

May 20, 2010

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

DRAFT ADVISORY OPINION 2010-06 is available for public comments under this procedure. It was requested by Christopher A. Shining, Senior Vice President, on behalf of Famos LLC.

Draft Advisory Opinion 2010-06 is scheduled to be on the Commission's agenda for its public meeting of Thursday, May 27, 2010.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00pm noon (Eastern Time) on May 26, 2010.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Judith Ingram (202) 694-1220

Deputy Commission Secretary: Darlene Harris (202) 694-1038

Other inquiries:

To obtain copies of documents related to AO 2010-06, contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission's website at www.fec.gov.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

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AGENDA ITEM

For Meeting of 05-27-10

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *PCS*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Neven F. Stipanovic *NFS*
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Subject: Draft AO 2010-06 (Famos LLC)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for May 27, 2010.

Attachment

1 ADVISORY OPINION 2010-06
2
3 Christopher A. Shining
4 Senior Vice President
5 Famos LLC
6 8645 Holloway Drive
7 West Hollywood, CA 90069-2303
8

DRAFT

9 Dear Mr. Shining:

10 We are responding to your advisory opinion request on behalf of Famos LLC
11 (“Famos”), concerning the application of the Federal Election Campaign Act of 1971, as
12 amended (the “Act”), and Commission regulations to a proposed affinity program¹
13 between Famos and political committees to provide a web-based technology platform.
14 The Commission concludes that the proposed program between Famos and political
15 committees would not violate the Act’s prohibition against corporate contributions.

16 ***Background***

17 The facts presented in this advisory opinion are based on your letter received on
18 April 2, 2010 and emails received on April 16 and April 21, 2010.

19 ***The Famos Platform***

20 Famos is a for-profit limited liability company that has created and wishes to
21 market a web-based product called the “Famos Platform.” The technology behind the
22 Famos Platform will allow its users to receive compensation from personal endorsements
23 of products and services. An example of a personal endorsement that Famos hopes to

¹ 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 1979-17 (RNC), 1992-40 (Leading Edge Communications), 2003-16 (Providian National Bank), 2006-34 (Working Assets), and 2008-18 (Mid-Atlantic Benefits).

1 “monetize” is an email sent from one friend to another recommending a movie. Such
2 personal referrals normally go uncompensated. When a Famos account holder sends a
3 similar email to a friend, however, the Famos Platform may direct the friend to websites
4 where tickets to that movie may be purchased.² Websites typically pay a commission to
5 search engines and other web-based tools that direct traffic to their websites and result in
6 online transactions. In this example, Famos will receive a commission from the website
7 for directing the account holder’s friend to purchase a movie ticket on that website.
8 Famos, in turn, will share some of that revenue with the account holder whose personal
9 referral contributed to the online transaction. The manner in which the revenue is shared
10 is described in more detail below.

11 Both individuals and organizations may become account holders by registering
12 with Famos and downloading the Famos Platform. Employees or members of an
13 organization will not generate any revenue for the organization by using their individual
14 Famos accounts; this will be true even if the individual employees or members used an
15 organization-issued email to register with Famos. An organization may receive a share of
16 revenues generated by referrals only by using the digital identifications (so-called “digital
17 instantiations”) it has registered under the organization’s Famos account. These digital
18 instantiations will include, but are not limited to, emails, text messages, posts, links, and
19 tweets.

20 Famos will offer the Famos Platform free of charge to prospective account
21 holders, which is how “virtually all web-based platforms [are] now offered in the

² The Famos Platform uses an application called a “topic page,” which pops-up when an online user highlights a specific term – e.g., the name of the movie – in an email, text message, or other form of online communication. The topic page contains content relevant to the term highlighted – in this example, a list of websites where an online user may purchase movie tickets.

1 marketplace.” See Request at 2. Account holders also may personalize certain features
2 of the Famos Platform free of charge. Famos, however, will charge account holders
3 \$200/hour for any non-standard customizations.

