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Via Hand Delivery

Lawrence H. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

RE: Advisory Opinion Request on Affinity Credit Card Program

Dear Mr. Norton:

We are submitting this advisory opinion request ("AOR") on behalf of Providian National Bank ("Providian"), a national bank, that, among other activities, issues credit cards to individual consumers throughout the U.S.

As part of its credit card business, Providian maintains an affinity credit card program in which Providian or its operating subsidiary, Providian Bancorp Services, enters into agreements with well known companies and organizations ("Affinity Sponsors") so that Providian can issue credit cards that are co-branded with Providian's and the Affinity Sponsor's name ("Affinity Program"). Providian's sole purpose in maintaining the Affinity Program is to grow its business by increasing the number of its active credit card customers. Providian's Affinity Program, which is similar to most affinity programs conducted by other major financial institutions, uses the Affinity Sponsor's customer or membership lists and trademark to market the credit card products in the Affinity Program. In these arrangements, Providian furnishes Affinity Sponsors with general statistical data and data about the Affinity Sponsor's customers or members who respond to the credit card offers.

Providian wants to enter into Affinity Program arrangements with national party committees ("National Parties"). Indeed, Providian is willing to enter into Affinity Program arrangements with any National Party as long as they provide similarly acceptable commercial benefits to Providian. There are a few types of Affinity Program arrangements, which are described below, that Providian wants to test-market in order to determine which would be the most attractive and useful to consumers and the most economically advantageous for Providian. None of those arrangements involves Providian making a payment of its funds to a National Party. Rather, in exchange for the use of a National Party's mailing list and trademark, Providian will edit the mailing list based on its own criteria and possibly give the individual cardholders, who are obtained through that mailing list, the option of directing their Rebates or Bonuses (described below) to a National Party. If a cardholder directs his or her Rebate or Bonus to a National Party, it would be a contribution from the individual cardholder to the National Party.

We request that the Federal Election Commission ("Commission" or "FEC") issue an advisory opinion ("AO") confirming the permissibility of these Affinity Program arrangements under the Federal Election Campaign Act of 1971, as amended ("FECA"). We are requesting this AO in light of the amendments under the Bipartisan Campaign Reform Act of 2002 ("BCRA") and the recent D.C. District Court decision in McConnell *et al.* v. FEC *et al.* In particular, we request that the Commission confirm the permissibility of the Affinity Program where the Rebates, the Bonuses, and the contributions made by individuals in connection with the Value Added Affinity Card, as described below, go to the hard money account of a national party committee (i.e., the account subject to the prohibitions and limitations of FECA).

I. Description of Affinity Program Arrangements

Providian is the ninth leading U.S. bank credit card issuer with over 9.6 million open credit card accounts and approximately $18.6 billion in outstanding receivables, as of December 31, 2002. Providian's credit card product line offers consumers a wide array of credit card types, with different pricing terms, features, services, and awards or incentives for using the card. These card product types include, but are not limited to:

(1) The Basic Card: Providian markets a basic credit card, which provides no Rebate Card or Value Added Card benefits (described below) to cardholders ("Basic Card").

(2) The Rebate Card: Providian markets a rebate credit card, which gives cardholders cash rebates or refunds ("Rebates") based on the manner in which the cardholder uses the card ("Rebate Card"). For example, depending on Rebate type, a Rebate can be a fixed percentage of purchase dollars charged on the card, a tiered percentage of purchase dollars charged on the card based on the total purchase dollars during a Rebate period, or a percentage of finance charges accrued on the card. Rebates are calculated and distributed to cardholders on a periodic basis (*e.g.*, annually).

(3) The Value Added Card: Providian markets a credit card that includes incentive features that reward cardholders for frequent use of their cards ("Valued Added Card"). These rewards can come in different forms and typically consist of reward points redeemable for roundtrip air flights, travel, hotel stays, merchandise, entertainment, and other gifts.

