



New Guidance on Campaigns' Use of NFTs Could Pave the Way for Use of Other Digital Assets in Politics

04.12.2022 | By **Amber R. Maltbie, William A. Powers**

For the first time, California's Fair Political Practices Commission (FPPC) has issued guidance addressing the use of digital assets for fundraising purposes by campaigns and PACs. As outlined in the *In Re Leiderman* Opinion, an advisory opinion (AO) adopted at a March 2022 meeting of the FPPC established how campaigns must value the sale of non-fungible tokens (NFTs) for purposes of contribution limits and reporting requirements. This opinion is particularly noteworthy because the only other occasion in which the FPPC has issued a rule on the use of a digital asset was in its 2018 regulation that banned making or receiving contributions via cryptocurrency. However, the FPPC is tentatively scheduled to revisit that regulation at its May 2022 meeting, and this NFT opinion may signal the agency's willingness to soften its cryptocurrency ban.

The FPPC's Opinion

The AO held that a campaign committee that sells NFTs as part of its fundraising efforts must count the entire amount received as a contribution. In this particular case, the campaign's request proposed selling digital assets that were akin to "trading cards" as part of its fundraising efforts.

The draft opinion, adopted unanimously by the FPPC, concluded that NFTs should be treated in the same manner as the sale of a ticket to a fundraising event or provision of a fundraising gift and that, consequently, the full amount of the sale counts as the contribution. In reaching this decision, the FPPC relied on the fact that an NFT has no "discernable value independent of the committee that sells it." Without an independently established Fair Market Value (FMV), the FPPC surmised that a campaign could circumvent contribution limits and reporting requirements by assigning an inflated FMV to the NFT and then only counting the contribution as that above the FMV.

For example, gubernatorial candidates are currently subject to a contribution limit of \$32,400 per election. If a gubernatorial candidate's campaign were allowed to "set" its own FMV, say at \$50,000, then it could sell an NFT for \$82,400 and still be within the limits, even if the NFT's cost basis was significantly less than \$50,000 (or even zero).

Where Do We Go From Here?

The *In re Leiderman* Opinion was issued in response to a request from a member of the public, but the FPPC has indicated that it is ready to take a more proactive approach to addressing the use of cryptocurrency and other digital assets in campaigns. For example, at the request of Chair Richard Miadich, the commission is scheduled to revisit the FPPC's current ban on making or receiving contributions in cryptocurrency at its May 2022 meeting. Staff intends to present to the commission an update on how other state's campaign finance regulators are adapting their rules for digital assets to inform the discussion. Other factors that the FPPC might consider are the increased ownership and use of cryptocurrencies by the general public and the fact that federal candidates currently can – and increasingly are – using cryptocurrency in their campaigns.

The world of NFTs, cryptocurrency and blockchain is not a static one, and the FPPC and other campaign regulators will face questions about their use in political fundraising as technological advances outpace the guidance of any single advisory opinion. Until agencies like the FPPC adopt workable regulations that provide a comprehensive and flexible approach to using these evolving technologies, campaigns, PACs and other politically active organizations that want to leverage digital assets for advocacy purposes will be well served to proceed carefully and seek knowledgeable legal counsel.