4 *Revenue Generation*

5 Famos and the users of the Famos Platform may earn and share revenue from
6 three types of internet transactions: internet searches, internet shopping, and online
7 referrals. In all three types of transactions, the revenue will be shared between Famos
8 and the account holders involved in the transaction; in other words, those account holders
9 who are in the personal “referral path.” Non-account holders who are in the referral path
10 also will be assigned a share of the revenue, which Famos will place into a separate
11 “anonymous account.”³ Non-account holders may redeem their share, up to one year
12 after the transaction, by themselves becoming account holders.⁴ Famos plans to keep
13 twenty percent of any revenue generated in the three types of transactions, and the
14 remaining eighty percent will be shared by account holders, as well as non-account
15 holders, who were in the referral path.

16 The Famos account holders will have “sole possession” of their share of the
17 revenues. Account holders may keep their share of revenue, or they can opt to direct
18 their share, or any portion of it, to a charity or a non-profit organization that also is a
19 Famos account holder. Famos will not distribute revenue shares to account holders
20 themselves, or their designated charities or non-profit entities, until their account balance
21 is above ten dollars.

³ Each non-account holder with assigned revenue will have a separate account according to their unique digital identification, or “digital instantiation.”

⁴ After one year any funds remaining in the anonymous account would be distributed to the charity organization One LapTop per Child.

1 ***The Political Affinity Account Holder Program***

2 Famos plans to offer its Famos Platform to political committees, including
3 authorized committees, nonconnected committees, and party committees. Famos,
4 however, will not offer its Famos Platform to separate segregated funds. Famos will
5 promote its Famos Platform without regard to party affiliation or ideological orientation.

6 Famos will offer its Famos Platform to political affinity account holders on
7 substantially the same terms and as to its other account holders: free of charge, with a
8 \$200/hour customization rate for those who wish to make non-standard customizations to
9 their Famos Platform. Political affinity account holders, however, will need to make
10 certain non-standard customizations, as described below, to comply with the Act. Any
11 marketing of the Famos Platform by the political affinity account holders to its supporters
12 will be the responsibility of the political affinity account holder.

13 Although identical in many respects to Famos's non-political account holder
14 program, the political affinity account holder program will have some important
15 differences. Unlike other Famos account holders, political affinity account holders will
16 be removed from the revenue generating chain. Any revenue that would have gone to the
17 political affinity account holders by virtue of their being in the referral path will be
18 passed down to the next account holder or entity in the referral path.

19 Famos account holders may have their revenue share, or a portion of it, directed to
20 political affinity account holders, just as they can direct their share to charities and non-
21 profit entities.⁵ The process for doing so will be the following:

⁵ Famos will not direct any revenue shares to political committees who themselves are not Famos account holders.

- 1 • At the time of registration with Famos, account holders may indicate whether any
2 portion of their revenue should be distributed to a political affinity account holder.
3 However, before Famos distributes any portion of an account holder's revenue
4 share to any political affinity account holder, Famos will send a separate
5 confirmation note to the account holder that Famos intends to make this
6 distribution. Only when the account holder confirms will Famos distribute the
7 revenue to the political affinity account holder.
- 8 • Famos will inform any account holder wishing to direct their share of revenue to a
9 political affinity account holder that this action will constitute a political
10 contribution, which will be subject to the limitations, prohibitions, and reporting
11 requirements of the Act.
- 12 • Famos will state the applicable contribution limits.
- 13 • Famos account holders will have to certify that they are individual United States
14 citizens or legal permanent residents, and that they have received the revenue
15 share individually and not on behalf of another person.
- 16 • Famos account holders will have to make the following certifications as described
17 in Advisory Opinion 1995-09 (NewtWatch): that they are making the
18 contribution from their own funds and not those of another; that the contributions
19 are not from the general treasury funds of a corporation, labor organization, or
20 national bank; and that contributors are not Federal government contractors or
21 foreign nationals who lack permanent resident status in the United States.
- 22 • Famos account holders will be informed that Federal law requires the political
23 affinity account holders to use their best efforts to collect and report the name,

1 mailing address, occupation, and name of employer of each individual whose
2 contributions exceed \$200 in a calendar year.