II. Providian's Proposed Affinity Program With National Parties

Providian wants to enter into Affinity Program arrangements with National Parties where one or more of the three credit card products described above will serve as affinity credit cards in the Affinity Program. Providian will test-market those credit cards to determine which card or cards are most attractive and useful to consumers and the most economically advantageous for Providian. The affinity credit cards will be co-branded with both Providian's and the National Party's trademarks. After test marketing, Providian will launch and market the credit card product types that produced positive test results.

The Affinity Program will also involve a National Party giving to Providian a mailing list and a license to use the National Party's trademark. We understand that National Parties develop these mailing lists in the normal course of their political operations and not for the purpose of selling the list. Providian will use the National Party's trademark to co-brand the credit cards and in the offers sent to prospective cardholders and other marketing materials for the Affinity Program.

Once Providian receives the mailing list, it will edit the list based on whether individuals are sufficiently creditworthy to receive the affinity credit card or whether they are likely to positively respond to an offer for the card. In this regard, names may be screened through a consumer reporting agency (credit bureau) to determine creditworthiness. After performing other customary list edits, Providian will send offers to the individual prospects to offer them an affinity credit card. Providian will provide the National Party with general statistical data and data about

prospects who respond positively that are gathered by Providian in the normal course of processing the names on the list.

The offers sent to prospects may include an invitation from the Chairman or another senior official of the National Party inviting the prospect to apply for the affinity credit card. These invitations will simply describe the affinity credit card and encourage prospects to apply for and use the card (*e.g.*, express general support for a National Party in an effort to raise interest in applying for and using the credit card) but will not mention federal candidates or otherwise promote the National Party. Providian may send new cardholders a token of appreciation of nominal value (*e.g.*, a keychain), which will be paid for by the National Party or by Providian, as is customarily done in the industry.

The National Party may, if it desires, also purchase advertising space in Providian's communications to cardholders (*e.g.*, in the credit card statements) or prospective cardholders (*e.g.*, in the credit card offers). Affinity Programs in the credit card industry generally do not require Affinity Sponsors to pay the credit card issuer for these sorts of advertising space, but the National Party as an Affinity Sponsor will pay Providian for such space. The National Party will buy the advertising space on the same terms and conditions as non-Affinity Sponsor advertisers who purchase similar space.

As discussed above, the affinity credit card for National Parties may be one or more of three types -- the Basic Card, Rebate Card, and Value Added Card (each an "Affinity Card"). The following describes how each Affinity Card would function in the context of the Affinity Program. In all cases, Providian will conduct the Affinity Program in compliance with applicable laws and regulations pertaining to banking, consumer financial privacy, and in the issuance of consumer credit cards.

The Basic Affinity Card

The Basic Affinity Card has no rebates or rewards, and thus a cardholder would not have the option of forwarding any such rebate or reward to a National Party.

The Rebate Affinity Card

The Rebate Affinity Card provides payments to a cardholder in the form of Rebates. The Rebates are earned by charging purchases on the credit card or by accruing finance charges on the account and are calculated and sent to the cardholder periodically. Under the Affinity Program, Providian will provide

cardholders with the opportunity to affirmatively authorize that their Rebates go to a National Party instead of to the cardholder, in which case Providian will send the Rebates to the National Party in the name of the cardholder once those rebates vest (i.e., the cardholder has earned, and has the right to receive, the rebates). If the cardholder does not make this authorization, the Rebates will be sent to the cardholder.

Providian will provide a cardholder with the opportunity to make this authorization when he or she is sent the offer to apply for the Rebate Affinity Card, and may also be sent a letter prior to the periodic distribution of the Rebates, asking him or her to make the authorization. Providian will ask the cardholder for the necessary information and include disclaimers as required under FECA. This will include a statement reminding the cardholder of the $25,000 per year contribution limit to a National Party.

