MEMORANDUM

TO:       The Commission
FROM:     Thomasenia P. Duncan
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Subject: Draft AO 2007-35

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for January 24, 2007.

Attachment
Dear Messrs. Sandler, Reiff, and Zucker:

We are responding to your advisory opinion request on behalf of FreeCause, Inc. ("FreeCause"), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to a proposed affinity program involving Internet browser toolbars.

The Commission concludes that FreeCause may enter into the proposed affinity program with Federal political committees and qualified nonprofit corporations ("QNCs"), without providing prohibited corporate contributions.

Background

The facts presented in this advisory opinion are based on your letters received on October 18 and November 27, 2007.

A. The Affinity Relationship

FreeCause is a closely held, privately owned, for-profit corporation specializing in online communications. FreeCause has built and is marketing an Internet browser toolbar to various nonprofit organizations.¹ FreeCause intends to make its toolbar available free of charge to any nonprofit organization that becomes an affinity sponsor.

¹ An Internet or web browser “toolbar” is a piece of software that provides added functionality and ease-of-use options to a user’s web browser by enabling the user, for example, to search the Internet, to access weather and news reports, or to link to other websites.
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1 ("Affinity Sponsor"), in exchange for the use of the Affinity Sponsor's logo and the
2 Affinity Sponsor's agreement to market the toolbar to its members and supporters at its
3 own cost.
4
5 The basic FreeCause toolbar will provide Internet search capability, as well as
6 news and video feeds. Each Affinity Sponsor will have the ability to customize its
7 toolbar's news, video, and audio feeds. The Affinity Sponsors will provide FreeCause
8 with permission to use their names and logos on their affinity toolbars and permission to
9 include their toolbars in a master list of all affinity toolbars available for download from
10 FreeCause. The promotion and marketing of the toolbar to an Affinity Sponsor's
11 members is the responsibility of that particular Affinity Sponsor.
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13 B. Revenue Generation
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15 The FreeCause toolbar is based on a revenue-sharing model, where use of the
16 toolbar by an Affinity Sponsor's members and supporters generates revenue for
17 FreeCause, a portion of which is shared with the individual toolbar user or Affinity
18 Sponsor. The FreeCause toolbar generates revenue for FreeCause, and through
19 FreeCause, to Affinity Sponsors and individual users through two mechanisms:
20 commissions on Internet searches and commissions on Internet shopping.
21 FreeCause has arranged with Yahoo! Search for a commission to be paid to
22 FreeCause for each search generated through a FreeCause toolbar. Every time an
23 individual member or supporter of an Affinity Sponsor uses the Affinity Sponsor's

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2 As part of the basic package, FreeCause will provide the Affinity Sponsor with access to an
administrative page where the sponsor will be able to choose which features are available and to customize
those features; customize the look and feel of the sponsor's default toolbar; update contact information for
the sponsoring organization; and monitor toolbar usage and prospective donations. In addition, the Affinity
Sponsor will be charged the usual and normal fee for the inclusion and customization of certain features.
toolbar to make a search, FreeCause will receive revenue. FreeCause will then rebate a portion of that revenue to the Affinity Sponsor.\(^3\) You state that it is common practice for search engine companies to enter into commission-based agreements with companies that direct traffic to their particular search engine and that toolbar providers, in turn, have begun promoting their toolbars by arranging to share these commissions with users of the toolbar.

FreeCause will also receive revenue under your proposal every time a person uses an Affinity Sponsor’s toolbar to make a purchase. FreeCause will in turn remit a portion of that revenue to the Affinity Sponsor. You state that it is common for online retailers to offer commissions to website owners that send them customers who make purchases. For example, you note that the online retailer Amazon.com pays an 8.5% commission to most websites that refer customers and that some websites have established affinity programs that enable nonprofit organizations to raise revenue through such retail commissions.

C. Proposal to Expand to Political Affinity Sponsors

FreeCause proposes to expand its affinity toolbar program to nonprofit organizations that are Federal political committees and QNCs. The expanded program would be promoted and made available to any QNC or Federal political committee that asks to participate, including authorized candidate committees, separate segregated funds ("SSFs"), non-connected political committees, and party committees, without regard to party affiliation or ideological orientation. FreeCause will make the toolbar available and

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\(^3\) FreeCause is currently marketing its affinity program to a number of nonprofit organizations and is beta testing an affinity toolbar called LookPink, in which several nonprofit organizations engaged in breast cancer research, detection, prevention and treatment jointly serve as the Affinity Sponsor. The funds generated by use of the LookPink search engine go directly to the nonprofit organizations participating in the program.
market the program to political Affinity Sponsors in “exactly” the same manner as it is
made available to other Affinity Sponsors. You also state that political Affinity Sponsors
will be able to arrange to download data files containing all information required to meet
the political Affinity Sponsor’s recordkeeping and reporting requirements under the
Commission’s rules.

