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April 25, 2012

MEMORANDUM

AGENDA ITEM

TO: The Commission

For Meeting of 4/26/12

FROM: Anthony Herman
General Counsel

AN

SUBMITTED LATE

Kevin Deeley
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Subject: Draft AO 2012-09 (Points for Politics, LLC)

Attached is a proposed draft of the subject advisory opinion. We have been asked to have this draft placed on the Open Session agenda for April 26, 2012.

Attachment

1 ADVISORY OPINION 2012-09

2
3 Cleta Mitchell, Esq.
4 Foley & Lardner LLP
5 3000 K Street, N.W.
6 Washington, D.C. 20007-5109
7

DRAFT

8 Dear Ms. Mitchell :

9 We are responding to your advisory opinion request on behalf of Points for
10 Politics, LLC (“Points for Politics”), concerning the application of the Federal Election
11 Campaign Act of 1971(the “Act”) and Commission regulations to a proposed technology
12 and business system (the “System”) through which participants in corporate-sponsored
13 loyalty programs¹ would convert the rewards they earn from participating in such
14 programs into monetary equivalents and contribute them to candidates and their
15 authorized committees, as well as to other kinds of political committees.

16 The Commission concludes that Points for Politics may implement its proposed
17 system under the conditions described below without making contributions, or otherwise
18 violating the Act or Commission regulations.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on
21 March 2, 2012.

¹ The requestor uses the term “affinity program” when describing these programs. The Commission, however, uses that term in a somewhat different sense to denote a relationship between a business that offers a product or service and an organization (*e.g.* fraternal, charitable, religious, professional) 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 1992-40 (Leading Edge Communications); Advisory Opinion 1979-17 (RNC). To avoid confusion, in this Advisory Opinion the Commission uses the term “loyalty program” to denote programs in which a business offers rewards, which may assume various forms, to its customers or consumers in exchange for their purchasing its products or using its services in a certain amount or quantity.

Points for Politics is a for-profit limited liability company organized under the laws of Delaware that elects to be taxed as a partnership for Federal income tax purposes. It has created and wishes to implement a proprietary technology and business system that would enable individuals who participate in corporate-sponsored loyalty programs to convert rewards that they earn from their participation in the form of “points” into dollar equivalents and to contribute these converted points to candidates, their authorized committees, and other political committees. Points for Politics is not itself a loyalty program; it only proposes to implement a system for individuals to convert loyalty “points” into monetary equivalents to make contributions to political committees. The Commission does not address the terms of any loyalty program in this opinion. Whether a specific loyalty program creates a sufficient ownership interest in individuals’ points to warrant their conversion to political contributions will depend on the details of the corporate sponsor’s arrangement with its customers.

Loyalty Programs

The request represents that many corporate retailers and service providers, such as banks, airline companies, credit card issuers, retailers, and other service providers, have instituted programs to furnish customers with incentives, in the form of rewards, to purchase their products and services. Such rewards may be monetary, consisting of rebates or credit toward future purchases. Rewards may also be distributed in the form of “points” that the customer may accrue over time and that may be redeemed for such things as cash, prizes, and free or discounted travel or merchandise. The corporate sponsors give consumers a range of options for redeeming their points and allow them

1 broad freedom to choose among these options. Recently, loyalty programs have offered
2 participants the opportunity to use their points to make donations to charities.

3 Corporate sponsors assign an established dollar value to the points; in practice,
4 this value typically ranges from \$.002 to \$.008 per point. Corporate sponsors are
5 required to treat the cash value of unredeemed reward points as a contingent liability on
6 their balance sheets under Generally Accepted Accounting Principles (“GAAP”).²

7 *The Points for Politics System*

8 Points for Politics has patented a process that can convert a customer’s points into
9 political contributions to candidates and political committees. Points for Politics is not
10 itself a loyalty program sponsor and hence does not generate and distribute reward points,
11 but rather it can convert to dollar equivalents points customers have earned from various
12 loyalty sponsors. To facilitate the making of contributions with converted reward points,
13 Points for Politics operates a web-based portal. Points for Politics proposes to make this
14 web-based portal available to loyalty program participants through links to the portal on
15 both political committee and loyalty sponsor websites.

