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For meeting of November 10, 2021

November 1, 2021

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*
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Subject: AO 2021-10 (Retail Benefits Inc.) Draft A

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00pm (Eastern Time) on November 9, 2021.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2021-10

2

3 Anthony Ward, Esq.
4 Retail Benefits, Inc.
5 1373 Veterans Highway, Suite 10
6 Hauppauge, NY 11788
7

DRAFT A

8 Dear Mr. Ward:

9 We are responding to your advisory opinion request on behalf of Retail Benefits,
10 Inc. (“RBI”), regarding the application of the Federal Election Campaign Act, 52 U.S.C.
11 §§ 30101-45 (the “Act”), and Commission regulations to RBI’s proposal to allow
12 individuals to make contributions to political committees using RBI’s online platform.
13 The Commission concludes that RBI’s proposal is permissible under the Act and
14 Commission regulations, and RBI’s proposed activities will not subject RBI to reporting
15 requirements under the Act or Commission regulations.

16 ***Background***

17 The facts presented in this advisory opinion are based on your letter received on
18 September 21, 2021, your email received on October 22, 2021, and publicly available
19 information.

20 RBI is a closely held, privately owned, for-profit corporation organized under the
21 laws of the state of Florida.¹ “With more than 15 years in the affiliate marketing space,”
22 RBI “provides custom web, mobile, and browser extension development,” as well as
23 “custom loyalty, reward and engagement solutions,” to a variety of for-profit and non-
24 profit entities (“affiliates”).²

¹ None of RBI’s shareholders is a federal candidate or foreign national.

² Profile, Retail Benefits Inc., [Retail Benefits | LinkedIn](#) (last viewed Oct. 22, 2021).

1 Specifically, RBI enters into licensing agreements with its affiliates that allow
2 them to use customized versions of RBI’s browser extensions and mobile apps
3 (collectively, “software”) to offer loyalty programs to their customers and supporters
4 (collectively, “users”). Affiliates determine the look of the software and market it as their
5 own. RBI does not charge affiliates for its services. Instead, RBI’s affiliates are
6 responsible for marketing the software and registering new users. Users may access the
7 affiliate-branded software through links provided by the affiliate or through the affiliate’s
8 app store. Through that software, the user registers to participate in the affiliate loyalty
9 program by setting up an account and agreeing to the terms of service. The terms of
10 service are customized for each affiliate and constitute an agreement between the user
11 and the affiliate. Although RBI continues to manage the software behind the scenes,
12 users are generally not aware of RBI’s involvement.

13 RBI has developed proprietary processes that enable it to identify rebates and
14 other incentives offered by online merchants. Participating merchants agree to provide
15 rebates to RBI when registered users make qualifying purchases from them. RBI retains
16 a portion of each user’s rebate in its corporate account and deposits the remainder in an
17 account set up by the user when they registered with the affiliate.³ Rebates accumulate in
18 the user’s account until dispensed by RBI at pre-arranged intervals as directed by the
19 user. Users may opt to receive their accumulated rebates as cash back or in other ways
20 allowed by the affiliate. Affiliates often allow registered users to use their rebates in
21 ways that complement the affiliate’s core business or message. For example, an energy

³ Merchants normally transfer rebates to RBI’s corporate account monthly. In addition to rebates, RBI derives a small percentage of its revenue from merchants’ incentive payments.

1 company affiliate might allow its customers to use their rebates as credits on their energy
2 bills. RBI transmits the accumulated rebates to the user or distributes the rebates on the
3 user's behalf as determined by the user.

4 RBI proposes to license its software to federal political committees to market to
5 their supporters.⁴ RBI states that it will treat political committee affiliates the same as
6 non-political committee affiliates, except as necessary to comply with the Act and
7 Commission regulations.