When an individual user downloads an affinity toolbar sponsored by a political
Affinity Sponsor, he or she will be required to create an account with FreeCause. To
create the account, the user will be required to provide his or her name, address,
occupation, and employer. The user will also need to create a user name and password to
be used for logging in. When creating an account, each individual user will be offered an
automatic remittance of 50% of the commissions generated to FreeCause by use of the
toolbar, by that user, both for Internet searches and retail sales.4 Users will be given the
option to receive the remittance in the form of a monthly check for any balance in excess
of $5, or to direct it as a contribution to the political Affinity Sponsor. This option will
be offered at the time of initial set up and annually thereafter. Users will be able to
change their option at any time. The user will also be informed that choosing to direct his
or her remittance to a political Affinity Sponsor will represent a political contribution to
the political Affinity Sponsor, which will be subject to the limitations and prohibitions of
the Act. The user will also be asked to certify that he or she is an individual U.S. citizen
or legal permanent resident that would be receiving the remitted funds individually in the
absence of re-direction and will be asked to make the certifications set forth in Advisory

4 This arrangement, where FreeCause retains one half of the commissions generated by use of the toolbar,
will apply both to nonpolitical and political Affinity Sponsors.
Opinion 1995-9 (NewtWatch). The account creation page will also inform the user that Federal law requires the political Affinity Sponsor to use its best efforts to collect and report the name, mailing address, occupation and name of employer of each individual whose contributions exceed $200 in a calendar year. Finally, the account creation page will include public communications disclaimers that are intended to meet the specifications set forth at 11 CFR 110.11.

All remittances directed to political Affinity Sponsors will be held in a segregated account and will not be commingled with FreeCause’s other corporate funds.

Remittances to political Affinity Sponsors will be credited to the political Affinity Sponsor through an automated clearinghouse transaction on the last day of each month.

FreeCause will transmit the contributor’s name, address, occupation and employer to the political Affinity Sponsor within ten days of the transfer of funds pursuant to 11 CFR 102.8(b)(2). The political Affinity Sponsor will be charged for all expenses related to the processing of remittances and related to the transmittal of the remittances and contributor information.

In addition, FreeCause intends to market certain affinity toolbars that FreeCause considers, in its best business judgment, to be of particularly broad appeal and likely to generate substantial revenue. Such marketing will be made without consultation with or participation by any political Affinity Sponsor. You inform us that FreeCause will not

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5 In Advisory Opinion 1995-9, the Commission concluded that solicitations over the Internet are permissible under the Act where the requestor built in certain safeguards against the receipt of excessive contributions, contributions in the name of another, and contributions from corporations, labor organizations, national banks, federal government contractors and foreign nationals.

6 In the case of political Affinity Sponsors that are SSFs, the toolbar will be marketed only on that Affinity Sponsor’s website on a password protected area in order to limit those who can access and sign up for the toolbar to members of the restricted class of the Affinity Sponsor’s connected organization. As a result of
expend any funds or incur any measurable, incremental increase in its staff time or other resources in this marketing of specific affinity toolbars.

**Question Presented**

*M*ay *Freec*ause *e*nter *i*nto the *p*rposed *a*ffinity *p*rogram *w*ith *F*ederal *p*olitical *c*ommittees and QNCs without *m*aking *p*rhibited *c*orporate *c*ontributions or *o*therwise *v*iolating the *A*c*t or *C*ommission *r*egulations?*

**Legal Analysis and Conclusions**

Yes, Freecause may enter into the proposed affinity program with Federal political committees and QNCs without making prohibited corporate contributions or otherwise violating the Act or Commission regulations, under the conditions set forth below.

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

this limitation, Freecause will not independently market affinity toolbars in which the Affinity Sponsor is an SSF.
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 CFR 100.52(d)(2).

