



FEDERAL ELECTION COMMISSION
Washington, DC 20463

January 16, 2009

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2008-18

Mr. Michael Dupay
Mid-Atlantic Benefits
P.O. Box 7280
Charleston, WV 25356

Dear Mr. Dupay:

We are responding to your advisory opinion request on behalf of Mid-Atlantic Benefits (“MAB”), concerning the application of the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to a proposed affinity program¹ involving payments to Federal political party committees for the provision of prescription drug discount cards to their supporters or other interested persons.

The Commission concludes that the proposed affinity program would result in prohibited corporate contributions being made to the national committees of political parties, or to State or local committees of political parties with respect to their Federal accounts.

Background

The facts presented in this advisory opinion are based on your letters dated September 30, October 10, and October 14, 2008; e-mails received on October 14 and November 20, 2008; telephone conversations with Commission attorneys, and information available on publicly accessible Internet websites.

¹ The Commission uses the term “affinity program” in this opinion to identify 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 among 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), and 2006-34 (Working Assets).

MAB is a limited liability company (“LLC”). It elects to be treated as a partnership rather than as a corporation for income tax purposes. Agelity, Inc. is a Delaware corporation that maintains a prescription drug discount program. The program involves recruitment of various kinds of entities, such as banks, religious organizations, unions, charitable organizations and local government entities (“sponsors”) to create, promote and distribute prescription drug discount cards. Agelity, Inc. maintains a contractual relationship with various pharmacy networks to honor the cards. These networks collectively include over 56,000 individual pharmacies. MAB partners with Agelity, Inc. by making the Agelity, Inc. prescription drug discount program available to prospective sponsors and by managing the program.

MAB proposes to offer the program to Democratic and Republican political party committees. MAB and Agelity, Inc. have executed contracts with the State committees of the Republican and Democratic parties in West Virginia.² These contracts contain the same terms and conditions as their contracts with non-political entities, and would be signed by MAB, Agelity, Inc., and the party committee sponsors. As delineated in the contract signed by the West Virginia Democratic Party (“Contract”), MAB in partnership with Agelity, Inc. would provide the Agelity, Inc. Prescription Drug Discount Program to the party committee sponsor, and in turn the party committee sponsor would offer the Agelity, Inc. program to supporters or other interested persons. *See* Contract, Preamble. The party committee sponsor would agree to manufacture the cards, and to pay for their promotion and distribution. The party committee sponsor would develop its own promotional materials. Agelity, Inc. and MAB would review and approve such materials before the party committee sponsor could disseminate them to determine whether the proposed materials properly focus on promoting the drug cards themselves and not on promoting the committee sponsor’s unrelated activities. *See* Contract, Duties of Sponsor, # 1, 5, and 6. MAB and Agelity, Inc. would scrutinize the proposed materials to ensure that they did not solicit political contributions or otherwise promote the party committee sponsor.

Cardholders would be able to use the cards that party committee sponsors offer (without charge) to obtain discounts on drug purchases at pharmacies in participating networks that honor the cards. The participating pharmacy networks would pay Agelity, Inc. a fee, the amount of which is negotiated between Agelity, Inc. and the pharmacy network,³ for each “transaction,” or each purchase of a single medication with the card. The pharmacies would use group numbers on the cards to pay the specified transaction fees to Agelity, Inc.. Agelity, Inc. would pay a transaction fee of \$.70 for each purchase to MAB, this fee being derived from the fee that the pharmacy networks would pay to Agelity, Inc.. MAB in turn would pay a transaction fee, out of what it receives from

² A copy of the fully executed contract between MAB, Agelity, Inc., and the West Virginia Democratic Party is included with your request. It may be accessed at <http://saos.nictusa.com/saos/searchao?SUBMIT=pending> (Last visited Nov. 25, 2008).

³ Because MAB is neither party nor privy to the contracts between Agelity, Inc. and the participating pharmacy networks, it cannot indicate the amount of this transaction fee.

Agelity, Inc., of \$.25 to the party committee sponsor. Thus, the Contract contemplates that the payments to the party committee sponsor would flow from Agelity, Inc. revenues.⁴ MAB's profit would be the difference between the fee it receives and the fee it disburses, while the party committee sponsors would earn a \$.25 fee per transaction.

