

AGENDA DOCUMENT NO. 10-62



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM

October 1, 2010

For Meeting of 10-7-10

MEMORANDUM

SUBMITTED LATE

TO: The Commission

FROM: Christopher Hughey *pch*
Acting General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Amy L. Rothstein *ALR*
Assistant General Counsel

Theodore M. Lutz *ML*
Law Clerk

Subject: Draft AO 2010-21 (ReCellular)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for October 7, 2010.

Attachment

2

3 Michael B. Trister, Esq. and Allen H. Mattison, Esq.
4 Lichtman, Trister & Ross, PLLC
5 1666 Connecticut Ave, N.W.
6 Fifth Floor
7 Washington, D.C. 20009
8

9 Dear Mr. Trister and Mr. Mattison:

10 We are responding to your advisory opinion request on behalf of ReCellular, Inc.
11 (“ReCellular”), concerning the application of the Federal Election Campaign Act of
12 1971, as amended (the “Act”), and Commission regulations to a proposed program under
13 which ReCellular would transmit to political committees contributions from consumers
14 resulting from the sale of used cell phones to ReCellular. The Commission concludes
15 that the proposed program is permissible under the Act and Commission regulations,
16 provided that it meets the conditions below.

17 ***Background***

18 The facts presented in this advisory opinion are based on your letter received on
19 August 9, 2010, and your email received on August 20, 2010.

20 1. *ReCellular’s Existing Operations*

21 ReCellular is a for-profit Michigan corporation that recycles and resells used cell
22 phones and accessories. ReCellular collects used cell phones through a variety of means,
23 including by purchasing them directly from consumers via ReCellular’s website.¹

¹ ReCellular also collects used cell phones through drop-boxes placed in various public locations and through pre-paid envelopes that are distributed by retailers of new cell phones. ReCellular does not pay for the phones it collects through these two methods. ReCellular’s website is located at www.SecureTradeIn.com.

1 ReCellular’s proposed activity pertains only to transactions initiated by consumers who
2 sell their phones to ReCellular through the company’s website.

3 Upon accessing ReCellular’s website, a consumer is directed to enter the model of
4 the cell phone that the consumer wishes to sell. ReCellular then offers a purchase price
5 to the consumer depending on a number of factors, including the supply and demand of
6 certain models of phones and their component parts, prices offered by ReCellular’s
7 competitors, the costs of shipping the phone, and the costs of processing both the phone
8 and the payment for the phone. ReCellular’s objective is to maximize profits, and it
9 characterizes the prices that it pays for each phone as “fair market value.”

10 If the consumer wishes to sell for the quoted price, the consumer enters his or her
11 contact information. ReCellular then provides a shipping label for the consumer to use in
12 sending ReCellular the phone. ReCellular states that paying the shipping costs of the
13 phone is common industry practice because it greatly increases the number of consumers
14 who follow through with the transaction by sending in their phones. After ReCellular
15 receives a phone, the company assesses the phone to ensure that it meets certain sales
16 criteria.² If the phone meets those criteria, then ReCellular will send the consumer a
17 check for the phone’s purchase price. If a consumer sends a phone that fails to meet
18 ReCellular’s criteria, then ReCellular will return the phone to the consumer.

² The sales criteria are:

1. The phone is one of approximately 425 models for which ReCellular has identified a high demand for phones or parts;
2. The phone is able to power up;
3. The phone is able to make an outgoing call;
4. The phone is not waterlogged;
5. The phone’s hardware (e.g., hinge, antenna, housing) is not broken or missing pieces; and
6. The phone’s LCD screen is not damaged.

1 ReCellular currently allows each consumer the option of donating his or her sale
2 proceeds to one of several charitable organizations described in section 501(c)(3) of the
3 Internal Revenue Code (“charities”) rather than having ReCellular send a check to the
4 consumer.³ If a consumer chooses to donate the sale proceeds to one of these charities,
5 then ReCellular will send a check in the consumer’s name for the full purchase price of
6 the phone as a donation to the charity selected by the consumer from ReCellular’s
7 website. If the consumer sends a phone that fails to meet ReCellular’s criteria, the
8 consumer’s designated charity will not receive payment.

9 *2. ReCellular’s Proposed Program*

10 ReCellular seeks to allow consumers to choose to contribute their sale proceeds to
11 political committees. Candidates’ authorized committees, national political party
12 committees, and nonconnected committees would be eligible to participate. ReCellular
13 hopes to implement this program for the 2010 elections and future elections, including
14 the 2012 presidential election.

