



FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 14, 2014

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2014-09

William J. McGinley, Esq.
Jones Day
51 Louisiana Avenue, NW
Washington, DC 20001

Dear Mr. McGinley:

We are responding to your advisory opinion request on behalf of REED Marketing Consultants, Inc. (“RMC”) concerning whether RMC’s proposed development and marketing of an affinity credit card product for national party committees and other federal political committees (“Committee(s)”), is permissible under the Federal Election Campaign Act, 2 U.S.C. §§ 431-457 (the “Act”), and Commission regulations. The Commission concludes that the requestor’s proposed affinity program¹ is permissible.

Background

The facts presented in this advisory opinion are based on your letter received on May 23, 2014, and your email received on July 3, 2014.

RMC is a marketing consulting firm that specializes in financial services and credit card businesses. A large part of RMC’s business model involves identifying and pursuing relationships with affinity organizations.

RMC plans to facilitate the development of an affinity credit card relationship between banks and Committees. Under the proposed plan, RMC would enter into agreements with banks that issue credit cards and with Committees.² Pursuant to such agreements, RMC would market

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.*, 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. *See, e.g.*, Advisory Opinion 2010-06 (Famos); Advisory Opinion 2008-18 (Mid-Atlantic Benefits); Advisory Opinion 2006-34 (Working Assets); Advisory Opinion 2003-16 (Providian National Bank).

² RMC states that it would enter into an agreement with any Committee that provides acceptable commercial

the banks' affinity credit cards to individuals on the Committees' mailing lists. Specifically, RMC would send an application package to potential cardholders,³ informing each of them that he or she had prequalified for a credit card that would offer monthly rebates on the cardholder's charges. The application would explain that the cardholder could choose to receive those rebates personally in cash or to have the bank forward the rebates to the Committee affinity partner as a contribution. The application would give the potential cardholder the option to designate his or her rebates to be sent as contributions to the Committee and would note that the cardholder could change this designation at any time.⁴ The application would also request contributor information from the cardholder so that this information could be forwarded to the Committee along with the cardholder's contributions. For similar purposes, the application would ask the potential cardholder to verify that his or her contributions would not be from a source prohibited by the Act; in the absence of such verification, the cardholder's contributions would not be forwarded. Finally, the application would contain disclaimers and other language that the Act and Commission regulations require to be placed on certain solicitations.

If the potential cardholder responded by returning a properly completed application, the issuing bank would run a final credit check and then issue the affinity credit card. After such issuance, RMC would provide the Committee "certain data and statistics" regarding cardholders and usage but would not receive, handle, or process the rebates or contributions. Rather, the partner banks would pay the rebates to the cardholder as cash or forward them as contributions directly to the designated Committee. The partner banks would forward any contributions to the Committee at the same time the banks would have distributed any rebates to the cardholder. The required contributor information (acquired during the application process) would also be forwarded to the recipient Committee.

In exchange for its services, RMC would receive as compensation from the Committee (1) use of the committee's mailing list, trademarks, and branding in marketing the affinity credit card program; (2) an "acquisition fee" for each new cardholder; and (3) a "monthly administration fee." The request states that the value of this compensation would "more than compensate[]" RMC for the costs of the services it would provide to the Committee.

The request states that the foregoing proposal is similar to the affinity credit card programs that RMC and its financial partners currently provide to non-political organizations and businesses.

Question Presented

Is RMC's proposal to develop and market an affinity credit card program between banks and Committees permissible under the Act and Commission regulations?

benefits to RMC and its partner banks.

³ The request indicates that RMC's bank partners would screen individuals on the Committees' lists for creditworthiness and other commercial factors.

⁴ Whether the potential cardholder chooses to receive the rebates as cash or make to contributions with them would not affect the banks' decision to issue a credit card.

Legal Analysis and Conclusion

Yes, RMC's proposal to develop and market an affinity credit card program between banks and Committees is permissible under the Act and Commission regulations.

a. Usual and Normal Charge

The Act and Commission regulations prohibit corporations from making a "contribution," which includes "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any [federal] election." 2 U.S.C. § 441b(a), (b)(2); 11 C.F.R. § 114.2(b)(1); *see also* 2 U.S.C. § 431(8)(A)(i); 11 C.F.R. § 100.52(a). "Anything of value" includes all in-kind contributions, including the provision of goods and services without charge or at less than the "usual and normal charge." *See* 11 C.F.R. § 100.52(d)(1). "Usual and normal charge" is defined as the price of goods in the market from which they ordinarily would have been purchased at the time of the contribution, or the commercially reasonable rate prevailing at the time the services were rendered. *See* 11 C.F.R. § 100.52(d)(2).

Corporations are also prohibited from facilitating the making of contributions to political committees. 11 C.F.R. § 114.2(f). Commission regulations define such "facilitation" as using corporate "resources or facilities to engage in fundraising activities in connection with any federal election," but the regulations provide that "[a] corporation does not facilitate the making of a contribution . . . if it provides goods and services in the ordinary course of its business as a commercial vendor in accordance with 11 CFR part 116 at the usual and normal charge." *Id.* Part 116, in turn, defines a commercial vendor as "any person providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease, or provision of those goods or services." 11 C.F.R. § 116.1(c).

In sum, the questions of whether RMC would be making or facilitating contributions within the meaning of the Act and Commission regulations turn largely on whether the Committees would be paying RMC the usual and normal charge (or other consideration of equal value) for RMC's ordinary services as a commercial vendor. *See, e.g.,* Advisory Opinion 2010-06 (Famos) at 6; Advisory Opinion 2006-34 (Working Assets) at 5-7; Advisory Opinion 2003-16 (Providian National Bank) at 6-7; Advisory Opinion 2007-04 (Atlant) at 3-4.