16 Individuals who have accrued earned reward points with various loyalty sponsors
17 and who wish to use these points to make political contributions to candidates or to
18 political committees would access the Points for Politics portal by instructing the loyalty
19 sponsor to redeem reward points. The instruction, which brings the individuals to the

² A liability is a dollar amount of obligation payable to another entity. Steven M. Bragg, *The Ultimate Accountants’ Reference including GAAP, IRS & SEC Regulations, Leases, and More* 817 (2nd ed. 2006). A contingent liability is one that will occur if a future event comes to pass and that is based on a current situation. Examples of contingent liabilities include lawsuits, standby letters of credit, guarantees of indebtedness, expropriation threats, risks of damage to company property, or potential obligations associated with product warranties or defects. *Id.* at 252. A business entity may be required to discharge the liability, but either the amount of the liability cannot reasonably be determined as of the report date, or the requirement to pay is uncertain. *Id.* at 131.

1 Points for Politics portal, may be issued either on the websites of loyalty sponsors or on
2 those of political committees that have agreed to host the portal.³ In either location, the
3 individual will be able to access the loyalty sponsor-maintained loyalty accounts through
4 the portal and to identify the amount and intended recipient of the contribution.

5 To complete the transaction, the individual will be required to attest that he or she
6 is a United States citizen or a foreign national with permanent resident status in the
7 United States, and that the individual actually owns the contributed reward points in an
8 individual capacity.

9 Once the individual has entered the information described above and made the
10 required attestations, the system will tell the individual how many loyalty points are
11 required to match the dollar amount of the proposed contribution. If the individual
12 reaffirms the desired dollar amount, the system will automatically redeem the loyalty
13 points at the sponsor's conversion rate.⁴ The sponsor will then transfer the funds to a
14 Points for Politics segregated account reserved for political contributions.⁵ Then, within
15 ten days of the individual's authorization of the contribution, Points for Politics will
16 transmit the funds to the political committee.

³ If the individual accesses the Points for Politics portal through a loyalty sponsor's website, the individual will also have access to a database of candidates and political committees that will provide information about the candidates, the offices they are seeking, and the candidate's party affiliation. The portal will not express a preference for any particular candidate, political party or political committee, and the search function will contain no preference for any political committee or group of political committees.

⁴ The contract between Points for Politics and the loyalty sponsor requires the sponsor to redeem loyalty points intended for political contributions at a rate equal to or less than the rate at which the loyalty sponsor redeems loyalty points for other kinds of rewards.

⁵ The Points for Politics system will automatically prevent individuals from making a contribution in excess of the Act's limitations through Points for Politics, and will not allow the individual to convert or contribute more loyalty points than that individual actually has.

1 Before transmitting the balance to the political committee, Points for Politics will
2 deduct a ten percent processing fee from the gross amount of the contribution. This
3 processing fee is in addition to other processing fees that third party processors may
4 assess. The processing fee will be the same regardless of how the individual contributor
5 entered the Points for Politics portal and regardless of the identity of the recipient of the
6 contribution. The amount of the processing fee is within the typical range of similar
7 financial transactions that involve processing contributions to political committees.

8 When Points for Politics transmits the contribution to the political committee, it
9 will also provide information required under Commission regulations to the committee.
10 This information includes the gross amount of the contribution, the fundraising cost
11 reflected in the fee, and the contributor's name, mailing address, employer, and
12 occupation. 11 CFR 102.8.

13 ***Question Presented***

14 *May Points for Politics implement its proposed system without making a*
15 *contribution and without otherwise violating the Act or Commission regulations?*

16 ***Legal Analysis and Conclusions***

17 Yes, Points for Politics may implement its proposed system without making a
18 contribution and without otherwise violating the Act or Commission regulations.

19 The Act and Commission regulations define a contribution as including "any gift,
20 subscription, loan, advance, or deposit of money or anything of value made by any
21 person for the purpose of influencing any election for Federal office." 2 U.S.C.
22 431(8)(A)(i); 11 CFR 100.52(a). "Anything of value" includes all in-kind contributions,
23 including the provision of goods or services without charge or at a charge that is less than

1 the usual and normal charge. *See* 11 CFR 100.52(d)(1). “Usual and normal charge” is
2 defined as the price of goods in the market from which they ordinarily would have been
3 purchased at the time of the contribution, or the commercially reasonable rate prevailing
4 at the time the services were rendered. *See* 11 CFR 100.52(d)(2).

