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AGENDA ITEM

For Meeting of 05-27-10

SUBMITTED LATE

May 27, 2010

Memorandum

TO: The Commission

FROM: Commissioner Ellen L. Weintraub

Handwritten signature of Ellen L. Weintraub in black ink.

Subject: Draft AO 2010-06 (Famos LLC) – Proposed Amendments to Draft (Agenda Document No. 10-28)

Attached is a draft with proposed amendments to Agenda Document No. 10-28, Draft AO 2010-06 (Famos LLC). Please place this draft on the agenda for May 27, 2010 as Agenda Document No. 10-28 **A**.

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 AMDENDMENTS

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.

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 *The Famos Platform*

2 Famos is a for-profit limited liability company that has created and wishes to
3 market a web-based product called the “Famos Platform.” The technology behind the
4 Famos Platform will allow its users to receive compensation from personal endorsements
5 of products and services. An example of a personal endorsement that Famos hopes to
6 “monetize” is an email sent from one friend to another recommending a movie. Such
7 personal referrals normally go uncompensated. When a Famos account holder sends a
8 similar email to a friend, however, the Famos Platform may direct the friend to websites
9 where tickets to that movie may be purchased.² Websites typically pay a commission to
10 search engines and other web-based tools that direct traffic to their websites and result in
11 online transactions. In this example, Famos will receive a commission from the website
12 for directing the account holder’s friend to purchase a movie ticket on that website.
13 Famos, in turn, will share some of that revenue with the account holder whose personal
14 referral contributed to the online transaction. The manner in which the revenue is shared
15 is described in more detail below.

16 Both individuals and organizations may become account holders by registering
17 with Famos and downloading the Famos Platform. Employees or members of an
18 organization will not generate any revenue for the organization by using their individual
19 Famos accounts; this will be true even if the individual employees or members used an
20 organization-issued email to register with Famos. An organization may receive a share of
21 revenues generated by referrals only by using the digital identifications (so-called “digital

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 instantiations”) it has registered under the organization’s Famos account. These digital
2 instantiations will include, but are not limited to, emails, text messages, posts, links, and
3 tweets.

4 Famos will offer the Famos Platform free of charge to prospective account
5 holders, which is how “virtually all web-based platforms [are] now offered in the
6 marketplace.” See Request at 2. Account holders also may personalize certain features
7 of the Famos Platform free of charge. Famos, however, will charge account holders
8 \$200/hour for any non-standard customizations.

9 *Revenue Generation*

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

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

7 *The Political Affinity Account Holder Program*

8 Famos plans to offer its Famos Platform to political committees, including
9 authorized committees, nonconnected committees, and party committees. Famos,
10 however, will not offer its Famos Platform to separate segregated funds. Famos will
11 promote its Famos Platform without regard to party affiliation or ideological orientation.

12 Famos will offer its Famos Platform to political affinity account holders on
13 substantially the same terms and as to its other account holders: free of charge, with a
14 \$200/hour customization rate for those who wish to make non-standard customizations to
15 their Famos Platform. Political affinity account holders, however, will need to make
16 certain non-standard customizations, as described below, to comply with the Act. Any
17 marketing of the Famos Platform by the political affinity account holders to its supporters
18 will be the responsibility of the political affinity account holder.

19 Although identical in many respects to Famos’s non-political account holder
20 program, the political affinity account holder program will have some important
21 differences. Unlike other Famos account holders, political affinity account holders will
22 be removed from the revenue generating chain. Any revenue that would have gone to the

1 political affinity account holders by virtue of their being in the referral path will be
2 passed down to the next account holder or entity in the referral path.

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

- 6 • At the time of registration with Famos, account holders may indicate whether any
7 portion of their revenue should be distributed to a political affinity account holder.
8 However, before Famos distributes any portion of an account holder's revenue
9 share to any political affinity account holder, Famos will send a separate
10 confirmation note to the account holder that Famos intends to make this
11 distribution. Only when the account holder confirms will Famos distribute the
12 revenue to the political affinity account holder.
- 13 • Famos will inform any account holder wishing to direct their share of revenue to a
14 political affinity account holder that this action will constitute a political
15 contribution, which will be subject to the limitations, prohibitions, and reporting
16 requirements of the Act.
- 17 • Famos will state the applicable contribution limits.
- 18 • Famos account holders will have to certify that they are individual United States
19 citizens or legal permanent residents, and that they have received the revenue
20 share individually and not on behalf of another person.
- 21 • Famos account holders will have to make the following certifications as described
22 in Advisory Opinion 1995-09 (NewtWatch): that they are making the

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

1 contribution from their own funds and not those of another: that the contributions
2 are not from the general treasury funds of a corporation, labor organization, or
3 national bank; and that contributors are not Federal government contractors or
4 foreign nationals who lack permanent resident status in the United States.