In prior advisory opinions, the Commission has examined a number of business
arrangements between political committees and service providers that were either affinity
programs or similar to affinity programs. See Advisory Opinions 2007-34 (Working
Assets), 2003-16 (Providian National Bank), 2002-7 (Careau & Co.), 1995-34
(Politech), 1994-33 (VITEL International), 1992-40 (Leading Edge Communications),
1991-20 (Call Interactive), 1990-i (Digital Corrections), 1988-12 (Empire of America
Federal Savings Bank), and 1979-17 (RNC). In these advisory opinions, the Commission
permitted corporations to offer affinity programs and to enter into affinity-type business
arrangements so long as the corporation and committee (1) enter into a commercially
reasonable transaction, and (2) the amounts contributed to political committees via
rebates or rewards are from individual customers’ funds and not from the corporation’s
funds. See Advisory Opinions 2007-34 (Working Assets), 2006-16 (Providian National
Bank), 2002-7 (Careau & Co.).

A. Commercially Reasonable Transaction

In order for the proposed political affinity program to be a commercially
reasonable transaction, the political Affinity Sponsors must pay the usual and normal
charge, including a reasonable profit, for any services provided or those services must be
provided in exchange for bargained for consideration of equal value. See, e.g., Advisory
in the request, FreeCause will provide without charge to its political Affinity Sponsors
the basic Internet browser toolbar in exchange for use of the political Affinity Sponsor’s logo and the political Affinity Sponsor’s agreement to promote and market the toolbar to its members and supporters at its own cost. Based upon the requestor’s representation that “virtually all toolbars now offered in the marketplace” are made available free of charge, the provision by FreeCause of its basic toolbar without charge to political Affinity Sponsors would be standard practice within the industry. In exchange, FreeCause would receive the value of the political Affinity Sponsor’s logo and marketing services. Moreover, FreeCause states that it will “incur no additional costs whatsoever” in providing the toolbar to “any particular Affinity Sponsor.” Because each additional user of FreeCause’s toolbars produces revenue for FreeCause (as well as the prospect of future individual contributions for the political Affinity Sponsor), the provision of the Internet browser toolbar in exchange for the political Affinity Sponsor’s promotion of the toolbar would represent a commercially reasonable transaction made in the ordinary course of business, with the expectation of a reasonable profit for FreeCause. See Advisory Opinions 2007-4 (Atlatl, Inc.), 2004-19 (Dollar Vote), 2002-07 (Ceara & Co.), 1995-34 (Politechs), 1994-33 (VITEL). As a result, FreeCause would not be providing political Affinity Sponsors the basic toolbar at less than the “usual and normal charge” for this type of software. See 11 CFR 100.52(d)(2).

Moreover, the political Affinity Sponsors would be required to pay the usual and normal charge for a variety of additional services and optional customizations. For instance, FreeCause indicates that it will charge the political Affinity Sponsors the “normal and usual fee” for inclusion of news, video, and audio feeds as part of the toolbar. Furthermore, FreeCause will charge political Affinity Sponsors the “industry
standard” fee for customization of the toolbar beyond the basic options provided as part
of the political Affinity Sponsor’s setup and administrative page. Additionally,
FreeCause will be paid by the political Affinity Sponsor for expenses related to
processing the remittances directed to the political Affinity Sponsor and related to
transmitting the proceeds and contributor information to the political Affinity Sponsor.
Accordingly, it appears that FreeCause would not provide these services to the political
Affinity Sponsors for free or at a reduced rate that would result in a prohibited in-kind
contribution. See 11 CFR 100.52(d)(I).

Finally, FreeCause intends to market certain affinity toolbars that FreeCause
considers, in its best business judgment, to be of particularly broad appeal and likely to
generate substantial revenue.7 FreeCause indicates that it will conduct this marketing
independently, without consultation with or participation by the political Affinity
Sponsors, and it will not spend funds or incur any additional measurable incremental
costs.

Although a benefit could flow to a political Affinity Sponsor by increasing the
number of individuals using the political Affinity Sponsor’s toolbar, that benefit would
not be the primary purpose of FreeCause’s proposed independent marketing activities.
Instead, the primary purpose would be to generate revenue for FreeCause. Furthermore,
any benefit flowing to a particular Affinity Sponsor would be not only incidental but also
contingent both on an individual’s decision to download a political Affinity Sponsor’s
toolbar, and the individual’s decision to forward earned remittances to the political
Affinity Sponsor rather than keep them for him or herself.