The Value Added Affinity Card

The Value Added Affinity Card offers incentives to the cardholder typically in the form of reward points. Providian today offers this type of credit card product. As with Providian's other Valued Added Card programs, the Value Added Affinity Card will include these incentives at no additional cost to the cardholder. These rewards will not be forwarded or directed to a National Party.

The Value Added Affinity Card may feature opportunities for Valued Added Affinity Card prospects or cardholders to earn extra reward points if they contribute a certain amount to a National Party. The National Party will pay the fair market value of any rewards claimed by a cardholder as a result of the extra reward points and will buy advertising space in Providian's promotional materials to prospects, or in Providian's cardholder communications, in which the National Party offers the extra reward points. The National Party will pay for the claimed rewards by directly paying the third party vendor that provides those rewards. The National Party will buy advertising space at the same rate and under the same terms and conditions as other non-Affinity Sponsor advertisers who purchase similar space. As described above, Affinity Sponsors are generally not required to pay for advertising space.

Bonus Feature

Affinity Cards may offer existing or prospective cardholders a bonus consisting of a payment of a certain fixed dollar amount once the cardholder charges a certain number of purchases or charges a certain minimum dollar amount on the

card ("Bonus"). Providian presently markets an affinity credit card with a Bonus feature, which other card issuers also offer from time to time. Indeed, adding a Bonus feature to a credit card is a common practice in the industry. The Bonus encourages a cardholder to start using the credit card rather than merely maintaining the credit card account without making charges. Such inactive credit card accounts are not economical for credit card issuers, and Bonuses help activate otherwise inactive accounts.

Under the Affinity Program, Providian will provide cardholders with the opportunity to affirmatively authorize that their Bonus go to a National Party instead of to the cardholder, in which case Providian will send the Bonus to the National Party in the name of the cardholder once the Bonus vests (i.e., the cardholder has earned, and has the right to receive, the Bonus). If the existing or prospective cardholder does not make this authorization, the Bonus will be sent to the cardholder. Providian will provide a prospect with the opportunity to make this authorization when he or she is sent the offer to apply for the Affinity Card or after he or she becomes a cardholder. Providian will ask cardholders for necessary information and include disclaimers as required under FECA. This will include a statement reminding the cardholder of the $25,000 per year contribution limit to a National Party.

III. The Proposed Affinity Program Arrangements are Permissible under FECA

The Affinity Program arrangements proposed above are permissible in that they are commercially reasonable and will be arrived at in arms-length negotiations with the National Party. Providian's sole purpose in these arrangements is to increase the number of its active credit card customers and to improve its business bottom line, and not to provide a benefit to a National Party. Providian is already engaged in the affinity credit card business and is constantly searching to identify viable and profitable affinity card relationships with companies and organizations in all industry sectors. These other Affinity Program arrangements are similar in all respects with those proposed for National Parties except that Rebate Cards and Bonus features, in this case, will give cardholders the option of voluntarily forwarding their Rebates or Bonuses to a National Party.

The question of commercial reasonableness turns on whether the National Party is sufficiently compensating Providian for any benefit that Providian may be providing to the National Party. In this case, the National Party would be compensating Providian by providing Providian with its mailing list. The Commission has repeatedly recognized that a National Party may sell or lease its

mailing list at a fair market value without it resulting in a contribution. See, *e.g.*, AO 2002-14 (January 30, 2003) (hereinafter the "Libertarian Opinion").

In exchange for the mailing list, Providian will be providing different services as described below, depending on which type of Affinity Card is used for the Affinity Program arrangement. In all cases, these services will be incidental to Providian carrying on its normal business of processing and administering its credit cards and will in no way exceed the value of the mailing list. Moreover, even though the value of the mailing list above is sufficient to compensate Providian for the incidental services that it will be providing, Providian will also receive the value of the license to use the National Party's trademark. As mentioned above, these Affinity Program arrangements are the result of arms-length negotiations, where Providian would not enter into the arrangement if the value of its services were to outweigh the value received from the National Party.