15 The political committee program would differ from the existing charity program
16 in certain ways. First, ReCellular would bill each political committee for the cost of
17 adding the political committee to its website. Second, ReCellular would post a statement
18 on its website stating that it does not endorse any of the political committees. Third,
19 ReCellular would require consumers who wish to contribute sale proceeds to political

³ ReCellular currently allows consumers to donate their sale proceeds to Cell Phones for Soldiers, the March of Dimes, and Susan G. Komen for the Cure. *See* Secure Trade In, How Does This Work?, http://www.securetradein.com/Home/how_does_this_work.aspx (last viewed September 14, 2010). Each of these organizations is eligible to receive tax-deductible charitable contributions under section 170(c) of the Internal Revenue Code. *See* Online Version of Publication 78, <http://www.irs.gov/app/pub-78> (last viewed September 14, 2010). An organization that qualifies for tax exempt status under section 501(c)(3) of the IRC is described in section 170(c).

1 committees to confirm: (1) that the amount of the contribution, when aggregated with
2 other contributions made by the same consumer, does not exceed the contribution limits
3 of the Act, and (2) that the contribution does not come from a prohibited source under the
4 Act, such as a corporation, national bank, labor organization, Federal contractor, or
5 foreign national.

6 ReCellular would also collect additional information from each consumer who
7 wishes to contribute sale proceeds to political committees, including the consumer's
8 occupation and employer. ReCellular would use this information to generate two emails.
9 ReCellular would send one email to each consumer making a contribution to confirm the
10 completion of the sale and the amount of the contribution made by the consumer to the
11 political committee. The email would also state that the contribution amount counts
12 toward the consumer's contribution limit for that particular candidate or political
13 committee. ReCellular would generate a second email to each recipient political
14 committee, to inform the political committee of the contribution amount and contributor
15 information provided by the consumer on ReCellular's website. ReCellular would not
16 forward any proceeds from the sale of a phone to a political committee until ReCellular
17 has verified that the phone meets ReCellular's criteria. ReCellular would send the sale
18 proceeds to a political committee within ten days of confirming that the consumer's
19 phone meets ReCellular's criteria.

20 ReCellular plans to promote the program in several ways. ReCellular would
21 advertise the program through mass media and email to those on its distribution list, but it
22 would not refer to specific candidates or political committees. ReCellular would also
23 contact candidates who have qualified for the ballot in their States and who meet the

1 definition of candidate under 2 U.S.C. 431(2). ReCellular would include in its program
2 any national political party committees and nonconnected committees that request to be
3 included, as well.

4 ***Questions Presented***

- 5 1. *Does the program described, whereby individuals who sell a used cell phone to*
6 *ReCellular and direct the company to send the proceeds from that sale to a*
7 *political candidate or political committee chosen by the individual, comply with*
8 *the Act and Commission regulations?*
- 9 2. *If the price that ReCellular pays each consumer to purchase a phone already reflects*
10 *the company's costs for shipping the phone, processing the transaction, confirming*
11 *the sale to the seller, and transmitting the payment, must ReCellular also charge the*
12 *recipient political committee for these costs?*
- 13 3. *Must each recipient political committee pay the incremental cost to ReCellular of*
14 *sending a notification email to that political committee with the contributor's name,*
15 *address, occupation and employer, and date of contribution, if the cost is not paid by*
16 *the consumer?*

17 ***Legal Analysis***

- 18 1. *Does the program described, whereby individuals who sell a used cell phone to*
19 *ReCellular and direct the company to send the proceeds from that sale to a*
20 *political candidate or political committee chosen by the individual, comply with*
21 *the Act and Commission regulations?*

22 Yes, ReCellular's proposal complies with the Act and Commission regulations.

1 The Act and Commission regulations prohibit corporations from making a
2 contribution in connection with a Federal election. *See* 2 U.S.C. 441b(a);
3 11 CFR 114.2(b)(1). A “contribution” includes “any gift, subscription, loan, advance, or
4 deposit of money or anything of value made by any person for the purpose of influencing
5 any election for Federal office.” 2 U.S.C. 431(8)(A)(i) and 11 CFR 100.52(a); *see also*
6 2 U.S.C. 441b(b)(2); 11 CFR 114.2(b)(1). “Anything of value” includes all in-kind
7 contributions, including the provision of goods or services without charge or at a charge
8 that is less than the usual and normal charge. *See* 11 CFR 100.52(d)(1). “Usual and
9 normal charge” is defined as the price of goods in the market from which they ordinarily
10 would have been purchased at the time of the contribution, or the commercially
11 reasonable rate prevailing at the time the services were rendered. *See*
12 11 CFR 100.52(d)(2).