The contracts contemplate continuation of the arrangement for at least five years, with automatic renewal for an additional potentially unlimited number of three-year terms. Party committee sponsors would be able to terminate the contract with thirty days notice if they determine that the program ceases to be viable or if any legal or regulatory requirements make continuation of the program unduly burdensome.

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?

Legal Analysis and Conclusions

Yes, MAB's and Agelity, Inc.'s proposed political affinity program would result in prohibited corporate contributions by Agelity, Inc. to the Federal account of a participating political party sponsor.⁵

The Act and Commission regulations prohibit corporations from making a contribution in connection with a Federal election. *See* 2 U.S.C. 441b(a); 11 CFR 114.2(b)(1). A contribution includes "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." 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a); *see also* 2 U.S.C. 441b(b)(2); 11 CFR 114.2(b)(1). "Anything of value" includes all in-kind contributions, including the provision of goods or services without charge or at a charge that is less than the usual and normal charge. *See* 11 CFR 100.52(d)(1). "Usual and normal charge" is defined as the price of goods in the market from which they ordinarily would have been purchased at the time of the contribution, or the commercially reasonable rate prevailing at the time the services were rendered. *See* 11 CFR 100.52(d)(2).

In previous advisory opinions, the Commission has examined a number of business arrangements between political committees and service providers that were either affinity programs or similar to affinity programs. *See, e.g.* Advisory Opinions 2006-34 (Working Assets), 2003-16 (Providian National Bank), 2002-07 (Careau & Co.), 1995-34 (Politechs), 1994-33 (VITEL International), 1992-40 (Leading Edge Communications), 1991-20 (Call Interactive), 1990-01 (Digital Corrections), 1988-12

⁴ *See, e.g.* Contract, Term and Termination, #5; Terms, #2; and General, #13.

⁵ MAB also asks whether the political parties may deposit revenues they earn from their participation in the program into their Federal accounts. Because the Commission concludes that MAB's and Agelity, Inc.'s proposed activity is not permissible with respect to Federal accounts, this question is moot.

(Empire of America Federal Savings Bank), and 1979-17 (RNC). Throughout, the Commission has consistently distinguished between two types of business affinity arrangements having different consequences under the Act and Commission regulations. In the first type of arrangement, the corporation pays a fee to a political committee in exchange for the right to use a political committee asset, such as a contributor list, in conjunction with the corporation's marketing efforts, or the corporation pays a fee to a political committee to perform the service of marketing the product to the committee's supporters. The Commission has not regarded these types of arrangements as commercial transactions, but rather as fundraising devices for political committees. The Commission specifically concluded in these cases that the fact that the corporation receives something of value from the political committee in exchange for payments that purported to be the proceeds of a commercial sale did not change the essential nature of the transaction as a contribution. The payments received by the political committees were regarded as contributions subject to the prohibitions of 2 U.S.C. 441b. *See, e.g.* Advisory Opinions 1992-40 (Leading Edge Communications), 1988-12 (Empire of America Federal Savings Bank) and 1979-17 (RNC).

In contrast, the second type of business affinity arrangement examined by the Commission involves cases in which a political committee pays a corporation a commercially reasonable fee in exchange for the corporation's efforts to market services that offer an opportunity for a purchaser to contribute to the political committee. In these situations, the Commission has concluded that so long as: (1) the corporation and political committee enter into a commercially reasonable transaction, and (2) the amounts contributed to political committees via rebates or rewards are from individual customers' funds and not from the corporation's funds, then the arrangements are *bona fide* commercial transactions that do not entail prohibited corporate contributions under 2 U.S.C. 441b. *See, e.g.* Advisory Opinions 2006-34 (Working Assets), 2003-16 (Providian National Bank), and 2002-07 (Careau & Co.).

In the impermissible affinity arrangements, the Commission has concluded that affinity programs in which a portion of the revenues charged and collected by a corporation are transmitted to a political committee result in prohibited corporate contributions under the Act and Commission regulations. *See generally* Advisory Opinions 1992-40 (Leading Edge Communications), 1988-12 (Empire of America Federal Savings Bank) and 1979-17 (RNC). In other advisory opinions in which the Commission permitted proposed affinity arrangements, the Commission distinguished those permissible arrangements from previous impermissible arrangements because corporate funds would not be paid to the political committees in the permissible arrangements. *See, e.g.* Advisory Opinions 2002-07 (Careau & Co.) (permitting arrangement expressly because payments "earmarked" by customers for contributions would not become corporate treasury funds), and 2003-16 (Providian National Bank) (distinguishing prior advisory opinions holding arrangements impermissible on ground that the party committee's share of membership fees and commission would have been paid out of bank profits in those prior situations).

