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Washington, DC 20463

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AGENDA ITEM
For Meeting of: 01-15-09

January 8, 2009

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Joshua S. Blume *JSB*
Attorney

Subject: Draft AO 2008-18

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for January 15, 2009.

Attachment

2 **DRAFT**

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

7 Dear Mr. Dupay:

8 We are responding to your advisory opinion request on behalf of Mid-Atlantic
9 Benefits (“MAB”), concerning the application of the Federal Election Campaign Act of
10 1971, as amended (the “Act”), and Commission regulations to a proposed affinity
11 program involving payments to Federal political party committees for the provision of
12 prescription drug discount cards to their supporters or other interested persons.

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

17 ***Background***

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

22 MAB is a limited liability company (“LLC”). It elects to be treated as a
23 partnership rather than as a corporation for income tax purposes. Agelity, Inc. is a
24 Delaware corporation that maintains a prescription drug discount program. The program
25 involves recruitment of various kinds of entities, such as banks, religious organizations,

1 unions, charitable organizations and local government entities (“sponsors”) to create,
2 promote and distribute prescription drug discount cards. Agelity, Inc. maintains a
3 contractual relationship with various pharmacy networks to honor the cards. These
4 networks collectively include over 56,000 individual pharmacies. MAB partners with
5 Agelity, Inc. by making the Agelity, Inc. prescription drug discount program available to
6 prospective sponsors and by managing the program.

7 MAB proposes to offer the program to Democratic and Republican political party
8 committees. MAB and Agelity, Inc. have executed contracts with the State committees
9 of the Republican and Democratic parties in West Virginia.¹ These contracts contain the
10 same terms and conditions as their contracts with non-political entities, and would be
11 signed by MAB, Agelity, Inc., and the party committee sponsors. As delineated in the
12 contract signed by the West Virginia Democratic Party (“Contract”), MAB in partnership
13 with Agelity, Inc. would provide the Agelity, Inc. Prescription Drug Discount Program to
14 the party committee sponsor, and in turn the party committee sponsor would offer the
15 Agelity, Inc. program to supporters or other interested persons. *See Contract, Preamble.*
16 The party committee sponsor would agree to manufacture the cards, and to pay for their
17 promotion and distribution. The party committee sponsor would develop its own
18 promotional materials. Agelity, Inc. and MAB would review and approve such materials
19 before the party committee sponsor could disseminate them to determine whether the
20 proposed materials properly focus on promoting the drug cards themselves and not on
21 promoting the committee sponsor’s unrelated activities. *See Contract, Duties of Sponsor,*

¹ 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).

1 # 1, 5, and 6. MAB and Agelity, Inc. would scrutinize the proposed materials to ensure
2 that they did not solicit political contributions or otherwise promote the party committee
3 sponsor.

4 Cardholders would be able to use the cards that party committee sponsors offer
5 (without charge) to obtain discounts on drug purchases at pharmacies in participating
6 networks that honor the cards. The participating pharmacy networks would pay Agelity,
7 Inc. a fee, the amount of which is negotiated between Agelity, Inc. and the pharmacy
8 network,² for each “transaction,” or each purchase of a single medication with the card.
9 The pharmacies would use group numbers on the cards to pay the specified transaction
10 fees to Agelity, Inc.. Agelity, Inc. would pay a transaction fee of \$.70 for each purchase
11 to MAB, this fee being derived from the fee that the pharmacy networks would pay to
12 Agelity, Inc.. MAB in turn would pay a transaction fee, out of what it receives from
13 Agelity, Inc.. of \$.25 to the party committee sponsor. Thus, the Contract contemplates
14 that the payments to the party committee sponsor would flow from Agelity, Inc.
15 revenues.³ MAB’s profit would be the difference between the fee it receives and the fee
16 it disburses, while the party committee sponsors would earn a \$.25 fee per transaction.

17 The contracts contemplate continuation of the arrangement for at least five years,
18 with automatic renewal for an additional potentially unlimited number of three-year
19 terms. Party committee sponsors would be able to terminate the contract with thirty days

² 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.