RMC proposes to provide several services to the Committees: marketing the affinity credit card program to individuals on the Committees' mailing lists; establishing a relationship between issuing banks and the Committees; obtaining and forwarding contributor information; and providing Committees with certain data and statistics regarding cardholders and usage. Advisory Opinion Request at 2-3 (May 23, 2014) ("AOR"). The request states that RMC, in the ordinary course of its business, markets similar services to other organizations and businesses that are not political committees. *Id.* at 4. Thus, in providing these services to a Committee,

RMC would qualify as a “commercial vendor” for purposes of 11 C.F.R. § 114.2(f).⁵

In exchange for its services to a Committee, RMC would receive a per-cardholder fee, a monthly fee, and use of the Committee’s mailing list, trademarks, and branding in marketing the affinity program. The request states that this exchange reflects the usual and normal charge for RMC’s services and that RMC enters into similar agreements on similar terms with its non-political clients. AOR at 4. RMC further states that the combined value to RMC from the use of the Committee’s mailing list, the license to use the Committee’s name/trademark, and the fees it would receive would cover the costs of the services that RMC would provide to the Committee. *Id.* at 4-5. Thus, by providing the services described in the request, RMC would neither be making a contribution to the Committee⁶ nor facilitating the making of contributions to a political committee under 11 C.F.R. § 114.2(f).

b. Ownership of Contributed Rebates or Rewards

The Commission has addressed and approved some affinity programs and similar arrangements between political committees and service providers. *See* Advisory Opinion 2010-06 (Famos); Advisory Opinion 2006-34 (Working Assets); Advisory Opinion 2003-16 (Providian National Bank); Advisory Opinion 2002-07 (Careau & Co.); Advisory Opinion 1995-34 (Politechs). In the advisory opinions that have approved affinity programs, the rebate or reward was offered to individual customers or users in the ordinary course of business, and the rebate or reward was the property of the individual customer who — rather than the corporate affinity partner — controlled the disposition of the revenue. *See, e.g.*, Advisory Opinion 2010-06 (Famos) at 7-8 (concluding that, once earned, reward became account holders’ “exclusive property”); Advisory Opinion 2003-16 (Providian National Bank) at 7 (“Rebates that have vested are the property of the cardholder.”); Advisory Opinion 2010-21 (ReCellular) at 5 (explaining that “contributions generated through these programs must be made by individuals from their own funds and not by the corporate service provider”).

⁵ In advisory opinions involving contribution processing services by corporations, the Commission has considered certain criteria when determining whether a corporation is acting as a commercial vendor. *See, e.g.*, Advisory Opinion 2012-09 (Points for Politics) at 5; Advisory Opinion 2007-04 (Atlatl) at 3. Here, because RMC is not handling the forwarding of rebates as contributions, the Commission need only consider whether the services rendered are in the ordinary course of business for the usual and normal charge.

⁶ The Commission has found that a payment by a corporation to a political committee for the rental of the committee’s mailing list does not constitute a contribution from the corporation when: (1) the mailing list has an ascertainable fair market value; (2) the political committee leases the mailing list at the usual and normal charge in a *bona fide*, arm’s-length transaction; and (3) the list is used in a commercially reasonable manner consistent with such arm’s-length agreement. Advisory Opinion 2014-06 (Ryan, *et al.*) at 8 (recounting Commission’s long-standing position “that a political committee’s mailing lists are assets that have value and that are frequently sold, rented, or exchanged in a market”); Advisory Opinion 2002-14 (Libertarian National Committee) at 4; *see also* Advisory Opinion 1982-41 (Dellums); Advisory Opinion 1981-46 (Dellums) (valuing lists using accepted industry practice). As discussed above, RMC’s use of the Committee’s list here would be part of what the request describes as a contractually limited, commercially reasonable exchange for the fair market value of RMC’s services. Accordingly, RMC would not be making an in-kind corporate contribution by providing services to a Committee in exchange for compensation that includes use of the mailing list.

Similarly, the rebates RMC proposes would be offered to cardholders in the ordinary course of business, as described above, and would be the cardholders' exclusive property: A cardholder could opt to begin receiving rebates in cash at any time, and neither the issuing bank nor RMC would exercise any control over disposition of contributed rebates (other than the mechanical act of transferring them to the recipient committees). Like the proposed affinity programs in the advisory opinions cited above, RMC's proposal is a permissible affinity credit card program.⁷

c. Disclaimers on Solicitations

The Act and Commission regulations require that whenever any person solicits a contribution through certain forms of communications, such a solicitation must include a disclaimer indicating who paid for the communication and whether it was authorized by a candidate or candidate's committee. *See* 2 U.S.C. § 441d(a); 11 C.F.R. §§ 100.26, 110.11. The request states that RMC's marketing materials — which would include requests for prospective cardholders to authorize the sending of their rebates as contributions — would contain the appropriate disclaimers and would not refer to any current federal candidates or future elections. AOR at 2, 4; Advisory Opinion Request Supplement (July 3, 2014) at 2. This aspect of the proposal is permissible. *See, e.g.*, Advisory Opinion 2003-16 (Providian National Bank) at 3, 8; Advisory Opinion 2006-34 (Working Assets) at 8-9.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. § 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. Any advisory opinions cited herein are available on the Commission's website.

On behalf of the Commission,

(signed)
Lee E. Goodman
Chairman

⁷ The Commission notes that any funds contributed by cardholders to Committees should be forwarded by RMC or its partners consistent with the requirements of 2 U.S.C. § 432(b) and 11 C.F.R. § 102.8. *See, e.g.*, Advisory Opinion 2003-16 (Providian National Bank) (noting that "contributions will be transferred to the national party committee at the same time they otherwise would have been transferred to the cardholder if he or she had elected to retain the rebate").