



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

**TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
CHIEF COMMUNICATIONS OFFICER
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE**

FROM: COMMISSION SECRETARY *MW*

DATE: January 14, 2009

**SUBJECT: COMMENT ON DRAFT AO 2008-18
Mid-Atlantic Benefits**

Transmitted herewith is a timely submitted comment from Michael P. Dupay, Partner, Mid-Atlantic Benefits regarding the above-captioned matter.

Proposed Advisory Opinion 2008-18 is on the agenda for Thursday, January 15, 2009.

Attachment

Mid-Atlantic Benefits

2009 JAN 14 A 8:26

January 13, 2009

Commission Secretary
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: DRAFT Advisory Response

Dear Commission Secretary,

I have received and read the draft advisory opinion 2008-18, and I am providing comment to this draft.

You begin your draft by referring to our proposal of distributing prescription discount drug cards to persons residing in the United States, through various political party committees, and our making periodic payments to these committees, as an "Affinity Program." Your labeling our distribution of prescription discount drug cards as an "Affinity Program" is not true and is a total mischaracterization.

Mid Atlantic Benefits, LLC (here after referenced as MAB) is an independent entity, and an independent contractor of those organizations whose products MAB chooses to market. MAB is not restricted by Agelity, Inc., nor is MAB controlled by Agelity, Inc. MAB's relationship with Agelity, Inc. is nothing more than an independent contractor established by an arms length agreement that Agelity, Inc. has with its distribution network. No other relationship between Agelity, Inc. and MAB exists. As you know, in order for an "Affinity Relationship" to exist, a close agreement, or a spiritual relation or attraction must be held to exist between certain persons. Agelity, Inc., does not have any financial interest in MAB to establish an "affinity relationship". Agelity, Inc., does not specify or require MAB establish any "outside" distribution network. The relationship between MAB and Agelity, Inc., continues to be strictly that of independent contractor, nothing more than that. Therefore, no direct "Affinity Relationship" exists or does a secondary or collateral "Affinity Relationship" exist.

"Affinity Relationships", exist in marital relationships and not business. Additionally, because no "Affinity Relationship" exists between Agelity, Inc. and MAB, Agelity, Inc. can not be the "Alter Ego" of MAB.

In order to establish the "Alter Ego" doctrine, it must be shown that the stockholders disregarded the entity of the corporation, made the corporation a mere conduit for the transaction of their own private business, and that the separate individualities of the corporation and its stockholders in fact cease to exist. This certainly is not the relationship existing between Agelity, Inc., MAB, and the clientele established by MAB.

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Page 4, Line 3 of your draft, presents the following:

Question Presented: Would MAB's and Agelity, Inc.'s proposed political affinity program result in prohibited corporate contributions to the Federal account of a participating political party sponsor or otherwise violate the Act or Commission regulations?

I argue that this question has no relevance because an Affinity Relationship between Agelity, Inc. and MAB does not exist. Additionally, the response given under the title "Legal Analysis and Conclusions" to this question becomes moot.

MAB understands that the Act and Commission Regulations prohibit corporations from making a contribution in connection with a Federal election. In MAB's business relationship with Agelity, Inc., an "Affinity Relationship" does not exist, and Agelity, Inc. is not the "Alter Ego" of MAB. Therefore, any transaction fees payable to any political party executive committee would not be a corporate political contribution. The transaction fee payable is Earned Income, just like interest payable by a bank on a Certificate of Deposit to a political party executive committee is earned income.

When a political party agrees to a defined interest rate in the purchase of a CD, how does that defined interest rate differ from the contractual defined transaction fee MAB would agree to pay?

Why is the CD interest rate not considered a corporate contribution when paid to the Political Executive Committee?

I pose another question. If the Political Executive Committee conducted a car wash and Verizon or AT&T brought a fleet of vehicles for washing and paid the committee \$5.00 per vehicle, would the commissioners rule that this payment is a corporate contribution? The point I want to make here is the fixed contracted transaction fee payable is earned in exchange for services rendered. It isn't paid if the card is not distributed, or not used by the cardholder. Therefore, this fee is not a contribution, it is not a donation, it is not a commission, and it is not tied to any donor list.

The transaction fees that are negotiated with sponsors/distributors of the prescription drug discount card originate with MAB, and are not dictated by Agelity, Inc. MAB does not have a single instance in which Agelity, Inc. was ever a party in any negotiation of transaction fees payable to any sponsor/distributor. Additionally, payments of any transaction fees are not related to any Federal election. The payment of any transaction fees are directly related to the utilization of the prescription drug discount card by the cardholders whoever they may be. The card is given freely. No information of any kind is requested or required. No solicitation of voter lists or party registration is requested. The prescription discount drug card is "live" regardless of any election cycle. Therefore it is not used to influence any election for Federal office. Its purpose is to help people pay less for their prescription drugs when no insured drug program exists for the cardholder. An election cycle will not determine the utilization of the card, nor will the cardholder be influenced by its distribution from any political party.

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On Page 5 of the draft advisory opinion, beginning with Line 10 and ending on Line 20, the draft explains that certain proposed business arrangements between political committees and various service providers were not deemed to be commercial transactions, "But rather fundraising devices for political committees." Reference is made that a corporation, in one situation "uses a political committee's asset, such as a contributor list," and pay the political committee a fee for the use of that list. MAB, in its strategy, makes no reference to buy any political committee's contributor list or use any list or asset of any political committee. The second scenario referenced a corporation paying "a fee to a political committee to perform the service of marketing the product to the committee's supporters." Again, MAB's strategy does not identify with any political committee's supporters. Therefore the identification of previous opinions referenced on Page 5 of the draft does not provide "Any Linkage" to MAB's proposal and is therefore not relevant. Additionally, MAB has no interest in creating opportunities for persons to contribute to any Political Committee.