13 In prior advisory opinions, the Commission has examined a number of business
14 arrangements between political committees and service providers that were either affinity
15 programs⁴ or, like ReCellular’s proposal, similar to affinity programs. *See* Advisory
16 Opinions 2010-06 (Famos), 2008-18 (Mid-Atlantic Benefits), 2006-34 (Working Assets),
17 2003-16 (Providian National Bank), and advisory opinions cited therein. In these
18 advisory opinions, the Commission concluded that corporations may offer affinity
19 programs and enter into affinity-type business arrangements with political committees so
20 long as (1) the corporations and political committees enter into commercially reasonable

⁴ The Commission uses the term “affinity program” to mean a relationship between a business that offers a product or service and an organization (e.g. fraternal, charitable, religious, professional, or, as in this case, political) that endorses or sponsors the business’s product or service to its members, supporters, or other interested persons. This definition is consistent with the Commission’s use of the term in previous advisory opinions. *See, e.g.*, Advisory Opinions 2010-06 (Famos), 2008-18 (Mid-Atlantic Benefits), 2003-16 (Providian National Bank), 1992-40 (Leading Edge Communications), and 1979-17 (RNC).

1 transactions in which the political committees pay the usual and normal charge for any
2 services provided by the corporations; and (2) the amounts contributed to the political
3 committees via rebates, rewards, or remittances are from consumers' funds and not from
4 the corporations' funds. *See* Advisory Opinions 2010-06 (Famos), 2008-18 (Mid-
5 Atlantic Benefits), 2006-34 (Working Assets), and 2003-16 (Providian National Bank).

6 a. *Usual and Normal Charge*

7 For its transactions to comply with the Act and Commission regulations,
8 ReCellular must not provide any goods or services to political committees without
9 receiving the usual and normal charges, or those goods and services must be provided in
10 exchange for bargained for consideration. 11 CFR 100.52(d)(1); *see also* Advisory
11 Opinions 2010-06 (Famos) and 2006-34 (Working Assets).

12 ReCellular proposes to provide two services to political committees. The first
13 service would involve adding political committees as an option on ReCellular's website
14 and including them in the program. ReCellular plans to charge political committees
15 participating in the program for the costs incurred by ReCellular in providing this service.
16 Because political committees would fully pay ReCellular for the costs of this service,
17 ReCellular would not be providing something of value, and hence would not be making
18 contributions, to the political committees. *See also* Advisory Opinion 2010-06 (Famos).

19 Second, ReCellular would send emails to recipient political committees to notify
20 them of contributors' names and personal information when it transmits contributions.
21 ReCellular would generate these emails automatically using information entered into its
22 website by consumers. Each email would include the consumer's name, address, email
23 address, occupation, and name of employer. The Commission concludes that this service

1 would not result in ReCellular making contributions to the recipient political committees,
2 provided that ReCellular complies with the conditions pertaining to these emails that are
3 discussed in the answer to Question 3 below.

4 b. *Consumer Contributions*

5 Generally, affinity and similar programs in which a corporation transmits to a
6 political committee a portion of the revenues that the corporation charges and collects
7 will result in a prohibited corporate contribution under the Act and Commission
8 regulations. *See generally* Advisory Opinion 2008-18 (Mid-Atlantic Benefits). Thus, all
9 contributions generated through these programs must be made by individuals from their
10 own funds and not by the corporate service provider. These programs may generate
11 revenue, such as remittances, rebates, or rewards, for customers or users who may then
12 use the earned revenue to make voluntary contributions to a political committee affinity
13 partner. *See* Advisory Opinions 2010-06 (Famos), 2006-34 (Working Assets), 2003-16
14 (Providian National Bank).

15 In evaluating affinity and affinity-like programs, the Commission considers two
16 factors: 1) whether the revenue or rebate is offered to individual customers or users in
17 the ordinary course of business; and 2) whether the revenue is the property of the
18 individual customer who – rather than the corporate affinity partner – controls the
19 disposition of the revenue. *See* Advisory Opinion 2010-06 (Famos).