³ See, e.g. Contract. Term and Termination, #5; Terms, #2; and General, #13.

1 notice if they determine that the program ceases to be viable or if any legal or regulatory
2 requirements make continuation of the program unduly burdensome.

3 ***Question Presented***

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

7 ***Legal Analysis and Conclusions***

8 Yes, MAB's and Agelity, Inc.'s proposed political affinity program would result
9 in prohibited corporate contributions by Agelity, Inc. to the Federal account of a
10 participating political party sponsor.⁴

11 The Act and Commission regulations prohibit corporations from making a
12 contribution in connection with a Federal election. *See* 2 U.S.C. 441b(a); 11 CFR
13 114.2(b)(1). A contribution includes "any gift, subscription, loan, advance, or deposit of
14 money or anything of value made by any person for the purpose of influencing any
15 election for Federal office." 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a); *see also* 2 U.S.C.
16 441b(b)(2); 11 CFR 114.2(b)(1). "Anything of value" includes all in-kind contributions,
17 including the provision of goods or services without charge or at a charge that is less than
18 the usual and normal charge. *See* 11 CFR 100.52(d)(1). "Usual and normal charge" is
19 defined as the price of goods in the market from which they ordinarily would have been
20 purchased at the time of the contribution, or the commercially reasonable rate prevailing
21 at the time the services were rendered. *See* 11 CFR 100.52(d)(2).

⁴ 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.

1 In previous advisory opinions, the Commission has examined a number of
2 business arrangements between political committees and service providers that were
3 either affinity programs or similar to affinity programs. *See, e.g.* Advisory Opinions
4 2006-34 (Working Assets), 2003-16 (Providian National Bank), 2002-07 (Careau & Co.),
5 1995-34 (Politechs), 1994-33 (VITEL International), 1992-40 (Leading Edge
6 Communications), 1991-20 (Call Interactive), 1990-01 (Digital Corrections), 1988-12
7 (Empire of America Federal Savings Bank), and 1979-17 (RNC). Throughout, the
8 Commission has consistently distinguished between two types of business affinity
9 arrangements having different consequences under the Act and Commission regulations.
10 In the first type of arrangement, the corporation pays a fee to a political committee in
11 exchange for the right to use a political committee asset, such as a contributor list, in
12 conjunction with the corporation's marketing efforts, or the corporation pays a fee to a
13 political committee to perform the service of marketing the product to the committee's
14 supporters. The Commission has not regarded these types of arrangements as
15 commercial transactions, but rather as fundraising devices for political committees. The
16 Commission specifically concluded in these cases that the fact that the corporation
17 receives something of value from the political committee in exchange for payments that
18 purported to be the proceeds of a commercial sale did not change the essential nature of
19 the transaction as a contribution. The payments received by the political committees
20 were regarded as contributions subject to the prohibitions of 2 U.S.C. 441b. *See, e.g.*
21 Advisory Opinions 1992-40 (Leading Edge Communications), 1988-12 (Empire of
22 America Federal Savings Bank) and 1979-17 (RNC).

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

12 In the impermissible affinity arrangements, the Commission has concluded that
13 affinity programs in which a portion of the revenues charged and collected by a
14 corporation are transmitted to a political committee result in prohibited corporate
15 contributions under the Act and Commission regulations. *See generally* Advisory
16 Opinions 1992-40 (Leading Edge Communications), 1988-12 (Empire of America
17 Federal Savings Bank) and 1979-17 (RNC). In other advisory opinions in which the
18 Commission permitted proposed affinity arrangements, the Commission distinguished
19 those permissible arrangements from previous impermissible arrangements because
20 corporate funds would not be paid to the political committees in the permissible
21 arrangements. *See, e.g.* Advisory Opinions 2002-07 (Careau & Co.) (permitting
22 arrangement expressly because payments "earmarked" by customers for contributions
23 would not become corporate treasury funds), and 2003-16 (Providian National Bank)

1 (distinguishing prior advisory opinions holding arrangements impermissible on ground
2 that the party committee's share of membership fees and commission would have been
3 paid out of bank profits in those prior situations).