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7 FreeCause will not market any toolbar where the political Affinity Sponsor is an SSF.
The Commission has previously concluded that marketing solicitations having the
primary purpose of generating revenue for the service provider are not in-kind
contributions to the political committee sponsor under similar circumstances, so long as
the political committee sponsor pays the usual and normal charge for the services
provided. Advisory Opinion 2006-34 (Working Assets). As noted above, the primary
purpose of the proposed marketing is to generate revenue for FreeCause, and the potential
contributions flowing to any political Affinity Sponsor are contingent in nature.
Moreover, unlike Advisory Opinion 2006-34, the marketing at issue would not be
targeted at previously identified members and supporters of the political Affinity
Sponsors and therefore would presumably be even less likely to result in contributions to
any particular political Affinity Sponsor. Accordingly, assuming that your proposed
selective marketing of political Affinity Sponsors’ toolbars does not differ in any material
respects from your selective marketing of non-political Affinity Sponsors’ toolbars, the
use of the political Affinity Sponsor’s name and/or logo and targeted marketing by the
political Affinity Sponsor in exchange for the potential for individual contributions would
be consistent with the commercial reasonableness of the entire transaction and would not
result in prohibited corporate contributions. Id.
You have stated that there will be no expenditure of funds or incremental cost
incurred by FreeCause to undertake the proposed marketing. To the extent that any costs
are incurred, however, the appropriate portion of those costs (representing the portion of
the costs attributable to the political Affinity Sponsor as well as a reasonable profit for
FreeCause) must be paid by the political Affinity Sponsor so that FreeCause does not
make a contribution to the political Affinity Sponsor.\textsuperscript{8} See 11 CFR 100.52(d); Advisory Opinion 2906-34 (Working Assets). Similarly, FreeCause has stated that it will market the selected affinity toolbars by several means, including on its own website and through “unpaid advertisements on other’s websites.” To the extent that FreeCause or the unspecified other websites would normally charge for these advertisements, the lack of a charge would be an in-kind contribution to the political Affinity Sponsor.

11 CFR 100.52(d).

B. Contributions From Rebates and Rewards

The second element discussed above requires that any contributions from rebates or rewards be made by individuals from their own funds and not by the corporate service provider. As a general matter, the Commission has concluded that affinity programs in which a portion of the revenues charged and collected by a corporation are transmitted to a political committee results in prohibited corporate contributions under the Act and Commission regulations. See generally Advisory Opinion 2003-16 ( Providian National Bank). The Commission has, however, approved affinity programs that generate revenue in the form of rebates or rewards to individual customers or users, who then choose to pass their earned revenue on to a political committee affinity partner. See Advisory Opinions 2006-34 (Working Assets), 2003-16 (Providian National Bank). In approving these programs, the Commission focused on the facts that (1) the revenue or rebate was offered in the ordinary course of business, and (2) the revenue was the property of the

\textsuperscript{8} These costs include a portion of the staff salaries dedicated to developing, executing, and monitoring the marketing program, as well as the costs associated with acquiring email address lists, website development, or other expenses directly related to the marketing program. 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a) and 100.52(d)(1); see Advisory Opinion 2007-27 (ActBlue).
individual customer who – rather than the corporate affinity partner – controlled the
disposition of the revenue. *See id.*

The remittances at issue in FreeCause’s request appear to be offered in the
ordinary course of business. Under the proposal, third parties make payments to
FreeCause in the ordinary course of their business, regardless of whether FreeCause
shares that revenue and regardless of whether individual users of any particular political
Affinity Sponsor’s toolbar choose to contribute their share of the revenue to the political
Affinity Sponsor. In addition, FreeCause will retain the same share of the commissions
generated by use of the toolbar on the same terms, regardless of whether the Affinity
Sponsor is a political committee or not. *See Advisory Opinion 2006-34 (Working
Assets); cf. 11 CFR 116.3(c) (setting forth factors relevant to determining whether a
commercial vendor extends credit in the ordinary course of business).*

It also appears that the individual toolbar users would make the decision to direct
any contributions to the political Affinity Sponsor. One element of the proposal raises a
question, however, as to whether the contributions are truly the property of the individual
toolbar users. Under the proposal, each individual toolbar user earns a share of the
commissions paid to FreeCause by search engines and retailers. Each individual toolbar
user is then given the option either to receive the remittance as a monthly check when the
balance exceeds $5, or to direct it as a contribution to the political Affinity Sponsor.
FreeCause will forward contributions to the political Affinity Sponsor each month,
regardless of the amount. Thus, FreeCause will forward contributions to political
Affinity Sponsors that would not be accessible had the users elected to retain their funds
instead. Since control is one indication of ownership, if FreeCause were to forward
contributions made from remittances that would not be accessible if they were being retained by the individual toolbar user, FreeCause runs the risk of making a corporate contribution in violation of 2 U.S.C. 441b(a). See 2 U.S.C. 441b(b)(2); 11 CFR 114.1(a)(1). In order to avoid this situation, FreeCause must ensure that all individual toolbar users have equal access to their funds.