20 In this case, the answers to both questions support a determination that the funds
21 contributed to political committees under ReCellular's proposal will be the funds of the
22 consumers and not ReCellular. First, the funds at issue here will be offered to consumers
23 in the ordinary course of ReCellular's business. ReCellular established its website to

1 purchase phones from consumers so that it could generate a profit by reselling or
2 recycling used cell phones. It currently allows consumers to donate their sale proceeds to
3 charities. ReCellular plans to extend to political committees this same program without
4 making any changes beyond those necessary to recoup costs incurred by ReCellular and to
5 avoid making a corporate endorsement of any candidate or political committee. Thus,
6 these funds would be offered to consumers in the ordinary course of business.

7 Second, the proceeds of each phone sale are the property of the consumer.
8 Currently, ReCellular does not disburse the proceeds of the sale of a consumer's phone to
9 the consumer or to the charity selected by the consumer until ReCellular has confirmed
10 that the consumer's phone meets ReCellular's purchase criteria, and it proposes to follow
11 the same procedure for transmitting contributions to political committees. This practice
12 helps to safeguard against the possibility of ReCellular inadvertently making a
13 contribution of its own funds, rather than transmitting a consumer's sale proceeds, to a
14 political committee. Further, the consumer has ultimate control over the disposition of
15 the funds. The consumer, upon agreeing to sell a phone to ReCellular, decides whether
16 ReCellular sends the sale proceeds to the consumer, a charity, or a political committee.

17 This arrangement is similar to affinity and affinity-like programs approved by the
18 Commission in the past. In Advisory Opinion 2010-06 (Famos), the Commission
19 approved a program under which individual account holders generated revenue through
20 transactions involving the Famos web referral platform. The account holders could opt to
21 receive a check in the amount generated, to donate the money to a charity, or to
22 contribute the funds to a political committee. The Commission concluded that, once
23 earned, the revenue became the account holders' "exclusive property." Similarly, in

1 Advisory Opinion 2003-16 (Providian National Bank), the Commission stated that
2 “[r]ebates that have vested are the property of the cardholder.” The Commission
3 approved the program in that advisory opinion because consumers retained the final
4 authority “to choose whether or not to contribute part or all of their rebates to the national
5 party committee.” Like the revenue contributed to political committees in these advisory
6 opinions, the money contributed to political committees under ReCellular’s proposal
7 would be property of the consumer, and the consumer would have final control over how
8 sale proceeds are disposed.

9 2. *If the price that ReCellular pays each consumer to purchase a phone already reflects*
10 *the company’s costs for shipping the phone, processing the transaction, confirming*
11 *the sale to the seller, and transmitting the payment, must ReCellular also charge the*
12 *recipient political committee for these costs?*

13 No, ReCellular is not required to also charge recipient political committees for
14 any costs already reflected in the purchase prices paid to consumers by ReCellular.

15 The necessary inquiry is whether ReCellular provides “any goods or services
16 without charge or at a charge . . . less than the usual and normal charge for goods or
17 services” 11 CFR 100.53(d)(1). The factors used by ReCellular to establish a
18 purchase price include the cost to ReCellular of shipping phones and processing
19 payments. ReCellular would offer the same purchase price for the phone, regardless of
20 whether a consumer directs ReCellular to send the payment to the consumer, a charity, or
21 to a political committee. So long as ReCellular does not provide any services without
22 charge, or at less than the usual and normal charge, ReCellular need not charge recipient
23 political committees for these costs.

1 3. *Must each recipient political committee pay the incremental cost to ReCellular of*
2 *sending a notification email to that political committee with the contributor's name,*
3 *address, occupation and employer, and date of contribution, if the cost is not paid by*
4 *the consumer?*

5 Yes, to avoid making a corporate contribution to the recipient political committee,
6 ReCellular must charge recipient political committees for the incremental expense of
7 emailing the consumer's name, address, occupation and employer, and date of
8 contribution, if this expense is not paid by the consumer.

9 Under ReCellular's proposal, the cost of the notification emails would be the only
10 cost borne by ReCellular. However, the prohibition on corporate contributions extends to
11 "*any services, or anything of value.*" 2 U.S.C. 441b(b)(2).