- 5 • Famos account holders will be informed that Federal law requires the political
6 affinity account holders to use their best efforts to collect and report the name,
7 mailing address, occupation, and name of employer of each individual whose
8 contributions exceed \$200 in a calendar year.
- 9 • Famos account holders' remittances will be credited to the political affinity
10 account holders through an automated clearinghouse transaction on the last day of
11 each month in which the user earns the remittance and confirms to redirect those
12 earnings to the political affinity account holders.
- 13 • Famos will transmit the contributor's name, address, occupation, and employer to
14 the recipient political committee within ten days of the transfer of funds.⁶
- 15 • Finally, the Famos Platform will include public communications disclaimers that
16 are intended to meet the specifications of 2 U.S.C. 441d and 11 CFR 110.11.

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

20 Famos, furthermore, will track the account holder's revenue account and inform
21 the account holder when the revenues designated as contributions to political affinity
22 account holders exceeded the Act's annual contribution limits. Account holders can also

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

1 track their own contributions by logging into to their account through the Famos
2 webpage.

3 ***Questions Presented***

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

6 ***Legal Analysis and Conclusions***

7 Yes, ~~because Famos may enter into~~ the proposed program ~~between Famos and~~
8 ~~political committees~~ because it would not violate the Act's prohibition against corporate
9 contributions.

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

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 and normal charge” is defined as the price of goods in the market from which they
2 ordinarily would have been purchased at the time of the contribution, or the commercially
3 reasonable rate prevailing at the time the services were rendered.

4 *See* 11 CFR 100.52(d)(2).

5 In addition, every person who receives a contribution for a political committee
6 that is not an authorized committee must forward such a contribution of \$50 or less to the
7 treasurer of that committee no later than thirty days after receiving the contribution; for
8 contributions of \$50 or more, the person must forward the contribution and the required
9 information no later than ten days after receiving the contribution. 2 U.S.C. 432(b)(2)(A)
10 and (b)(2)(B); 11 C.F.R. 102.8(b)(1) and (b)(2). Every person who receives a
11 contribution for an authorized political committee must forward such a contribution and,
12 if necessary, the required information about the contribution, to the treasurer of that
13 committee no later than ten days after receiving the contribution. 2 U.S.C. 432(b)(1);
14 11 C.F.R. 102.8(a).

15 In prior advisory opinions, the Commission has examined a number of business
16 arrangements between political committees and service providers that were either affinity
17 programs or similar to affinity programs. *See* Advisory Opinions 2006-34 (Working
18 Assets, Inc.), 2003-16 (Providian), 2002-07 (Careau & Co.), 1995-34 (Politechs), 1994-
19 33 (VITEL), 1992-40 (Leading Edge), 1991-20 (Call Interactive), 1990-01 (Digital
20 Corrections), 1988-12 (Empire Bank), and 1979-17 (RNC). In these advisory opinions,
21 the Commission indicated that the Act permits corporations to offer affinity programs and
22 to enter into affinity-type business arrangements so long as (1) the corporation and
23 | political committee enter into a commercially reasonable transaction in which the

1 | political committee pays the usual and normal charge for any services provided, and (2)
2 | the amounts contributed to political committees via rebates or rewards are from
3 | individual customers' funds and not from the corporation's funds. See Advisory
4 | Opinions 2006-34 (Working Assets, Inc.), ~~2006~~2003-16 (Providian), and 2002-7
5 | (Careau).

6 | ~~*A. Commercially Reasonable Transaction*~~

7 | *A. Usual and Normal Charge*

8 | For Famos's proposed political affinity program to ~~be a commercially reasonable~~
9 | ~~transaction~~comply with the Commission's regulations, the political affinity account
10 | holders must pay Famos the usual and normal charge for any services provided, or those
11 | services must be provided in exchange for bargained for consideration of equal value.
12 | ~~See, e.g.,~~ 11 C.F.R. 100.52(d)(2); *see also* Advisory Opinions 2006-34 (Working Assets,
13 | Inc.) and ~~2006~~2003-16 (Providian).