5 Every person who receives a contribution for a political committee that is not an
6 authorized committee must forward such a contribution of \$50 or less to the treasurer of
7 that committee no later than 30 days after receiving the contribution; for contributions of
8 \$50 or more, the person must forward the contribution and the required information no
9 later than ten days after receiving the contribution. 2 U.S.C. 432(b)(2)(A), (b)(2)(B);
10 11 CFR 102.8(b)(1), (b)(2). Every person who receives a contribution for an authorized
11 political committee must forward such a contribution and, if necessary, the required
12 information about the contribution, to the treasurer of that committee no later than ten
13 days after receiving the contribution. 2 U.S.C. 432(b)(1); 11 CFR 102.8(a).

14 The Commission’s regulations treat limited liability companies electing to be
15 taxed as partnerships as partnerships for contribution purposes. 11 CFR 110.1(g)(2).
16 Unlike corporations, which are prohibited from making contributions or acting as a
17 conduit for earmarked contributions under the Act and Commission regulations,⁶
18 partnerships are permitted to make contributions, subject to the Act’s contribution limits.
19 11 CFR 110.1(e) (referencing contribution limits set forth in 11 CFR 110.1(b), (c), and
20 (d)). Contributions made by partnerships are attributable both to the partnerships and to
21 the partners according to the partnership agreement or according to a formula set forth in
22 Commission regulations. 11 CFR 110.1(e).

⁶ 2 U.S.C. 441b(a); 11 CFR 114.2(b)(1); 110.6(b)(2)(ii).

1 Points for Politics proposes to offer a service that would allow individual earners
2 of reward points in separate corporate-sponsored loyalty-type arrangements to convert
3 those reward points into dollar equivalents and to contribute them to political committees.
4 In doing so, Points for Politics would essentially function like the corporations providing
5 contribution processing and transmittal services addressed in Advisory Opinion 2007-04
6 (Atlatl). While Points for Politics would base its service on the conversion of reward
7 points earned as a result of participating in various corporate loyalty-type arrangements,
8 it would not itself offer an affinity-type arrangement or generate reward points for
9 consumers.⁷

10 When analyzing processing and transmittal services, the Commission is typically
11 determining whether a proposal would result in a prohibited corporate contribution. *See*,
12 *e.g.*, Advisory Opinions 2007-04 (Atlatl, Inc.); 2004-19 (DollarVote). Here, Points for
13 Politics is a limited liability company that opts for tax treatment as a partnership, and is
14 therefore a partnership under Commission regulations. 11 CFR 110.1(g)(2). Unlike a
15 corporation, Points for Politics is not prohibited from making contributions. 11 CFR
16 110.1(e). Nevertheless, even though Points for Politics may generally make contributions
17 consistent with the Act and Commission regulations, if it is acting as a commercial
18 vendor under its proposal, it would not make any contribution at all. Accordingly, the
19 question here is whether, in its role as a third-party processor and transmitter of political

⁷ The Commission has addressed the corporate provision of revenue, rewards, and remittances to political committees in prior advisory opinions addressing affinity and affinity-like programs. *See, e.g.*, Advisory Opinion 2011-19 (GivingSphere); Advisory Opinion 2010-21 (ReCellular); Advisory Opinion 2010-06 (Famos); Advisory Opinion 2008-18 (Mid-Atlantic Benefits). Points for Politics will require the contributor to confirm that he or she owns the contributed reward points in an individual capacity.

1 contributions, Points for Politics is acting as a commercial vendor. *See, e.g.*, Advisory
2 Opinion 2007-04 (Atlatl).

3 In order for Points for Politics to be acting as a commercial vendor, it must satisfy
4 three criteria: first, the service is rendered in the ordinary course of business at the usual
5 and normal charge; second, the vendor forwards contributions to candidates and political
6 committees through segregated accounts; and third, the vendor employs adequate
7 screening procedures to ensure that it is not forwarding illegal contributions. *See, e.g.*,
8 Advisory Opinion 2007-04 (Atlatl); Advisory Opinion 2004-19 (Dollar Vote).

9 Points for Politics satisfies all three criteria and therefore qualifies as a
10 commercial vendor. First, Points for Politics charges a fee that includes compensation
11 for the cost of the technology and service that converts reward points into dollar
12 equivalents. The total fee assessed is ten percent of the gross contribution, and Points for
13 Politics represents that this amount is within the normal range of similar financial
14 transactions that involve processing contributions to political committees.⁸ Advisory
15 Opinion 2007-04 (Atlatl). Further, Points for Politics will receive fees when
16 contributions are made. Advisory Opinion 2004-19 (Dollar Vote); Advisory Opinion
17 2002-07 (Careau). That Points for Politics deducts its fees before transmitting the
18 contribution to the political committee ensures that it is not advancing funds and thereby
19 making a partnership contribution to the political committee.

