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Washington, DC 20463

January 22, 2010

AGENDA ITEM

For Meeting of 1-29-10

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan TPD
General Counsel

Rosemary C. Smith ACR for RCS
Associate General Counsel

Amy L. Rothstein ALR
Assistant General Counsel

Jessica Selinkoff JS
Attorney

Subject: Draft AO 2009-31 (MAXIMUS, Inc.)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for January 29, 2010.

Attachment

ADVISORY OPINION 2009-31

Kirk L. Jowers, Esq.
Matthew T. Sanderson, Esq.
Caplin & Drysdale
One Thomas Circle, NW, Suite 1100
Washington, DC 20005

DRAFT

Dear Messrs. Jowers and Sanderson:

We are responding to your advisory opinion request on behalf of MAXIMUS, Inc. ("MAXIMUS") concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to MAXIMUS's plan to allow employees to contribute the value of "credits" received as compensation to MAXIMUS's separate segregated fund, MAXIMUS, Inc. Political Action Committee ("MAXPAC"). The Commission concludes that MAXIMUS may allow its restricted class employees to contribute the value of credits to MAXPAC as proposed.

Background

The facts presented in this advisory opinion are based on your letter received on November 16, 2009, your emails of November 24 and December 3, 2009, and your telephone conversations with Commission staff.

MAXIMUS is a corporation. MAXPAC is MAXIMUS's separate segregated fund ("SSF"). MAXPAC filed its statement of organization with the Commission in 1999.

As set forth in the MAXIMUS Employee Manual, MAXIMUS employees earn credits as part of a regular compensation plan in addition to their salaries. These credits are earned in the normal course of employment. The number of credits earned increases with an employee's tenure at MAXIMUS. For example, MAXIMUS's executive

employees earn credits at the rate of between 10.00 and 13.34 credits per month and non-executive employees earn credits at the rate of between 6.66 and 13.34 credits per month. Each MAXIMUS employee may have no more than 240 unredeemed credits at a time.

MAXIMUS employees control the use of their earned credits in that they may redeem one or more of their earned credits for those credits' cash value. The cash value of credits held by an employee is based on a *pro rata* share of that employee's salary. Currently, MAXIMUS employees may exchange their earned credits for the following three purposes: (1) to receive pay while on personal leave; (2) to receive pay during times of financial or personal hardship; and (3) to receive a lump sum payment upon permanently leaving employment at MAXIMUS. At the time credits are redeemed for cash, employees realize income and pay applicable taxes.

MAXIMUS proposes to revise its compensation plan to allow its restricted class employees to exchange credits for the credits' cash equivalent for the following additional purposes: (1) to make a donation to MAXIMUS's charitable foundation;[1] and (2) for restricted class employees to make a contribution to MAXPAC. Your request represents that, under the proposed credit plan, employees would realize income and pay applicable taxes at the time credits are redeemed to make a contribution to MAXPAC. MAXIMUS proposes to allow restricted class employees to voluntarily complete and submit a form, a draft of which is attached to the request for an advisory opinion, to authorize MAXIMUS to redeem a number of credits (and partial credits, as necessary to avoid exceeding contribution limits) determined by the employee for the purpose of making a contribution to MAXPAC. This form would be distributed only to restricted

[1] MAXIMUS does not ask, and the Commission gives no opinion on, those aspects of the proposal concerning MAXIMUS's charitable foundation.

class employees and would contain all notifications required under the Act and Commission regulations for solicitations to an SSF's restricted class.

Question Presented

May MAXIMUS expand its employee credit program, as proposed, to allow restricted class employees to redeem credits to make contributions to MAXPAC?

Legal Analysis and Conclusions

For the reasons discussed below, MAXIMUS may allow its restricted class employees to redeem credits to make contributions to MAXPAC, as proposed.

The Act prohibits corporations from using general treasury funds to make any contributions in connection with a Federal election. *See* 2 U.S.C. 441b; 11 CFR 114.2. However, the Act and Commission regulations permit a corporation to solicit its restricted class for contributions to the corporation's SSF. *See* 2 U.S.C. 441b(b)(2)(C) and (4)(A)(i); 11 CFR 114.1(a)(2)(iii), (c), (f) and (j); 114.2(f)(1) and (4)(i); 114.5(g)(1). Corporate solicitation of members of the corporation's restricted class for contributions to the SSF must meet the requirements of voluntariness set out at 2 U.S.C. 441b(b)(3) and 11 CFR 114.5(a)(1)-(5). These requirements include, but are not limited to, informing the employee of the political purposes of the SSF and of the employee's right to refuse to contribute without reprisal. 11 CFR 114.5(a).