3 • Famos account holders' remittances will be credited to the political affinity
4 account holders through an automated clearinghouse transaction on the last day of
5 each month in which the user earns the remittance and confirms to redirect those
6 earnings to the political affinity account holders.

7 • Famos will transmit the contributor's name, address, occupation, and employer to
8 the recipient political committee within ten days of the transfer of funds.⁶

9 • Finally, the Famos Platform will include public communications disclaimers that
10 are intended to meet the specifications of 2 U.S.C. 441d and 11 CFR 110.11.

11 The above certifications will require non-standard customizations to the account
12 of each political affinity account holder. Famos will charge the political affinity account
13 holders \$200 per hour for this customization.

14 Famos, furthermore, will track the account holder's revenue account and inform
15 the account holder when the revenues designated as contributions to political affinity
16 account holders exceeded the Act's annual contribution limits. Account holders can also
17 track their own contributions by logging into to their account through the Famos
18 webpage.

19 ***Questions Presented***

20 *May Famos enter into the proposed program with political committees without*
21 *making prohibited corporate contributions?*

22

⁶ The political affinity account holders will be charged for any expenses related to processing of the contributions.

1 ***Legal Analysis and Conclusions***

2 Yes, because the proposed program between Famos and political committees
3 would not violate the Act's prohibition against corporate contributions.

4 The Act and Commission regulations prohibit corporations from making a
5 contribution in connection with a Federal election. *See* 2 U.S.C. 441b(a);
6 11 CFR 114.2(b)(1).⁷ Under 2 U.S.C. 441b, the term "contribution" includes a
7 contribution as that term is defined in 2 U.S.C. 431, "and also includes any direct or
8 indirect payment, distribution, loan, advance, deposit, or gift of money, or any services,
9 or anything of value . . . to any candidate, campaign committee, or political party or
10 organization," in connection with any election to any Federal office.
11 2 U.S.C. 441b(b)(2); 11 CFR 114.2(b)(1). Moreover, 2 U.S.C. 431 defines a
12 contribution as including "any gift, subscription, loan, advance, or deposit of money or
13 anything of value made by any person for the purpose of influencing any election for
14 Federal office." 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a). "Anything of value" includes
15 all in-kind contributions, including the provision of goods or services without charge or at
16 a charge that is less than the usual and normal charge. *See* 11 CFR 100.52(d)(1). "Usual
17 and normal charge" is defined as the price of goods in the market from which they
18 ordinarily would have been purchased at the time of the contribution, or the commercially
19 reasonable rate prevailing at the time the services were rendered.
20 *See* 11 CFR 100.52(d)(2).

21 In addition, every person who receives a contribution for a political committee
22 that is not an authorized committee must forward such a contribution of \$50 or less to the

⁷ Famos elects to be treated as a corporation by the Internal Revenue Service and, accordingly, is considered a corporation under Commission regulations. *See* 11 CFR 110.1(g)(3).

1 treasurer of that committee no later than thirty days after receiving the contribution; for
2 contributions of \$50 or more, the person must forward the contribution and the required
3 information no later than ten days after receiving the contribution. 2 U.S.C. 432(b)(2)(A)
4 and (b)(2)(B); 11 C.F.R. 102.8(b)(1) and (b)(2). Every person who receives a
5 contribution for an authorized political committee must forward such a contribution and,
6 if necessary, the required information about the contribution, to the treasurer of that
7 committee no later than ten days after receiving the contribution. 2 U.S.C. 432(b)(1);
8 11 C.F.R. 102.8(a).

