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Washington, DC 20463

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AGENDA ITEM
For meeting of August 14, 2014
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August 12, 2014

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS by AN*
Deputy General Counsel

Adav Noti *AN*
Acting Associate General Counsel

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Assistant General Counsel

Esther Gyory *EG*
Attorney

Subject: Draft AO 2014-09 (REED Marketing Consultants)

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 9:00 am (Eastern Time) on August 14, 2014.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <http://www.fec.gov/law/draftaos.shtml>.

Attachment

1 ADVISORY OPINION 2014-09

2

3 William J. McGinley, Esq.

4 Jones Day

5 51 Louisiana Avenue, NW

6 Washington, DC 20001

7

8 Dear Mr. McGinley:

DRAFT

9 We are responding to your advisory opinion request on behalf of REED Marketing
10 Consultants, Inc. (“RMC”) concerning whether RMC’s proposed development and marketing of
11 an affinity credit card product for national party committees and other federal political
12 committees (“Committee(s)”), is permissible under the Federal Election Campaign Act, 2 U.S.C.
13 §§ 431-457 (the “Act”), and Commission regulations. The Commission concludes that the
14 requestor’s proposed affinity program¹ is permissible.

15 ***Background***

16 The facts presented in this advisory opinion are based on your letter received on May 23,
17 2014, and your email received on July 3, 2014.

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

21 RMC plans to facilitate the development of an affinity credit card relationship between
22 banks and Committees. Under the proposed plan, RMC would enter into agreements with banks
23 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 benefits to RMC and its partner banks.

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

15 If the potential cardholder responded by returning a properly completed application, the
16 issuing bank would run a final credit check and then issue the affinity credit card. After such
17 issuance, RMC would provide the Committee "certain data and statistics" regarding cardholders
18 and usage but would not receive, handle, or process the rebates or contributions. Rather, the
19 partner banks would pay the rebates to the cardholder as cash or forward them as contributions
20 directly to the designated Committee. The partner banks would forward any contributions to the

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.

1 Committee at the same time the banks would have distributed any rebates to the cardholder. The
2 required contributor information (acquired during the application process) would also be
3 forwarded to the recipient Committee.

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

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

12 ***Question Presented***

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

15 ***Legal Analysis and Conclusion***

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

18 *a. Usual and Normal Charge*

19 The Act and Commission regulations prohibit corporations from making a
20 "contribution," which includes "any direct or indirect payment, distribution, loan, advance,
21 deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign
22 committee, or political party or organization, in connection with any [federal] election."

23 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.

1 § 100.52(a). “Anything of value” includes all in-kind contributions, including the provision of
2 goods and services without charge or at less than the usual and normal charge. *See* 11 C.F.R.

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

6 § 100.52(d)(2).

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

16 In sum, the questions of whether RMC would be making or facilitating contributions
17 within the meaning of the Act and Commission regulations turn largely on whether the
18 Committees would be paying RMC the usual and normal charge (or other consideration of equal
19 value) for RMC’s ordinary services as a commercial vendor. *See, e.g.,* Advisory Opinion
20 2010-06 (Famos) at 6; Advisory Opinion 2006-34 (Working Assets) at 5-6; Advisory Opinion
21 2003-16 (Providian National Bank) at 6-7; Advisory Opinion 2007-04 (Atlatl) at 3-4; Advisory
22 Opinion 2006-34 (Working Assets) at 7.

23 RMC proposes to provide several services to the Committees: marketing the affinity

1 credit card program to individuals on the Committees' mailing lists; establishing a relationship
2 between issuing banks and the Committees; obtaining and forwarding contributor information;
3 and providing Committees with certain data and statistics regarding cardholders and usage.
4 Advisory Opinion Request at 2-3 (May 23, 2014) ("AOR"). The request states that RMC, in the
5 ordinary course of its business, markets similar services to other organizations and businesses
6 that are not political committees. *Id.* at 4. Thus, in providing these services to a Committee,
7 RMC would qualify as a "commercial vendor" for purposes of 11 C.F.R. § 114.2(f).⁵

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

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

1 political committee under 11 C.F.R. § 114.2(f).

2 *b. Ownership of Contributed Rebates or Rewards*

3 The Commission has addressed and approved some affinity programs and similar
4 arrangements between political committees and service providers. *See* Advisory Opinion
5 2010-06 (Famos); Advisory Opinion 2006-34 (Working Assets, Inc.); Advisory Opinion 2003-16
6 (Providian National Bank); Advisory Opinion 2002-07 (Careau & Co.); Advisory Opinion
7 1995-34 (Politechs). In the advisory opinions that have approved affinity programs, the rebate or
8 reward was offered to individual customers or users in the ordinary course of business, and the
9 rebate or reward was the property of the individual customer who — rather than the corporate
10 affinity partner — controlled the disposition of the revenue. *See, e.g.*, Advisory Opinion
11 2010-06 (Famos) at 7-8 (concluding that, once earned, reward became account holders’
12 “exclusive property”); Advisory Opinion 2003-16 (Providian National Bank) at 7 (“Rebates that
13 have vested are the property of the cardholder.”); Advisory Opinion 2010-21 (ReCellular) at 5
14 (explaining that “contributions generated through these programs must be made by individuals
15 from their own funds and not by the corporate service provider”).

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

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.

1 card program.⁷

2 *c. Disclaimers on Solicitations*

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

13 This response constitutes an advisory opinion concerning the application of the Act and
14 Commission regulations to the specific transaction or activity set forth in your request. *See* 2
15 U.S.C. § 437f. The Commission emphasizes that, if there is a change in any of the facts or
16 assumptions presented, and such facts or assumptions are material to a conclusion presented in
17 this advisory opinion, then the requestor may not rely on that conclusion as support for its
18 proposed activity. Any person involved in any specific transaction or activity which is
19 indistinguishable in all its material aspects from the transaction or activity with respect to which
20 this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C.

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”).

1 § 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
2 affected by subsequent developments in the law including, but not limited to, statutes,
3 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available
4 on the Commission's website.

5 On behalf of the Commission,

6
7
8 Lee E. Goodman
9 Chairman