12 In previous advisory opinions regarding affinity programs, the Commission has
13 determined that the recipient political committees must pay the costs associated with
14 transmitting contributor information. In Advisory Opinion 2006-34 (Working Assets),
15 the Commission approved an affinity program in which a corporation marketed phone
16 services to the supporters of certain political committees. Consumers who enrolled in the
17 program received a rebate on their monthly phone bill, which they could then direct the
18 corporation to transmit to the sponsoring political committee if they wished to do so. The
19 Commission approved the program because Working Assets engaged in similar
20 transactions "in its ordinary course of business," but political committees were required
21 to pay the usual and normal charge "for expenses related to processing and transmitting
22 contributions and contributor information[.]" Advisory Opinion 2006-34 (Working
23 Assets). Similarly, in Advisory Opinion 2003-16 (Providian National Bank), the

1 Commission approved an affinity program in which a bank charged national party
2 committees “for any expenses related to sending the check . . . [and] forwarding the
3 contribution to the national party committee.” Accordingly, here, the recipient political
4 committees would have to pay ReCellular for the cost of the notification emails, unless,
5 as explained in the answer to Question 2, above, the cost is borne by the consumers.

6 ReCellular and recipient political committees could structure the payments for the
7 notification emails in a variety of ways. For example, in Advisory Opinion 2002-07
8 (Careau), the Commission approved an affinity program that accounted for a company’s
9 costs in processing political contributions from consumers by taking a fee out of the
10 contributions transmitted by the company to political committees. In Advisory Opinion
11 2006-34 (Working Assets), the Commission did not require the recipient political
12 committees to pay the company for its services in advance or concurrently with the
13 company’s service, but instead required payment within a “commercially reasonable
14 period of time.” *See also* 11 CFR 114.2(f)(1) and 116.4. ReCellular states that it would
15 be less administratively burdensome for it to bill each individual political committee on a
16 monthly basis for the aggregate cost of sending it notification emails than to account for
17 this cost in the purchase price of individual phones. This proposed monthly billing cycle
18 is acceptable, so long as payment is received within a “commercially reasonable period of
19 time.”

20 The Act and Commission regulations also establish deadlines by which
21 ReCellular must forward contributions and contributor information to recipient political

1 committees.⁵ ReCellular plans to forward sale proceeds to recipient political committees
2 within ten days of confirming “that the consumer’s phone was worth the quoted price,”
3 thus complying with the statutory and regulatory deadlines. *See* 2 U.S.C. 432(a) and (b);
4 11 CFR 102.8. ReCellular will also require a consumer to confirm that the contribution
5 complies with the amount limitations and source prohibitions of the Act: specifically, that
6 it is not made by a corporation, national bank, labor organization, Federal contractor, or
7 foreign national. These actions are consistent with safeguards approved by the
8 Commission in prior advisory opinions. *See* Advisory Opinions 2010-06 (Famos),
9 2006-35 (Working Assets), and 1995-09 (NewtWatch).

10 The Commission expresses no opinion regarding any tax ramifications of the
11 proposed activities because those issues are not within the Commission’s jurisdiction.

12 This response constitutes an advisory opinion concerning the application of the
13 Act and Commission regulations to the specific transaction or activity set forth in your
14 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
15 of the facts or assumptions presented, and such facts or assumptions are material to a
16 conclusion presented in this advisory opinion, then the requestor may not rely on that
17 conclusion as support for its proposed activity. Any person involved in any specific
18 transaction or activity which is indistinguishable in all its material aspects from the
19 transactions or activity with respect to which this advisory opinion is rendered may rely

⁵ ReCellular must forward contributions to authorized political committees within ten days after receipt. 2 U.S.C. 432(b)(1); 11 CFR 102.8(a). ReCellular must also provide to authorized committees the name and address of each person who contributes in excess of \$50 and the date of receipt of the contribution. *Id.* ReCellular must forward contributions of \$50 or less to political committees that are not authorized committees within thirty days after receipt. *Id.* ReCellular must forward contributions greater than \$50 to political committees other than authorized committees, along with the name and address of the contributors, within ten days after receipt. *Id.* Finally, for all contributions greater than \$200, ReCellular must also provide political committees with a contributor’s occupation and employer. *Id.*; 11 CFR 100.12.

1 on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
2 conclusions in this advisory opinion may be affected by subsequent developments in the
3 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
4 The cited advisory opinions are available on the Commission's website at
5 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

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Matthew S. Petersen

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Chairman