8 Under RBI's proposal, when a user registers to use a political committee's
9 software to shop with participating merchants online, the software will give the user the
10 option of contributing all or a portion of the user's future rebates to that political
11 committee. A user will be able to direct contributions to any political committee with
12 which the user has registered and to register with more than one political committee. A
13 user will also be able to modify or cancel the contribution at any time before the rebated
14 funds hit the user's account. Users will not be required, however, to make contributions
15 in order to use a political committee's software to shop, and users will earn rebates at the
16 same rates and on the same terms regardless of whether they choose to make
17 contributions. Each user's aggregate contributions to all political committees made via
18 RBI's platform will be limited to \$200 per calendar year.

19 RBI will transfer the user's share of any rebates into the user's segregated account
20 as soon as practicable after receipt from a participating merchant. User accounts will be
21 held separately from any corporate funds under RBI's control. Users who wish to use

⁴ RBI proposes to license its software to any political committee that wishes to participate, other than corporate and labor organization separate segregated funds.

1 rebated funds to make contributions to a political committee must agree to treat the funds
2 as earned income and to receive an IRS Form 1099;⁵ provide their name, address,
3 occupation, and employer’s name; and verify that they are a United States citizen or
4 “permanent lawful resident alien,” are not a federal contractor, and are using their own
5 funds to make contributions.⁶ RBI states that it will transmit a user’s rebate from the
6 user’s account to the political committee designated by the user, along with the user’s
7 identifying information and verifications, within ten days after receiving the rebate from
8 a participating merchant.

9 As with its non-political committee affiliates, RBI proposes to remain behind the
10 scenes and will limit its interaction with users to addressing issues pertaining to online
11 shopping and rebates. RBI will not solicit users on behalf of any political committee or
12 drive web traffic to any committee’s software. RBI generally will let committees decide
13 on the design and content of the software, except that RBI will not create or offer any
14 content that promotes, supports, attacks, or opposes any candidate, political party, or
15 political committee, or that advocates the election or defeat of any candidate for public
16 office. RBI’s incentives and rebates will be set at its customary market rates. RBI states
17 that it does not support any political party, candidate, or political cause.

⁵ RBI states that it will issue IRS Forms 1099 as required by law. RBI does not ask about, and the Commission does not address, any potential issues arising under the Internal Revenue Code or IRS regulations.

⁶ AOR003.

1 ***Questions Presented***

2 1. *May RBI follow a user’s instruction to transfer some or all of the user’s*
3 *rebates to a political committee?*⁷

4 2. *Must RBI file any reports with the Federal Election Commission based on*
5 *the proposed activities?*

6 ***Legal Analysis and Conclusion***

7 1. *May RBI follow a user’s instruction to transfer some or all of the user’s*
8 *rebates to a political committee?*

9 Yes, RBI may transfer some or all of a user’s rebates to a political committee as
10 instructed by the user without providing a contribution to the committee, because RBI
11 will be acting as a commercial vendor to that committee and will comply with applicable
12 requirements for entities forwarding contributions.

13 The Act and Commission regulations prohibit corporations from making
14 contributions to federal candidates and to political committees that make contributions to
15 federal candidates.⁸ A “contribution” includes “any direct or indirect payment,
16 distribution, loan, advance, deposit, or gift of money, or any services, or anything of
17 value . . . to any candidate, campaign committee, or political party or organization, in

⁷ As presented in the AOR, Question 1 uses the term “customer” to refer to individuals who use RBI’s licensed software to make contributions to political committees. To avoid confusion, the Commission has replaced “customer” with “user” in this question.

⁸ 52 U.S.C. § 30118(a) (generally prohibiting corporations from making contributions); 11 C.F.R. § 114.2(b) (same). Corporations may, however, make contributions to nonconnected political committees that make only independent expenditures, *see, e.g.*, Advisory Opinion 2011-11 (Colbert); *Citizens United v. FEC*, 558 U.S. 310 (2010); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (*en banc*), and to non-contribution accounts of hybrid political committees, *see* FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 6, 2011), <https://www.fec.gov/updates/fec-statement-on-carey-v-fec/>.