Basic Affinity Card

If the Basic Affinity Card is used in the Affinity Program arrangement, the only service that Providian will be providing to a National Party is to edit the National Party's mailing list based on whether the individuals are sufficiently creditworthy to apply for the affinity credit card or whether they are likely to positively respond to an offer to apply. This apparent benefit to the National Party is purely incidental to the normal and regular conduct of Providian's business activities. Regardless of whether the Affinity Sponsor is a National Party or a non-political entity, Providian would have to credit-screen or edit a mailing list in this manner to determine whether to send those individuals an offer to apply for a credit card. The value of this incidental service is well under the value of the mailing list alone, not to mention the value of the trademark license.

Value Added Affinity Card

The reward points provided under the Value Added Card are permissible under FECA given that neither those reward points nor any benefit resulting from those reward points would be transferred to a National Party. It would also be permissible for a National Party to include an advertisement in a mailing to prospects or cardholders offering extra reward points if they contribute to the National Party. Specifically, no contribution from Providian would result because the National Party would be paying for the fair market value of extra reward points and for the fair market value of the advertising space by paying the same rate as other advertisers for similar advertising space.

Rebate Affinity Cards and Bonus Features

Rebates and Bonuses are common in the credit card industry. Indeed, Providian today offers its Rebate Cards and Bonuses to creditworthy customers separate and apart from the Affinity Program. In the proposed Affinity Program arrangements with National Parties, Providian will be making a variation to these otherwise established credit cards and features by giving cardholders the option of directing their earned cash rewards (*i.e.*, the Rebates or Bonuses) to a National Party rather than receiving those rewards themselves. In any case, Providian will be sending the Rebate or Bonus to someone -- whether it be to the cardholder or to the National Party.

In AO 1979-17, the Commission prohibited a bank from making payments from its funds to a national party committee's federal account, which were paid as a fee in connection with an affinity credit card program. However, the Rebates and Bonuses in this case do not belong to Providian. They are earned cash rewards belonging to the cardholder, which Providian would otherwise send to the cardholder. Permitting cardholders to voluntarily direct their own funds to a National Party is different in kind from the arrangement at issue in AO 1979-17 in that the individuals, rather than the bank, are making the contribution to the National Party.

The Commission has on several occasions permitted individuals to authorize their personal funds to be directed to a political committee. For instance, in AO 1989-19, the Commission permitted a federal campaign committee to work out an arrangement with a bank so that individuals with an account at the bank could authorize that a certain amount be transferred from their account to the campaign on a monthly basis. The Commission also permitted individual credit card holders to authorize a contribution to be charged on their credit card. See, AO 1978-68 (September 19, 1978). In AO 1994-33, the Commission permitted a telephone company to give their customers the option of directing a certain portion of their purchase of time on their phone cards to go to a political committee as a voluntary contribution. In fact, that AO likened the phone cards to "affinity credit cards." Similarly, the Affinity Program based on the Rebate Affinity Card and Bonus feature is also permissible under FECA.

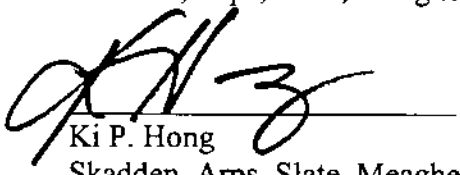
IV. Conclusion

For the reasons described above, we request that the Commission issue an advisory opinion confirming that the Affinity Program based on any one or more of the Basic Affinity Card, the Rebate Affinity Card, the Value Added Affinity Card, and the Bonus feature is permissible under FECA.

Please call with any questions regarding this letter or if you need any further information.

Sincerely,

Kenneth A. Gross
Skadden, Arps, Slate, Meagher & Flom LLP



Ki P. Hong
Skadden, Arps, Slate, Meagher & Flom LLP

Attorneys for Providian National Bank

cc: Rosemary Smith, Esq.