

January 22, 2010

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

DRAFT ADVISORY OPINION 2009-31 is available for public comments under this procedure. It was requested by Kirk L. Jowers, Esq., and Matthew T. Sanderson, Esq., on behalf of MAXIMUS, Inc.

Draft Advisory Opinion 2009-31 is scheduled to be on the Commission's agenda for its public meeting of Friday, January 29, 2010.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00pm noon (Eastern Time) on Thursday, January 28, 2010.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Judith Ingram (202) 694-1220

Deputy Commission Secretary: Darlene Harris (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2009-31, contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission's website at www.fec.gov.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

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January 22, 2010

AGENDA ITEM

For Meeting of 1-29-10

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *RCR for RCS*
Associate General Counsel

Amy L. Rothstein *ALR*
Assistant General Counsel

Jessica Selinkoff *JS*
Attorney

Subject: Draft AO 2009-31 (MAXIMUS, Inc.)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for January 29, 2010.

Attachment

1 ADVISORY OPINION 2009-31

2

3 Kirk L. Jowers, Esq.

4

5 Matthew T. Sanderson, Esq.

6

7 Caplin & Drysdale

DRAFT

8

9 One Thomas Circle, NW, Suite 1100

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11 Washington, DC 20005

12

13 Dear Messrs. Jowers and Sanderson:

14 We are responding to your advisory opinion request on behalf of MAXIMUS, Inc.

15 (“MAXIMUS”) concerning the application of the Federal Election Campaign Act of

16 1971, as amended (the “Act”), and Commission regulations to MAXIMUS’s plan to

17 allow employees to contribute the value of “credits” received as compensation to

18 MAXIMUS’s separate segregated fund, MAXIMUS, Inc. Political Action Committee

19 (“MAXPAC”). The Commission concludes that MAXIMUS may allow its restricted

20 class employees to contribute the value of credits to MAXPAC as proposed.

21 ***Background***

22 The facts presented in this advisory opinion are based on your letter received on

23 November 16, 2009, your emails of November 24 and December 3, 2009, and your

24 telephone conversations with Commission staff.

25 MAXIMUS is a corporation. MAXPAC is MAXIMUS’s separate segregated

26 fund (“SSF”). MAXPAC filed its statement of organization with the Commission in

27 1999.

As set forth in the MAXIMUS Employee Manual, MAXIMUS employees earn

credits as part of a regular compensation plan in addition to their salaries. These credits

are earned in the normal course of employment. The number of credits earned increases

with an employee’s tenure at MAXIMUS. For example, MAXIMUS’s executive

1 employees earn credits at the rate of between 10.00 and 13.34 credits per month and non-
2 executive employees earn credits at the rate of between 6.66 and 13.34 credits per month.
3 Each MAXIMUS employee may have no more than 240 unredeemed credits at a time.

4 MAXIMUS employees control the use of their earned credits in that they may
5 redeem one or more of their earned credits for those credits' cash value. The cash value
6 of credits held by an employee is based on a *pro rata* share of that employee's salary.
7 Currently, MAXIMUS employees may exchange their earned credits for the following
8 three purposes: (1) to receive pay while on personal leave; (2) to receive pay during
9 times of financial or personal hardship; and (3) to receive a lump sum payment upon
10 permanently leaving employment at MAXIMUS. At the time credits are redeemed for
11 cash, employees realize income and pay applicable taxes.

12 MAXIMUS proposes to revise its compensation plan to allow its restricted class
13 employees to exchange credits for the credits' cash equivalent for the following
14 additional purposes: (1) to make a donation to MAXIMUS's charitable foundation;¹ and
15 (2) for restricted class employees to make a contribution to MAXPAC. Your request
16 represents that, under the proposed credit plan, employees would realize income and pay
17 applicable taxes at the time credits are redeemed to make a contribution to MAXPAC.
18 MAXIMUS proposes to allow restricted class employees to voluntarily complete and
19 submit a form, a draft of which is attached to the request for an advisory opinion, to
20 authorize MAXIMUS to redeem a number of credits (and partial credits, as necessary to
21 avoid exceeding contribution limits) determined by the employee for the purpose of
22 making a contribution to MAXPAC. This form would be distributed only to restricted

¹ MAXIMUS does not ask, and the Commission gives no opinion on, those aspects of the proposal concerning MAXIMUS's charitable foundation.

1 class employees and would contain all notifications required under the Act and
2 Commission regulations for solicitations to an SSF's restricted class.

3 ***Question Presented***

4 *May MAXIMUS expand its employee credit program, as proposed, to allow*
5 *restricted class employees to redeem credits to make contributions to MAXPAC?*

6
7 ***Legal Analysis and Conclusions***

8 For the reasons discussed below, MAXIMUS may allow its restricted class
9 employees to redeem credits to make contributions to MAXPAC, as proposed.