1 connection with any [Federal] election”⁹ “Anything of value” includes all in-kind
2 contributions, including the provision of goods or services without charge or at less than
3 the usual and normal charge.¹⁰ The “usual and normal charge” for services means the
4 commercially reasonable rate prevailing at the time that the services were rendered.¹¹

5 In addition, every person who receives a contribution of \$50 or less for a political
6 committee that is not an authorized committee must forward the contribution to the
7 treasurer of that committee no later than thirty days after receipt; contributions in excess
8 of \$50 must be forwarded with certain identifying information no later than ten days after
9 receipt.¹² Every person who receives a contribution for an authorized political committee
10 must forward the contribution and, if necessary, certain identifying information, to the
11 treasurer of that committee no later than ten days after receipt.¹³

12 The Commission has previously examined a number of business arrangements
13 where, as here, a service provider proposed to provide contribution processing and other
14 services to political committees.¹⁴ The Commission has determined that a service
15 provider does not make a contribution to a political committee when the service provider
16 acts as a commercial vendor by (1) rendering services in the ordinary course of business

⁹ 52 U.S.C. § 30118(b)(2); *see also id.* § 30101(8) and 11 C.F.R. § 100.52(a).

¹⁰ 11 C.F.R. § 100.52(d)(1).

¹¹ *Id.* § 100.52(d)(2).

¹² 52 U.S.C. §§ 30102(b)(2)(A), (b)(2)(B); 11 C.F.R. §§ 102.8(b)(1), (b)(2).

¹³ 52 U.S.C. § 30102(b)(1); 11 C.F.R. § 102.8(a).

¹⁴ *See, e.g.*, Advisory Opinion 2019-04 (Prytany); Advisory Opinion 2018-05 (CaringCent); Advisory Opinion 2016-08 (eBundler); Advisory Opinion 2012-09 (Points for Politics); Advisory Opinion 2010-21 (ReCellular).

1 at the usual and normal charge or in exchange for bargained-for consideration;
2 (2) forwarding contributions through a segregated account to candidates and committees;
3 and (3) employing adequate screening procedures to ensure that the service provider does
4 not forward illegal contributions.¹⁵

5 The Commission concludes that RBI will meet all three criteria under its
6 proposal. First, RBI will provide its services in the ordinary course of its business as a
7 for-profit developer of mobile and web-based fundraising software and in exchange for
8 bargained-for consideration. The services that RBI proposes to provide to political
9 committees — which include licensing, customizing, and managing its software, and
10 processing and transmitting users' contributions of rebated funds — are comparable to
11 the services that RBI provides to its non-political committee affiliates.¹⁶ In exchange,
12 political committee affiliates, like non-political committee affiliates, will be responsible
13 for marketing the software to potential users and registering new users for RBI's
14 platform.¹⁷ Any new users who then make qualifying purchases from participating
15 merchants through RBI's platform will increase RBI's revenue.¹⁸ The Commission has
16 previously determined that a company's provision of contribution processing services to
17 political committees in exchange for their marketing services is a commercially

¹⁵ See, e.g., Advisory Opinion 2019-04 (Prytany) at 5; Advisory Opinion 2018-05 (CaringCent) at 4-5; Advisory Opinion 2016-08 (eBundler) at 6-7; Advisory Opinion 2012-09 (Points for Politics) at 5-6; see also Advisory Opinion 2010-21 (ReCellular) at 5. The Commission has also concluded that such an arrangement does not result in prohibited corporate facilitation of contributions under 11 C.F.R. § 114.2(f)(1). Advisory Opinion 2007-04 (Atlatl) at 3-4.

¹⁶ Advisory Opinion Request Supplement at 2.

¹⁷ *Id.* at 1.

¹⁸ *Id.* at 2.

1 reasonable transaction made in the ordinary course of business where, as here, the
2 marketing services could lead to increased revenue for the company.¹⁹ Accordingly, RBI
3 will provide its services in the ordinary course of business in exchange for bargained-for
4 consideration.