9 In prior advisory opinions, the Commission has examined a number of business
10 arrangements between political committees and service providers that were either affinity
11 programs or similar to affinity programs. See Advisory Opinions 2006-34 (Working
12 Assets, Inc.), 2003-16 (Providian), 2002-07 (Careau & Co.), 1995-34 (Politechs), 1994-
13 33 (VITEL), 1992-40 (Leading Edge), 1991-20 (Call Interactive), 1990-01 (Digital
14 Corrections), 1988-12 (Empire Bank), and 1979-17 (RNC). In these advisory opinions,
15 the Commission indicated that the Act permits corporations to offer affinity programs and
16 to enter into affinity-type business arrangements so long as (1) the corporation and
17 political committee enter into a commercially reasonable transaction, and (2) the amounts
18 contributed to political committees via rebates or rewards are from individual customers'
19 funds and not from the corporation's funds. See Advisory Opinions 2006-34 (Working
20 Assets, Inc.), 2006-16 (Providian), and 2002-7 (Careau).

21 *A. Commercially Reasonable Transaction*

22 For Famos's proposed political affinity program to be a commercially reasonable
23 transaction, the political affinity account holders must pay Famos the usual and normal

1 charge for any services provided, or those services must be provided in exchange for
2 bargained for consideration of equal value. *See, e.g.*, Advisory Opinions 2006-34
3 (Working Assets, Inc.) and 2006-16 (Providian).

4 Because virtually all web-based platforms now offered in the marketplace are
5 made available free of charge. Famos itself would provide the Famos Platform to all
6 persons free of charge. The provision by Famos of its basic Famos Platform without
7 charge to political affinity account holders would be standard practice both within the
8 industry and by Famos. In exchange, Famos would receive the value of the political
9 affinity account holders' marketing services. Moreover, because each additional user of
10 the Famos Platform has the potential to produce revenue for Famos (as well as the
11 prospect of future individual contributions for the political affinity account holder), the
12 provision of the Famos Platform in exchange for the political affinity account holders'
13 promotion of the Famos Platform would represent a commercially reasonable transaction
14 made in the ordinary course of business. *See* Advisory Opinions 2007-04 (Atlant)
15 (providing credit card processing services to political committees), 2004-19 (Dollar Vote)
16 (collecting and forwarding online contributions to candidates), 2002-07 (Careau) (same),
17 1995-34 (Politechs) (providing 900-line services for fundraising by political committees),
18 and 1994-33 (VITEL) (sale and use of prepaid phone calling cards to make contributions
19 to candidates). Accordingly, Famos would not be providing the Famos Platform to
20 political affinity account holders at less than the "usual and normal charge" for this type
21 of product. *See* 11 CFR 100.52(d)(2).

22 Moreover, the political affinity account holders would be required to pay the
23 usual and normal charge for any customization of the Famos Platform. In particular,

1 Famos will charge political affinity account holders the “industry rate,” and the same rate
2 it charges other Famos account holders, of \$200/hour for customization of the Famos
3 Platform beyond the basic options provided as part of the political affinity account
4 holders’ setup and administrative page. Additionally, the political affinity account
5 holders would pay Famos for any additional transactional expenses related to the
6 processing of contributions to the political affinity account holders. Accordingly, Famos
7 would not provide these services to the political affinity account holders for free or at a
8 reduced rate that would result in a prohibited in-kind contribution. *See* 11 CFR
9 100.52(d)(1).

10 *B. Contributions From Rebates and Rewards*

11 As explained above, the Commission has concluded in its advisory opinions that
12 any contributions from rebates or rewards must be made by individuals from their own
13 funds and not by the corporate service provider. As a general matter, the Commission
14 has concluded that affinity programs, in which a corporation transmits to a political
15 committee a portion of the revenues it charges and collects, result in prohibited corporate
16 contributions under the Act and Commission regulations. *See generally* Advisory
17 Opinions 2008-18 (Mid-Atlantic Benefits) and 2003-16 (Providian). The Commission,
18 however, has concluded that it is permissible for affinity programs to generate revenue in
19 the form of rebates or rewards to individual customers or users, who then choose to pass
20 their earned revenue on to a political committee affinity partner. *See* Advisory Opinions
21 2006-34 (Working Assets, Inc.) and 2003-16 (Providian). In considering these programs,
22 the Commission focused on the facts that (1) the revenue or rebate was offered to
23 individual customers or users in the ordinary course of business, and (2) the revenue was