10 The Act prohibits corporations from using general treasury funds to make any
11 contributions in connection with a Federal election. *See* 2 U.S.C. 441b; 11 CFR 114.2.
12 However, the Act and Commission regulations permit a corporation to solicit its
13 restricted class for contributions to the corporation's SSF. *See* 2 U.S.C. 441b(b)(2)(C)
14 and (4)(A)(i); 11 CFR 114.1(a)(2)(iii), (c), (f) and (j); 114.2(f)(1) and (4)(i); 114.5(g)(1).
15 Corporate solicitation of members of the corporation's restricted class for contributions to
16 the SSF must meet the requirements of voluntariness set out at 2 U.S.C. 441b(b)(3) and
17 11 CFR 114.5(a)(1)-(5). These requirements include, but are not limited to, informing
18 the employee of the political purposes of the SSF and of the employee's right to refuse to
19 contribute without reprisal. 11 CFR 114.5(a).

20 Methods available for corporate collection of contributions from the restricted
21 class to the SSF include, but are not limited to, payroll deduction or checkoff systems,
22 other periodic payment plans, or return envelopes enclosed in a solicitation request. *See*
23 11 CFR 114.1(f), 114.2(f)(4)(i), 114.5(g)(1) and (k); *see also* Advisory Opinion 1999-03
24 (Microsoft PAC). A corporation may not use its treasury monies to pay any contributor

1 for his or her contribution through a bonus or other form of direct or indirect
2 compensation. *See* 2 U.S.C. 441f; 11 CFR 114.5(b)(1).

3 Under the circumstances presented here, the Commission concludes that
4 MAXIMUS's proposal would not constitute a prohibited use of corporate treasury funds
5 to compensate employees for their contributions to MAXPAC. As a preliminary matter,
6 it appears that MAXIMUS's existing credit system is part of a regular compensation plan
7 provided by MAXIMUS to each of its employees; that is, credits are earned in the normal
8 course of employment, at a regular rate, according to terms set forth in the Employee
9 Manual. Moreover, employees control the use of any credits earned and may redeem
10 them in a variety of situations, including as a salary equivalent any time that an employee
11 takes personal leave. Thus, neither the earning of the credits nor the ability to redeem
12 them depends on an employee's contributions to the SSF or other political activity. As
13 such, MAXIMUS's proposal is distinguishable in material aspects from the proposal
14 presented in Advisory Opinion 1986-41 (Air Transport Association). In that advisory
15 opinion, the Commission concluded that providing some employees with additional
16 compensation in recognition of their political contributions would be contrary to the Act
17 and Commission regulations. Accordingly, the proposed expansion of MAXIMUS's
18 credit system to allow restricted class employees also to redeem credits to make
19 contributions to MAXPAC would not constitute augmentation of their compensation to
20 effect a contribution in violation of the Act or Commission regulations.

21 The proposed expansion of MAXIMUS's credit program is analogous to a
22 corporate payroll deduction plan, which the Commission has found to be an acceptable
23 method of facilitating contributions to a corporation's SSF. *See* 11 CFR 114.1(c) and (f),

1 114.5(k)(1); Advisory Opinions 1999-03 (Microsoft PAC) and 1996-42 (Lucent
2 Technologies). Like a payroll deduction plan, MAXIMUS's proposed plan requires
3 affirmative authorizations from restricted class employees before any credit can be
4 redeemed and contributed to MAXPAC. In fact, MAXIMUS's proposed plan would
5 require such authorizations for each discrete contribution of credits.

6 Under MAXIMUS's proposal, only the restricted class employees would be
7 solicited for contributions of credits to MAXPAC. MAXIMUS's proposed solicitations
8 would include the necessary disclaimers regarding voluntariness, including the political
9 purposes of MAXPAC and the employee's right to refuse to contribute. If MAXIMUS's
10 solicitation of the restricted class to contribute the cash value of credits contains
11 guidelines as to an amount of credits that employees should contribute, the solicitation
12 must make clear that the guidelines are merely suggestions and that other amounts,
13 including partial credits, may be contributed instead. *See* 11 CFR 114.5(a)(2); Advisory
14 Opinion 1999-06 (National Rural Letter Carriers' Association). Provided the
15 solicitations comply with these requirements, the proposed solicitations for MAXIMUS's
16 expanded credit system are consistent with the Act and Commission regulations.

17 An employee's contributions to MAXPAC of the cash value of redeemed credits,
18 whether in whole or in part and as aggregated with other contributions to MAXPAC from
19 that employee, must comply with applicable contribution limits in the Act and
20 Commission regulations. *See, e.g.,* 2 U.S.C. 441a(a)(1); 11 CFR 110.1.

21 Finally, MAXIMUS, as a corporation that collects and transmits contributions to
22 its SSF, is responsible for complying with the rules concerning a "collecting agent" under

1 the Act and Commission regulations. *See, e.g.*, 2 U.S.C. 432(b)(2); 11 CFR 102.6(b) and
2 (c), 102.8(b); Advisory Opinion 2000-11 (Georgia-Pacific Corp.).

3 The Commission expresses no opinion regarding the application of Federal tax
4 law to the proposed activities, because those questions are not within the Commission's
5 jurisdiction.

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

17 The cited advisory opinions are available on the Commission's Web site at
18 <http://saos.nictusa.com/saos/searchao>.

19 On behalf of the Commission,
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23 Matthew S. Petersen
24 Chairman
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