5 Second, RBI will hold users' funds separate from its corporate funds.²⁰ RBI will
6 only permit a user's rebate funds to be used to make contributions after the user agrees to
7 treat the funds as earned income and to receive an IRS Form 1099.²¹ RBI will also
8 forward contributions to political committees within 10 days after receiving and
9 depositing the funds in users' accounts, as required by the Act and Commission
10 regulations.²²

11 Third, RBI will screen contributions to ensure that they are neither excessive nor
12 from prohibited sources. Each registered user wishing to make a contribution to a
13 political committee through RBI's platform will be required to affirm that the user is
14 making contributions from the user's own, permissible funds; to attest to statements

¹⁹ *See, e.g.*, Advisory Opinion 2011-19 (GivingSphere) at 11-12 (concluding that corporation's allowing political committees and others to post digital badge on their websites without charge in exchange for marketing services was commercially reasonable transaction made in ordinary course of business where marketing services could increase corporation's revenue); Advisory Opinion 2010-06 (Famos) at 6 (concluding that company's provision of online platform without charge to political committees and others in exchange for marketing services was commercially reasonable transaction made in ordinary course of business where marketing services had "potential to produce revenue" for company).

²⁰ AOR006.

²¹ AOR001-2.

²² AOR003; *see* 52 U.S.C. § 30102(b); 11 C.F.R. § 102.8.

1 verifying the user’s eligibility under federal law to make contributions;²³ and be limited
2 to making contributions through RBI’s platform that do not exceed in the aggregate \$200
3 per year.²⁴ In addition, RBI will forward all necessary information regarding the
4 contributions and user identification to the recipient political committees.²⁵

5 Thus, RBI will act as a commercial vendor in providing the proposed services to
6 political committees and will forward contributions as required. Accordingly, the
7 Commission concludes that RBI may transfer some or all of a user’s rebates to a
8 Committee as directed by the user without providing a contribution to the recipient
9 political committee.

10 2. *Must RBI file any reports with the Federal Election Commission based on*
11 *the proposed activities?*

12 No, RBI is not required to file any reports with the Commission as a result of the
13 activities it proposes.

14 The Act and Commission regulations require certain persons to file reports with
15 the Commission. Potentially relevant here are the reporting requirements that apply to
16 political committees,²⁶ persons who make independent expenditures or electioneering
17 communications, and intermediaries or conduits of earmarked contributions. A “political

²³ See, e.g., Advisory Opinion 2021-07 (PACMS); Advisory Opinion 2017-06 (Stein & Gottlieb).
See also 52 U.S.C. § 30119(a) (prohibiting contributions by federal government contractors), § 30121(a)
(prohibiting contributions by foreign nationals).

²⁴ AOR001-2.

²⁵ AOR003.

²⁶ 52 U.S.C. § 30104(a)(1) (providing that “treasurer of a political committee shall file reports of
receipts and disbursements”); see 11 C.F.R. § 104.1 (implementing 52 U.S.C. § 30104(a)(1)).

1 committee” includes any group of persons that receives contributions or makes
2 expenditures in excess of \$1,000 and has as its major purpose the election or defeat of a
3 clearly identified federal candidate.²⁷

4 As described in its request, RBI proposes to continue to derive its revenue from
5 merchants’ incentive payments and from users’ earned rebates. Neither of these forms of
6 revenue constitutes a “contribution.”²⁸ Further, there is no indication that RBI’s proposal
7 will cause it to make any “expenditures.”²⁹ Because RBI would not be receiving
8 contributions or making expenditures, RBI’s proposed activity would not cause it to be a
9 political committee and, therefore, would not subject it to the reporting requirements for
10 political committees.³⁰

11 In addition to the periodic reporting requirements that apply to political
12 committees, persons who make independent expenditures or electioneering
13 communications are also subject to reporting requirements.³¹ “The term ‘independent
14 expenditure’ means an expenditure by a person . . . expressly advocating the election or

²⁷ 52 U.S.C. § 30101(4); *see Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (construing “political committee” to “only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate”).

²⁸ *See* definition of “contribution,” *supra* pp. 5-6 and n.9.