The Commission concludes that MAB's proposal entails prohibited corporate contributions. The proposed arrangement is impermissible because the transaction fees payable to the political committees are from Agelity, Inc.'s corporate funds, and not from individual funds, as in scenarios the Commission has found permissible.⁶ As noted above, Agelity, Inc. would pay MAB's transaction fee out of the revenues it would collect from the pharmacy networks and MAB in turn would pay the party committee sponsor's transaction fee out of the fee it would collect from Agelity, Inc. While MAB is not itself a corporation or treated as a corporation, all the funds it provides the party committee sponsor consist of general treasury funds from Agelity, Inc. Therefore, the political party committees participating in the program would receive corporate contributions from Agelity, Inc.

This proposal is essentially identical to the plan that the Commission disapproved in Advisory Opinion 1992-40 (Leading Edge Communications). In that advisory opinion, the requestor corporation sought to recruit political party committees to market and distribute a long distance telephone discount card to the parties' members. In exchange for the party's performance of these services, the corporation proposed to pay to the parties a commission consisting of a percentage of the revenue it collected from long distance telephone charges. Thus, the plan involved a corporation's use of a political committee's assets to generate income through an ongoing business venture. The fact that the business model was based on an arms-length commercial transaction in which a corporation paid a political committee for services rendered, did not affect the Commission's characterization of it under the Act and Commission regulations as a fundraising device. *See also, e.g.* Advisory Opinions 1988-12 (Empire of America Federal Savings Bank) and 1979-17 (RNC).

In this case, Agelity, Inc. and MAB furnish access to Agelity, Inc.'s drug discount program by recruiting sponsors to perform marketing and distribution services on Agelity, Inc.'s behalf in exchange for a portion of the revenues Agelity, Inc. generates from the participating pharmacy networks. As was the case in Advisory Opinion 1992-40 (Leading Edge Communications), here party committee sponsors would lend their resources in promoting and distributing the cards to Agelity, Inc. and MAB to facilitate the distribution of the cards. That distribution in turn would generate revenue for Agelity, Inc., for MAB, and for the party committee sponsors.

Apart from the fact that the source of payments to the political committees would be corporate funds, the Commission also deemed it significant in its prior advisory opinions that the corporation or bank and the political committee were not engaged in an isolated transaction, but in an ongoing enterprise in which there was no upper limit to the total amount of payments a party would be able to receive. Under the proposals considered, a political committee would have had the potential to earn revenue far in excess of the value of the services it rendered. Similarly, MAB's proposal involves not

⁶ In permissible corporate affinity arrangements, the individual customers may choose to allocate their own funds to political party committees. *See, e.g.* Advisory Opinions 2006-34 (Working Assets) and 2003-16 (Providian National Bank) (individuals designate earned rebates and rewards). This is not a feature of MAB's and Agelity, Inc.'s proposal.

an isolated transaction but an ongoing enterprise of indefinite duration, given the terms of the Contract. Because a political party 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 and distribution services it would perform.

For these reasons, were MAB and Agelity, Inc. to implement their proposal by contracting with national committees of political parties, or with State or local committees of political parties (using their Federal accounts), prohibited corporate contributions would result. Therefore, MAB and Agelity, Inc. may not implement their proposal.⁷

The Commission expresses no opinion as to the possible application of any State or local law to the described activity because those issues are outside its 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 requester 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. All cited advisory opinions are available on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

On behalf of the Commission,

(signed)
Steven T. Walther
Chairman

⁷ Nothing in this opinion should be interpreted to preclude MAB and Agelity, Inc. from implementing their proposal with respect to *non*-Federal accounts of State or local committees, provided that: (1) the transaction fees such State or local committees receive are placed in their non-Federal accounts, and (2) the party committees' participation in the program and the deposits of their transaction fees in their non-Federal accounts are permitted under State or local law. *See* 11 CFR 102.5(a), 300.2(j), and 300.30(b)(1); *see also* Advisory Opinion 1992-40 (Leading Edge Communications).