Under the proposal, FreeCause will inform each individual toolbar user that choosing to direct his or her remittance to a political Affinity Sponsor will represent a political contribution to the political Affinity Sponsor, which will be subject to the limitations and prohibitions of the Act. FreeCause will also ask the user to certify that he or she is an individual U.S. citizen or legal permanent resident who would be receiving the remitted funds individually in the absence of re-direction, and will require the user to make all certifications required of individuals making contributions over the Internet as set forth in Advisory Opinion 1995-9 (NewtWatch). The Commission has previously found that the use of attestation language, derived from the Commission’s guidance in Advisory Opinion 1995-9, constitutes an adequate screening procedure for contributions solicited over the Internet. See Advisory Opinions 2006-34 (Working Assets), 2004-19 (DollarVote), 1999-22 (Aristotle Publishing), 1999-9 (Bradley for President), and 1995-9 (NewtWatch).

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9 You also state that when a user creates an account with FreeCause, the account creation page will inform the individual user that Federal law requires the political Affinity Sponsor to use its best efforts to collect and report the name, mailing address, occupation and name of the employer of individuals whose contributions exceed $200 in a calendar year. This language constitutes an accurate statement of federal law as required by 11 CFR 104.7(b). See 11 CFR 102.9(d). In addition, the account creation page will also set out the necessary disclaimers required by 11 CFR 110.11 (as applicable to the political Affinity Sponsor). The Commission notes that under certain circumstances, the marketing of the Affinity Sponsor’s toolbars, including the independent marketing proposed by FreeCause, may constitute a public communication for which an appropriate disclaimer is required under 11 CFR 110.11.
All remittances directed to political Affinity Sponsors will be held in a segregated account and will not be commingled with FreeCause's corporate funds. This particular safeguard is a longstanding requirement for businesses engaged in soliciting and processing contributions. See Advisory Opinions 2006-34 (Working Assets), 2004-19 (DollarVote), 1999-22 (Aristotle Publishing), and 1991-20 (Call Interactive).

Remittances to political Affinity Sponsors will be credited to the political Affinity Sponsor through an automated clearinghouse transaction on the last day of each month in which the remittance is earned by the user. This complies with the requirement that any person who receives a contribution of $50 or less for a political committee must forward the contribution to the political committee within 30 days after receipt. See 2 U.S.C. 432(b)(2)(A); 11 CFR 102.8(b)(1). FreeCause will transmit the contributor's name, address, occupation and employment to the sponsoring committee within ten days of the transfer of funds, pursuant to 11 CFR 102.8(b)(2).\(^\text{10}\)

\(\text{C. Effect on Qualified Nonprofit Corporations}\)

QNCs may make independent expenditures and electioneering communications free from the funding restrictions imposed on other corporations. See 11 CFR 114.10(d)(1) and (2). One of the requirements for a QNC is that it cannot offer benefits that serve as a disincentive for persons to "disassociate themselves with the corporation on the basis of the corporation's position on a political issue."

\(^\text{10}\) The request indicates that it is "virtually certain that the remittance to which any one individual would be entitled would not exceed $50 in any one calendar year." Nonetheless, FreeCause must transmit any contribution exceeding $50, along with contributor information for that contribution, within ten days after receipt of the remittance. See 2 U.S.C. 432(b)(2)(B); 11 CFR 102.8(b)(2); Advisory Opinion 2006-34 (Working Assets).
1  11 CFR 114.10(c)(3)(ii). Assuming that the shared commissions “would be available on
2  the same terms to individuals who are not members of the QNC, and that individuals
3  could continue to be eligible for the . . . rebate even after they terminate their membership
4  with the QNC,” a corporation would not lose its QNC status by participating in
5  FreeCause’s affinity toolbar program as an Affinity Sponsor. Advisory Opinion 2006-34
6  (Working Assets).
7  
8  D. Conclusion
9  
10  FreeCause may enter into the proposed affinity program with Federal political
11  committees and QNCs without making prohibited corporate contributions or otherwise
12  violating the Act or Commission regulations, under the conditions set forth in this
13  Advisory Opinion.
14  
15  This response constitutes an advisory opinion concerning the application of the
16  Act and Commission regulations to the specific transaction or activity set forth in your
17  request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
18  of the facts or assumptions presented and such facts or assumptions are material to a
19  conclusion presented in this advisory opinion, then the requester may not rely on that
20  conclusion as support for its proposed activity. All cited advisory opinions are available
22  
23  Sincerely,
24  
25  David M. Mason
26  Chairman