investment capital). Given Bitcoin's very high market price volatility, this could be a substantial amount.

Single Bitcoin transactions often originate from and/or are sent to multiple Bitcoin addresses. These might or might not be owned by the same person; there is no way to tell. "Refunds" could be used as *de facto* a Bitcoin mixing / laundering service, especially if the Bitcoins have been swept into a Bitcoin address which intermingles Bitcoins from multiple sources.

This is not *nearly* an exhaustive list of how these loopholes could be exploited, but only some of the most obvious cases. This is an unavoidable part of the nature of Bitcoin transactions.

Any form of Bitcoin refund or exchange into currency is exploitable, and may allow or even sanction PACs to commit felony violations of the BSA, participate in or be victim to investment speculation or financial fraud, receive unreported contributions or contributions in the name of another, "refund" money to someone other than its true source, etc.

We therefore urge the Commission to *absolutely* forbid *any* form of Bitcoin refund whatsoever. Any contribution that would otherwise need to be refunded must be disposed of by transfer to a recipient permitted to accept unlimited anonymous contributions.

Alternatively, the Commission should ask FinCEN about the above issues[26] *before* ruling, and

[26] We believe it is unclear under current FinCEN guidance whether CAF may even *conduit* Bitcoins; receiving Bitcoins that whose market value is then given as currency to an earmark recipient may be deemed 'exchange'. We notified FinCEN of the draft AO and our comment on Nov. 9th, and invited them to coordinate with the Commission on these issues.

warn CAF of its possible liability under the BSA as an "exchanger of virtual currency".

3. Disbursements

We concur with the draft AO that CAF should not be permitted to make payments to other FECA-regulated entities, nor for purposes of funding regulated categories of expenditure such as advertising, except using real currency and a registered depository.

However, we believe that the Commission *should* permit CAF to use Bitcoins (whether ones it has itself mined, held since acquiring them as an in-kind contribution, or purchased expressly for the purpose) as a means of payment for *bona fide* goods and services, rendered at their usual rate by other parties (e.g. employees, merchants, etc.), to the extent that doing so does not harm interests in public transparency and is adequately reported.

For instance, unlike payments for advertisements or contributions to FECA-regulated entities, we see no policy justification for a prohibition on paying employees using Bitcoin.

Likewise, we see no policy basis to prohibit CAF from using Bitcoin to pay for the kinds of goods and services it mentions in its email addendum (website design, food, and computer equipment). Nor do we see any reason why it would be unlawful to give or receive the kinds of discounts for Bitcoin-based payments that CAF describes, if that is the merchant's routine business practice, offered equally to non-political customers.

Any such payments should be valued and reported at the fair market rate at time of payment.

There are also two Bitcoin-specific technical problems with the draft AO's proposed rule.

First, in order for any Bitcoin transaction to be effective (including, for example, a transfer of someone's own Bitcoins to a Bitcoin exchange like MtGox for conversion to USD), it must be included by a Bitcoin miner in a new block. Miners are anonymous. As a *de facto* matter, miners refuse to do this unless they are paid a small amount of Bitcoin, called a "transaction fee"[27] — typically on the order of 0.0001 Bitcoins. This fee is nominally optional, but in practice it is not; the size of the fee determines the priority with which a transaction will be finalized, and zero-fee transactions won't usually be processed.

In order for anyone to actually use Bitcoins, they *must* pay such Bitcoin-denominated fees to anonymous third parties. Therefore, the Commission should permit PACs to do so, so long as the transaction fee is paid at the standard rate. We suggest that such transaction fees need be reported only in aggregate.

[27] https://en.bitcoin.it/wiki/Transaction_fees

If the PAC is trying to get rid of Bitcoins that it is not allowed to possess (e.g. contributions from an anonymous source), it should be permitted to spend some of that amount, at the normal transaction fee rate, as part of giving the Bitcoins to a permitted recipient.