14 | Because virtually all web-based platforms now offered in the marketplace are
15 | made available free of charge, Famos itself would provide the Famos Platform to all
16 | persons free of charge. ~~The~~Accordingly, the provision by Famos of its basic Famos
17 | Platform without charge to political affinity account holders would be standard practice
18 | both within the industry and by Famos. In exchange, Famos would receive the value of
19 | the political affinity account holders' marketing services. Moreover, because each
20 | additional user of the Famos Platform has the potential to produce revenue for Famos (as
21 | well as the prospect of future individual contributions for the political affinity account
22 | holder), the provision of the Famos Platform in exchange for the political affinity account
23 | holders' promotion of the Famos Platform would represent a commercially reasonable

1 transaction made in the ordinary course of business. *See* Advisory Opinions 2007-04
2 (Atlal) (providing credit card processing services to political committees), 2004-19
3 (Dollar Vote) (collecting and forwarding online contributions to candidates), 2002-07
4 (Careau) (same), 1995-34 (Politechs) (providing 900-line services for fundraising by
5 political committees), and 1994-33 (VITEL) (sale and use of prepaid phone calling cards
6 to make contributions to candidates). ~~Accordingly~~ Therefore, Famos would not be
7 providing the Famos Platform to political affinity account holders at less than the “usual
8 and normal charge” for this type of product. *See* 11 CFR 100.52(d)(2).

9 Moreover, the political affinity account holders would be required to pay the
10 usual and normal charge for any customization of the Famos Platform. In particular,
11 Famos will charge political affinity account holders the “industry rate,” and the same rate
12 it charges other Famos account holders, of \$200/hour for customization of the Famos
13 Platform beyond the basic options provided as part of the political affinity account
14 holders’ setup and administrative page. Additionally, the political affinity account
15 holders would pay Famos for any additional transactional expenses related to the
16 processing of contributions to the political affinity account holders. Accordingly, Famos
17 would not provide these services to the political affinity account holders for free or at a
18 reduced rate that would result in a prohibited in-kind contribution. *See* 11 CFR
19 100.52(d)(1).

20 *B. Contributions From Rebates and Rewards*

21 As explained above, the Commission has concluded in its advisory opinions that
22 any contributions from rebates or rewards must be made by individuals from their own
23 funds and not by the corporate service provider. As a general matter, the Commission

1 has concluded that affinity programs, in which a corporation transmits to a political
2 committee a portion of the revenues it charges and collects, result in prohibited corporate
3 contributions under the Act and Commission regulations. *See generally* Advisory
4 Opinions 2008-18 (Mid-Atlantic Benefits) and 2003-16 (Providian). The Commission,
5 however, has concluded that it is permissible for affinity programs to generate revenue in
6 the form of rebates or rewards to individual customers or users, who then choose to pass
7 their earned revenue on to a political committee affinity partner. *See* Advisory Opinions
8 2006-34 (Working Assets, Inc.) and 2003-16 (Providian). In considering these programs,
9 the Commission focused on the facts that (1) the revenue or rebate was offered to
10 individual customers or users in the ordinary course of business, and (2) the revenue was
11 the property of the individual customer who – rather than the corporate affinity partner –
12 controlled the disposition of the revenue. *See id.*

13 The remittances at issue here would be offered in the ordinary course of business.
14 | Third parties, (for example, websites or advertisers,) would make payments to Famos
15 regardless of whether individual account holders choose to contribute their share of the
16 revenue to a political affinity account holder. In addition, Famos will retain the same
17 share of the commissions generated by use of the Famos Platform and on the same terms,
18 regardless of the ultimate disposition of the account holder's revenue share. Moreover,
19 the individual Famos Platform users make the decision whether to direct any
20 contributions to the political affinity account holder. Accordingly, as long as Famos
21 gives all individual account holders access to their remittances on the same terms, they
22 are in control of the disposition of their remittances and the remittances are the exclusive
23 property of the individual account holders.

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

5 As described above, Famos will inform account holders of the appropriate
6 requirements of the Act. Famos also will require the certifications described in Advisory
7 Opinion 1995-09 (NewtWatch), which are intended to ensure compliance with the Act.
8 *See* Advisory Opinions 2006-34 (Working Assets, Inc.), 2004-19 (DollarVote), 1999-22
9 (Aristotle Publishing), and 1999-09 (Bradley for President). In addition, Famos's plan to
10 credit account holder-confirmed contributions to political committees through an
11 automated clearinghouse transaction on the last day of each month in which the
12 remittance is earned complies with the requirement that any person who receives a
13 contribution of \$50 or less for a political committee must forward the contribution to the
14 political committee within thirty days after receipt. *See* 2 U.S.C. 432(b)(2)(A); 11 CFR
15 102.8(b)(1). Because the account holder does not make a contribution until Famos sends
16 a separate confirmation note to the account holder that Famos intends to make the
17 distribution to a political affinity account holder, Famos's plan would also comply with
18 the requirement that contributions to authorized political committees be forwarded, along
19 with any required information, no later than ten days after the receipt of the contribution.
20 *See* 2 U.S.C. 432(b)(1); 11 CFR 102.8(a). Finally, Famos's proposal to transmit the
21 contributor's name, address, occupation, and employer to the sponsoring political
22 committee within ten days of the transfer of funds conforms with the requirements of
23 11 CFR 102.8(b)(2).