On Page 7, beginning with Line 4, the draft opinion asserts that Agelity, Inc. is the Alter Ego of MAB, and that assertion is not only not true, it is wrong. MAB gets paid by Agelity because:

- 1. MAB distributes a prescription discount drug card to residents of the United States, and**
- 2. Persons who receive the card use it to receive a discount when they pay for a prescription.**

The arrangements made by MAB for distribution of the card does not require "clearance or approval" of Agelity, Inc. In fact, Agelity does not require MAB to build a distribution force. MAB knows that the more people who possess the card, the greater the possibility the card will be used. There is no hidden agenda here, nor is there any desire by MAB to be involved in any manner with contributors or supporters of any political committee. MAB, through affiliations with political committees, can reach a large number of people, many of whom need some financial help with prescription drugs in this current economy.

On page 8, beginnings on line 17, concerns are expressed that a political committee would potentially earn revenue in excess of their rendered services. Continuing on Page 8, Line 23, the draft opinion reads, "Because a political committee need only market and distribute a card to a supporter once, but would earn a transaction fee every time that person used the card in the indefinite future, a political party could receive payments that substantially exceed the value of the promotional services it would perform."

On the surface, that statement is true. However, there will be residents on our country who will receive their prescriptions from the Veterans Administration, others from Medicaid, others from Part D of Medicare, and others who are covered by an employer insured drug plan. The market is greatly reduced due to the participation in these other programs. No political committee, or MAB, or any other entity can identify how wide or how narrow the potential user market is.

Neither is there assurance that the card will receive multiple uses.

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If a cardholder uses the card for a 90 day supply of a prescribed drug, that transaction generates \$.25 to a political committee. How many uses of the card will be needed to cover the costs of producing, marketing, and distributing this card is unknown. Multiple uses enable the distributor to recover the costs and hopefully earn some money above their costs.

Conclusion:

I believe that I have good comprehension of the law that you Commissioners are required to enforce. I have attempted to argue that MAB's relationship is clearly arms length with Agelity, Inc., and our role is simply that of an independent contractor – nothing more.

My arguments have attempted to explain that Agelity, Inc., is not the alter ego of MAB and that MAB's contractual relationship with Agelity, Inc., does not establish an affinity relationship. Therefore, any contractual relationship between MAB and the executive committee of any political party that would generate transaction fees would not be a corporate contribution.

Regarding the possibility of continuous earned income payable to an executive committee of a political party, do not conclude that a continuous level stream of income will occur because the drug card is issued just once. The income payable will be directly related to the efforts put into program.

I have concluded that my request for a favorable opinion does not mirror any previous requests of you. I have read and compared those other opinions referenced in your draft and I find that we are vastly different on which you have opined.

Our program does not create any enrollments, nor does a prescription discount card create political advertising, or promote a candidate or slate of candidates. Our program, as described in previous correspondence, provides for a free distribution of our prescription discount drug card to any and all persons in our country.

Lastly, Consider first U.S. Code 431 and the code's definitions. Paragraph 8, subparagraph (A) defines "contribution" to include,

- (i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or
- (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

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My responses to questions relating to a National Party have consistently referenced the earning of a transaction fee rather than receiving a "contribution." Why a transaction fee differs from a "contribution" is, a contribution is the giving or donation of money, time, knowledge, experience, or assistance along with others to a common supply or fund. A transaction fee does not meet the definition of donation, and our system for its payment is not made "for the purpose of influencing any election for Federal office.

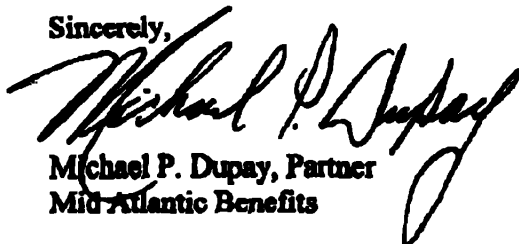
Additionally, the payment of a "transaction fee" does not meet this definition or that of a "commission" as referenced in advisory opinion 1992-40. The accepted definition of a "commission" is the receipt of a percentage of the principal or of the income or of both which a fiduciary receives as compensation for services. The "transaction fee" payable is not a percentage of any principal sum, it is a transactional fee of a specified amount (\$.25) that becomes payable whenever the prescription drug discount card is used. The \$.25 transactional fee does not vary regardless of the dollar amount paid for a prescription drug. If a prescription drug, through the use of our prescription card, is discounted from a retail price of \$50.00 down to \$30.00, the same \$.25 transaction fee is payable.

U.S. code 441B, paragraph B, subparagraph (2) speaks to the definition of the term "contribution" as defined in U.S. Code sections 431 that has already been discussed herein. Again, the U.S. Code sections 431 and 441B do not speak to or define a transaction fee. Therefore, since these referenced code sections do not address or define the receipt of transaction fees as contributions, the transaction fee must be recognized as earned income and reportable by the executive committee as such.

As you Commissioners study my comments to your draft, please keep in mind that any transaction fee becomes due and payable only when a cardholder uses the prescription discount drug card to secure discounts on the cardholder's prescription drug purchases. If the card isn't used, no transaction fee is paid. Thank you for the opportunity to comment on your draft.

I look forward to hearing from you soon.

Sincerely,



Michael P. Dupay, Partner
Mid-Atlantic Benefits

MPD/d