4 The Commission concludes that MAB's proposal entails prohibited corporate
5 contributions. The proposed arrangement is impermissible because the transaction fees
6 payable to the political committees are from Agelity, Inc.'s corporate funds, and not from
7 individual funds, as in scenarios the Commission has found permissible.⁵ As noted
8 above, Agelity, Inc. would pay MAB's transaction fee out of the revenues it would
9 collect from the pharmacy networks and MAB in turn would pay the party committee
10 sponsor's transaction fee out of the fee it would collect from Agelity, Inc. While MAB is
11 not itself a corporation or treated as a corporation, all the funds it provides the party
12 committee sponsor consist of general treasury funds from Agelity, Inc. Therefore, the
13 political party committees participating in the program would receive corporate
14 contributions from Agelity, Inc.

15 This proposal is essentially identical to the plan that the Commission disapproved
16 in Advisory Opinion 1992-40 (Leading Edge Communications). In that advisory
17 opinion, the requestor corporation sought to recruit political party committees to market
18 and distribute a long distance telephone discount card to the parties' members. In
19 exchange for the party's performance of these services, the corporation proposed to pay
20 to the parties a commission consisting of a percentage of the revenue it collected from
21 long distance telephone charges. Thus, the plan involved a corporation's use of a

⁵ 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.

1 political committee's assets to generate income through an ongoing business venture.
2 The fact that the business model was based on an arms-length commercial transaction in
3 which a corporation paid a political committee for services rendered, did not affect the
4 Commission's characterization of it under the Act and Commission regulations as a
5 fundraising device. *See also, e.g.* Advisory Opinions 1988-12 (Empire of America
6 Federal Savings Bank) and 1979-17 (RNC).

7 In this case, Agelity, Inc. and MAB furnish access to Agelity, Inc.'s drug discount
8 program by recruiting sponsors to perform marketing and distribution services on
9 Agelity, Inc.'s behalf in exchange for a portion of the revenues Agelity, Inc. generates
10 from the participating pharmacy networks. As was the case in Advisory Opinion 1992-
11 40 (Leading Edge Communications), here party committee sponsors would lend their
12 resources in promoting and distributing the cards to Agelity, Inc. and MAB to facilitate
13 the distribution of the cards. That distribution in turn would generate revenue for
14 Agelity, Inc., for MAB, and for the party committee sponsors.

15 Apart from the fact that the source of payments to the political committees would
16 be corporate funds, the Commission also deemed it significant in its prior advisory
17 opinions that the corporation or bank and the political committee were not engaged in an
18 isolated transaction, but in an ongoing enterprise in which there was no upper limit to the
19 total amount of payments a party would be able to receive. Under the proposals
20 considered, a political committee would have had the potential to earn revenue far in
21 excess of the value of the services it rendered. Similarly, MAB's proposal involves not
22 an isolated transaction but an ongoing enterprise of indefinite duration, given the terms of
23 the Contract. Because a political party need only market and distribute a card to a

1 supporter once, but would earn a transaction fee every time that person used the card in
2 the indefinite future, a political party could receive payments that substantially exceed the
3 value of the promotional and distribution services it would perform.

4 For these reasons, were MAB and Agelity, Inc. to implement their proposal by
5 contracting with national committees of political parties, or with State or local
6 committees of political parties (using their Federal accounts), prohibited corporate
7 contributions would result. Therefore, MAB and Agelity, Inc. may not implement their
8 proposal.⁶

9 The Commission expresses no opinion as to the possible application of any State
10 or local law to the described activity because those issues are outside its jurisdiction.

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

⁶ 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).

1 including, but not limited to, statutes, regulations, advisory opinions and case law. All
2 cited advisory opinions are available on the Commission's website at
3 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Steven T. Walther
Chairman