²⁹ An “expenditure” is “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.” 52 U.S.C. § 30101(9)(A); *see also* 11 C.F.R. § 100.111; AOR003 (“RBI as an organization does not support any particular candidate, political party, or political cause. RBI will not create or offer content or information that advocates for the election or defeat of any candidate for public office.”).

³⁰ *See* Advisory Opinion 2021-07 (PACMS) at 10; Advisory Opinion 2012-22 (skimmerhat) at 9; Advisory Opinion 2011-19 (GivingSphere) at 10.

³¹ *See* 52 U.S.C. §§ 30104(c) (independent expenditures), (f) (electioneering communications); 11 C.F.R. §§ 109.10 (independent expenditures); 100.29 (electioneering communications).

1 defeat of a clearly identified [federal] candidate”³² “The term ‘electioneering
2 communication’ means any broadcast, cable, or satellite communication which . . . refers
3 to a clearly identified candidate for Federal office”³³

4 Based on RBI’s representation that it will not advocate the election or defeat of
5 any federal candidate, the Commission concludes that RBI will not make independent
6 expenditures and, accordingly, will not be subject to the reporting requirements for
7 persons making independent expenditures. Moreover, given that RBI’s proposal is
8 limited to providing contribution-processing services over the internet and does not
9 include any broadcast, cable, or satellite communications, RBI’s proposal does not
10 implicate the reporting requirements for persons making electioneering
11 communications.³⁴

12 The Act and Commission regulations also require intermediaries or conduits of
13 earmarked contributions to report the original source of such a contribution and the
14 recipient candidate or authorized committee.³⁵ Commission regulations provide that “[a]
15 commercial fundraising firm retained by the candidate or the candidate’s authorized
16 committee to assist in fundraising” is not a “conduit.”³⁶ Because RBI will act as a
17 commercial vendor in providing the proposed services to political committees, as

³² 52 U.S.C. § 30101(17); *see also* 11 C.F.R. § 100.16 (further defining independent expenditure).

³³ 52 U.S.C. § 30104(f)(3)(A)(i); *see also* 11 C.F.R. § 100.29 (further defining electioneering communication).

³⁴ *See* Advisory Opinion 2021-07 (PACMS) at 10; Advisory Opinion 2012-22 (skimmerhat) at 9; Advisory Opinion 2011-19 (GivingSphere) at 10.

³⁵ 52 U.S.C. § 30116(a)(8); 11 C.F.R. § 110.6(c)(1).

³⁶ 11 C.F.R. § 110.6(b)(2)(i)(D).

1 discussed above, RBI will also qualify as a “commercial fundraising firm” for purposes
2 of that regulation.³⁷ As a commercial fundraising firm, RBI will not act as a conduit
3 when it processes and forwards contributions as a service to candidates and authorized
4 committees. Therefore, RBI will not be subject to the reporting requirements for
5 conduits.

6 For these reasons, RBI’s proposed activities as described in the advisory opinion
7 request will not subject it to reporting requirements under the Act or Commission
8 regulations.

9 This response constitutes an advisory opinion concerning the application of the
10 Act and Commission regulations to the specific transaction or activity set forth in your
11 request. *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change
12 in any of the facts or assumptions presented, and such facts or assumptions are material to
13 a conclusion presented in this advisory opinion, then the requestor may not rely on that
14 conclusion as support for its proposed activity. Any person involved in any specific
15 transaction or activity which is indistinguishable in all its material aspects from the
16 transaction or activity with respect to which this advisory opinion is rendered may rely on
17 this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B). Please note that the analysis or
18 conclusions in this advisory opinion may be affected by subsequent developments in the

³⁷ *See* Advisory Opinion 2016-08 (eBundler) at 8 (determining that corporation providing contribution-forwarding services to political committees would be commercial fundraising firm and thus not conduit); Advisory Opinion 2004-19 (DollarVote.org) at 5 (same).

1 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

2 Any advisory opinions cited herein are available on the Commission's website.

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On behalf of the Commission,

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Shana M. Broussard

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Chair