⁸ In the patent description accompanying its advisory opinion request, Points for Politics states that the processing fee allows it “to cover its operating costs and/or earn a profit.” The Commission assumes from this statement that the processing fee incorporates a reasonable profit for Points for Politics. *See, e.g.*, Advisory Opinion 2007-04 (Atlatl); Advisory Opinion 2002-07 (Careau).

1 As noted above, the Commission recently confirmed the analytical distinction
2 between providing a service to the political committee and providing a service to the
3 contributor. *See* Advisory Opinion 2011-19 (GivingSphere). This distinction rests on the
4 nature of the business's contractual relationship (with the political committee or the
5 contributor), and the means the contributor uses to make a contribution (through the
6 political committee's website or not). *Id.* *See also* Advisory Opinion
7 2011-06 (Democracy Engine). Points for Politics' system could be conceived as
8 providing services both to political committees and to contributors under this analysis,
9 because some but not all recipient political committees will have contracts with Points for
10 Politics, and some but not all contributions will be made through political committee
11 websites.

12 Assuming for the purpose of analysis that the service is provided to political
13 committees, consistent with the Commission's commercial vendor analysis,⁹ the
14 Commission concludes that the system is permissible and that the amount of the
15 contribution that the political committee is deemed to receive under the system will be
16 the gross amount paid by the contributor, not the net amount the committee will actually
17 receive. Advisory Opinion 2007-04 (Atlatl).

18 Second, Points for Politics places the funds the loyalty sponsor transmits to it in a
19 segregated account created for the purpose of holding contributions before transmittal to
20 recipient committees. Advisory Opinion 2007-04 (Atlatl); Advisory Opinion 2004-19
21 (Dollar Vote); Advisory Opinion 2002-07 (Careau). *See also* Advisory Opinion 2006-34

⁹ Only business entities that provide services to candidates and political committees may be "commercial vendors." 11 CFR 116.1(c).

1 (Working Assets) (finding sufficient a single segregated account established for the
2 purpose of holding contributions). Thus, the contributions will not become partnership
3 funds.

4 Third, Points for Politics represents that it will subject contributions to screening
5 on its portal to ensure both that they are not excessive and that they are not from
6 prohibited sources. *See* Advisory Opinion 2006-34 (Working Assets, Inc.); Advisory
7 Opinion 2004-19 (DollarVote), Advisory Opinion 1999-22 (Aristotle Publishing);
8 Advisory Opinion 1999-09 (Bradley for President); Advisory Opinion 1995-09 (Newt
9 Watch).

10 Contributions to authorized political committees must be forwarded, along with
11 any required information, no later than ten days after the receipt of the contribution.
12 *See* 2 U.S.C. 432(b)(1); 11 CFR 102.8(a). *See also* Advisory Opinion 1995-09
13 (NewtWatch) (finding the date credit card contribution via Internet is deemed received is
14 date notice of contributor's confirmation of transaction is received). Points for Politics'
15 plan to transmit the contributions to the political committees within ten days of receiving
16 the contributor's authorization to do so satisfies that requirement. Points for Politics also
17 will transmit the contributor's name, address, occupation, and employer to the recipient
18 political committee at the same time it transmits the contribution. Providing this
19 information satisfies the requirements of 11 CFR 102.8(b)(2). Points for Politics
20 represents that it will work with loyalty sponsors and political committees to identify

1 what, if any, disclaimers would be required to appear on any website associated with the
2 system and to ensure that such disclaimers are posted.¹⁰

3 For the foregoing reasons, and under the conditions set forth in this advisory
4 opinion, Points for Politics may implement its proposed system without itself making
5 contributions, or violating the Act or Commission regulations.

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

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

¹⁰ Based on this representation, and because Points for Politics has not inquired about disclaimers, the Commission does not address the subject of any required disclaimers in this advisory opinion.

1 The cited advisory opinions are available on the Commission's website, www.fec.gov, or
2 directly from the Commission's Advisory Opinion searchable database at
3 <http://www.fec.gov/searchao>.

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On behalf of the Commission,

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Caroline C. Hunter

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Chair