Second, because the transaction cost to effectively *dispose* of a bitcoin is higher than the minimum amount one can receive, third parties can anonymously give a PAC Bitcoins that cost far more than they're worth to transfer (e.g. 'dust' transactions).[28] A malicious third party can create thousands of such transactions, which can't be disposed of without significant loss.

We propose the Commission find that Bitcoins that cost more than they're worth to spend are not a "thing of value" at all. This would prevent malicious third parties from forcing a PAC to spend Bitcoins in order to get rid of negative-value contributions that the PAC could not legally retain, or forcing a PAC to report many negative-value in-kind contributions.

4. *Accounting requirements and contribution limits*

As we discuss in part 5 above, we believe that the draft AO has overlooked and should require certain accounting procedures particular to Bitcoin (exclusive use of one-time-only linked addresses, recordkeeping of linked addresses used, affirmation of ownership, etc) to ameliorate problems with attributing and tracing Bitcoin-based transactions.

The Commission should also clearly specify what information should be collected from Bitcoin-based contributors, and whether there should be a $100/yr/contributor limit to the amount of Bitcoin-based contributions a FECA-regulated entity may receive.

We believe the Commission should approach these questions with a great degree of caution, requiring the most stringent information collection and contribution limits, given the risks of anonymous third-party participation inherent to Bitcoin-based transactions.

5. *Contributions to and from 501(c)4s*

As we discuss in part 6 above, we believe the Commission must also address the questions of whether a 501(c)4 may receive Bitcoins (we believe 'yes', when confined to genuine issue advocacy), and whether a Super PAC such as CAF may accept Bitcoin-derived contributions from a 501(c)4 (we believe 'no').

[28] https://code.google.com/p/bitcoin-wallet/wiki/DustTransactions

See also https://bitcointalk.org/index.php?topic=278122.0, which creates similarly negative-value Bitcoins.

Conclusion

After we received requests from multiple people interested in contributing to us via Bitcoin, we began discussing this matter with the Bitcoin Foundation, the Cryptocurrency Legal Advocacy Group[29], the Bitcoin community, state candidates accepting Bitcoin, and others over a year ago, to carefully assess the legal, policy, practical, and other issues involved in Bitcoin-based political contributions. We had planned on submitting an AOR about substantially similar questions at a later date. However, CAF has beat us to it, so we respond now.

We concur with BitPay and the Bitcoin Foundation that, in principle, Bitcoin *should* be permitted as a means of political contribution. Bitcoin is a useful and evolving new medium of exchange, and permitting its use would encourage technological innovation. Like CAF, we too would like to accept Bitcoins. We believe that technologically sophisticated approaches to campaign finance have the potential to be of great benefit to the public.

However, we feel that in their desire to support Bitcoin, which we share, our fellow commenters overlooked nuances of the FECA. Therefore, we must disagree with them in how this principle should be applied. Given the serious policy issues that must be considered and protected in the Commission's ruling on this matter, we urge it to proceed with caution.

Both legally and as a matter of policy, for the purposes of the FECA, Bitcoin *must* be treated as an in-kind good, not any kind of currency, cash, or money.

PACs and other regulated recipients should be allowed to accept Bitcoin-based contributions, *if and only if* they meet restrictions, such as those we outlined in part 5 of the first section, designed to prevent illegal activity under the FECA and BSA that is an inherent risk of Bitcoin's anonymous design.

501(c)4s should be allowed to accept Bitcoin-based contributions without any FECA limit or reporting requirement, so long as such contributions are used *exclusively* for genuine issue advocacy (and never reach an account permitted to pay for express advocacy).

If you have any questions or comments, please do not hesitate to contact me at sai@makeyourlaws.org or (717) 469-5695. I would be happy to appear remotely at the Commission's hearing on this matter if I might be of any assistance.

Sincerely,
Sai
President & Treasurer
Make Your Laws PAC, Inc.
Make Your Laws Advocacy, Inc.

[29] http://theclag.org