Methods available for corporate collection of contributions from the restricted class to the SSF include, but are not limited to, payroll deduction or checkoff systems, other periodic payment plans, or return envelopes enclosed in a solicitation request. *See* 11 CFR 114.1(f), 114.2(f)(4)(i), 114.5(g)(1) and (k); *see also* Advisory Opinion 1999-03 (Microsoft PAC). A corporation may not use its treasury monies to pay any contributor

for his or her contribution through a bonus or other form of direct or indirect compensation. *See* 2 U.S.C. 441f; 11 CFR 114.5(b)(1).

Under the circumstances presented here, the Commission concludes that MAXIMUS's proposal would not constitute a prohibited use of corporate treasury funds to compensate employees for their contributions to MAXPAC. As a preliminary matter, it appears that MAXIMUS's existing credit system is part of a regular compensation plan provided by MAXIMUS to each of its employees; that is, credits are earned in the normal course of employment, at a regular rate, according to terms set forth in the Employee Manual. Moreover, employees control the use of any credits earned and may redeem them in a variety of situations, including as a salary equivalent any time that an employee takes personal leave. Thus, neither the earning of the credits nor the ability to redeem them depends on an employee's contributions to the SSF or other political activity. As such, MAXIMUS's proposal is distinguishable in material aspects from the proposal presented in Advisory Opinion 1986-41 (Air Transport Association). In that advisory opinion, the Commission concluded that providing some employees with additional compensation in recognition of their political contributions would be contrary to the Act and Commission regulations. Accordingly, the proposed expansion of MAXIMUS's credit system to allow restricted class employees also to redeem credits to make contributions to MAXPAC would not constitute augmentation of their compensation to effect a contribution in violation of the Act or Commission regulations.

The proposed expansion of MAXIMUS's credit program is analogous to a corporate payroll deduction plan, which the Commission has found to be an acceptable method of facilitating contributions to a corporation's SSF. *See* 11 CFR 114.1(c) and (f),

114.5(k)(1); Advisory Opinions 1999-03 (Microsoft PAC) and 1996-42 (Lucent Technologies). Like a payroll deduction plan, MAXIMUS's proposed plan requires affirmative authorizations from restricted class employees before any credit can be redeemed and contributed to MAXPAC. In fact, MAXIMUS's proposed plan would require such authorizations for each discrete contribution of credits.

Under MAXIMUS's proposal, only the restricted class employees would be solicited for contributions of credits to MAXPAC. MAXIMUS's proposed solicitations would include the necessary disclaimers regarding voluntariness, including the political purposes of MAXPAC and the employee's right to refuse to contribute. If MAXIMUS's solicitation of the restricted class to contribute the cash value of credits contains guidelines as to an amount of credits that employees should contribute, the solicitation must make clear that the guidelines are merely suggestions and that other amounts, including partial credits, may be contributed instead. *See* 11 CFR 114.5(a)(2); Advisory Opinion 1999-06 (National Rural Letter Carriers' Association). Provided the solicitations comply with these requirements, the proposed solicitations for MAXIMUS's expanded credit system are consistent with the Act and Commission regulations.

An employee's contributions to MAXPAC of the cash value of redeemed credits, whether in whole or in part and as aggregated with other contributions to MAXPAC from that employee, must comply with applicable contribution limits in the Act and Commission regulations. *See, e.g.*, 2 U.S.C. 441a(a)(1); 11 CFR 110.1.

Finally, MAXIMUS, as a corporation that collects and transmits contributions to its SSF, is responsible for complying with the rules concerning a "collecting agent" under

the Act and Commission regulations. *See, e.g.*, 2 U.S.C. 432(b)(2); 11 CFR 102.6(b) and (c), 102.8(b); Advisory Opinion 2000-11 (Georgia-Pacific Corp.).

The Commission expresses no opinion regarding the application of Federal tax law to the proposed activities, because those questions are not within the Commission's jurisdiction.

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 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. The cited advisory opinions are available on the Commission's Web site at http://saos.nictusa.com/saos/searchao.

On behalf of the Commission,

Matthew S. Petersen
Chairman