1 the property of the individual customer who – rather than the corporate affinity partner –
2 controlled the disposition of the revenue. *See id.*

3 The remittances at issue here would be offered in the ordinary course of business.
4 Third parties, for example websites or advertisers, would make payments to Famos
5 regardless of whether individual account holders choose to contribute their share of the
6 revenue to a political affinity account holder. In addition, Famos will retain the same
7 share of the commissions generated by use of the Famos Platform and on the same terms,
8 regardless of the ultimate disposition of the account holder's revenue share. Moreover,
9 the individual Famos Platform users make the decision whether to direct any
10 contributions to the political affinity account holder. Accordingly, as long as Famos
11 gives all individual account holders access to their remittances on the same terms, they
12 are in control of the disposition of their remittances and the remittances are the exclusive
13 property of the individual account holders.

14 Each individual user of the Famos Platform may earn a share of the commissions
15 paid to Famos by search engines and retailers. Each individual account holder is given
16 the option to either receive the remittance in the form of a monthly check for any balance
17 in excess of \$10, or to direct it as a contribution to a political affinity account holder.

18 As described above, Famos will inform account holders of the appropriate
19 requirements of the Act. Famos also will require certifications described in Advisory
20 Opinion 1995-09 (NewtWatch), which are intended to ensure compliance with the Act.
21 *See* Advisory Opinions 2006-34 (Working Assets, Inc.), 2004-19 (DollarVote), 1999-22
22 (Aristotle Publishing), and 1999-09 (Bradley for President). In addition, Famos's plan to
23 credit account holder-confirmed contributions to political committees through an

1 automated clearinghouse transaction on the last day of each month in which the
2 remittance is earned complies with the requirement that any person who receives a
3 contribution of \$50 or less for a political committee must forward the contribution to the
4 political committee within thirty days after receipt. *See* 2 U.S.C. 432(b)(2)(A); 11 CFR
5 102.8(b)(1). Because the account holder does not make a contribution until Famos sends
6 a separate confirmation note to the account holder that Famos intends to make the
7 distribution to a political affinity account holder, Famos's plan would also comply with
8 the requirement that contributions to authorized political committees be forwarded, along
9 with any required information, no later than ten days after the receipt of the contribution.
10 *See* 2 U.S.C. 432(b)(1); 11 CFR 102.8(a). Finally, Famos's proposal to transmit the
11 contributor's name, address, occupation, and employer to the sponsoring political
12 committee within ten days of the transfer of funds conforms with the requirements of
13 11 CFR 102.8(b)(2).

14 *C. Conclusion*

15 The proposed program between Famos and political committees would not violate
16 the Act's prohibition against corporate contributions under the conditions set forth in this
17 Advisory Opinion.

18 The Commission expresses no opinion regarding any tax ramifications of the
19 proposed activities because those issues are not within the Commission's jurisdiction.

20 This response constitutes an advisory opinion concerning the application of the
21 Act and Commission regulations to the specific transaction or activity set forth in your
22 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
23 of the facts or assumptions presented, and such facts or assumptions are material to a

1 conclusion presented in this advisory opinion, then the requestor may not rely on that
2 conclusion as support for its proposed activity. Any person involved in any specific
3 transaction or activity which is indistinguishable in all its material aspects from the
4 transaction or activity with respect to which this advisory opinion is rendered may rely on
5 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or
6 conclusions in this advisory opinion may be affected by subsequent developments in the
7 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
8 The cited advisory opinions are available on the Commission's Web site at
9 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Matthew S. Petersen
Chairman