



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2006-34

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Dear Messrs. Sandler and Lowell:

We are responding to your advisory opinion request on behalf of Working Assets, Inc. (“Working Assets”), concerning the application of the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to a proposed program in which political committees would serve as sponsors of wireless telephone service provided by Working Assets to individual customers. Specifically, you ask whether the proposed arrangements between Working Assets and the sponsoring political committees would result in impermissible corporate contributions by Working Assets to the political committees.

The Commission concludes that the arrangements would not result in impermissible corporate contributions, so long as Working Assets and the political committees comply with the conditions described below.

Background

The facts presented in this advisory opinion are based on your letters received on October 6, October 30, and November 15, 2006.

a. Current Programs

Working Assets is a closely held for-profit corporation specializing in donation-linked telecommunications and credit card services. During its more than 20 years of existence, it has contracted with various non-profit organizations to provide to those organizations a portion of

the billed amounts paid by Working Assets' customers. Under some of these "affinity" programs, ten cents of each of a credit cardholder's purchases and one percent of each long distance or wireless phone customer's charges were donated to a fixed pool of non-profit organizations (along with the customer's optional donation of a "round-up" of the monthly bill payment). Working Assets has also established affinity programs specific to particular non-profit organization "partners," in which one percent of the long-distance charges of a customer associated with a given non-profit partner was donated to that partner.

In addition, Working Assets recently entered into affinity sponsor programs with two large non-profit, section 501(c)(3) organizations to market wireless service to their members and supporters. Working Assets donates ten percent of each customer's monthly charges to his or her organization. Working Assets is currently negotiating with several other large section 501(c)(3) and (c)(4) organizations for their participation, and this program is available to any section 501(c)(3) or (c)(4) organization that meets Working Assets' criteria for commercial viability. You state that this non-profit affinity program represents a "major component of [Working Assets'] growth strategy," and that two senior level positions in Working Assets' management are dedicated exclusively to managing and marketing non-profit affinity partnerships. Working Assets projects that affinity programs with the ten percent donation feature will account for 29 percent of its wireless revenue by the end of 2007.

In 1991, Working Assets also created a "Citizen Action" program to provide its long-distance and wireless customers with an opportunity to communicate their views on legislative and public policy issues to elected and appointed officials. Each customer's monthly bill contains "alerts" urging the customer to take action on specific issues and identifying officials to contact. The customer can call the identified officials free of charge on the customer's regular or wireless phone or can have Working Assets send a letter to the official for a fee paid by the customer.

b. The Proposed Program

Working Assets proposes to expand its affinity relationships to Federal political committees and to qualified non-profit corporations ("QNCs") as described in 11 CFR 114.10. The proposed affinity program would be made available to any political party committee, non-connected political committee, or QNC that asks to participate, without regard to party affiliation or ideological orientation, "but subject to each particular program's commercial viability determined by common commercial principles," including, for example, size of membership and hence number of potential customers, potential for long-term customer commitment, strength of trademark, and credit rating of membership.¹ (Political committees and QNCs that would partner with Working Assets are hereinafter referred to as "political committee sponsors" or "committee sponsors.") You state that information about the political affinity program would be made available on the Working Assets website, which is publicly accessible, with contact information enabling interested parties to approach Working Assets. As with the non-profit affinity program, Working Assets would also actively approach potential political committee sponsors.

¹ The program will not be made available to separate segregated funds or authorized committees of candidates.

i. The Political Committee Sponsor Program

Under the political committee sponsor program, each committee sponsor would allow Working Assets to use the committee sponsor's name, trademark, and supporter list in marketing Working Assets' mobile phones and wireless services to the committee sponsor's individual members and supporters. Working Assets would pay the costs of this marketing, which would include direct mail and/or on-line communications that contain messages from the political committee sponsor soliciting support. The messages might refer to past elections or electoral results, but would not refer to current or future elections or current Federal candidates.

Individual customers who purchase the phones and wireless services from Working Assets would be offered an automatic rebate of ten percent of their monthly charges. At the time of enrollment, customers would be given the option either (1) to receive the rebate in the form of a credit on the customer's next bill, or (2) to direct the rebate amount as a contribution to the political committee sponsor. Customers would be able to change their rebate designations at any time by contacting customer service. In addition, customers would receive annual notices in their bills allowing them to affirm or change their rebate designations. Regardless of which option a customer chooses, the customer would also be able to contribute to the political committee sponsor by "rounding up" monthly charges and specifying the rounded up amount as a contribution. When the customer authorizes the forwarding of rebates as contributions, the customer would provide his or her name, address, occupation, and employer name to Working Assets, which Working Assets would forward to the political committee sponsor.

You state that the donation form in the bill would include all the required "disclaimer" language in connection with the solicitation of contributions (*see* 2 U.S.C. 441d and 11 CFR 110.11) and would describe the source prohibitions and amount limitations on contributions. The form would require contributors to provide their name, address, occupation, and employer's name. Working Assets would transmit this information to the political committee sponsor "in time to meet the Sponsor's recordkeeping and reporting requirements" under the Act and Commission regulations.

All rebates directed to the political committee sponsor would be credited to the sponsor's depository account through an automated clearinghouse transaction within 24 hours after Working Assets receives payment of the customer's bill. All contributions received as a result of a round-up would be forwarded to the political committee within 24 hours of Working Assets' receipt.

Political committee sponsors may also insert and pay for issue advocacy "Citizen Action" alerts in the customers' bills. As with the current Citizen Action programs, customers could call the identified decisionmakers without paying a charge, or could pay Working Assets to send a letter to the decisionmaker. The bills may also include advertising space for content created, and paid for, by the political committee sponsor. The advertising space would include the committee sponsor's disclaimer as required by 2 U.S.C. 441d and 11 CFR 110.11.

ii. Financing

Each political committee sponsor would allow Working Assets to use the committee sponsor's supporter list in exchange for the costs incurred by Working Assets in soliciting individuals on the list to enroll in the committee sponsor program. You state that the list, in all cases, (1) will have been developed by the committee sponsor in the normal course of its operations primarily for its own use, rather than for sale to, or lease by, others, and (2) will have an ascertainable fair market rental value.

You acknowledge that the full cost of the marketing effort will exceed the fair market rental value of the list, but assert that because the marketing services will benefit both Working Assets and the political committee sponsor, only a portion of the marketing costs should be attributable to the committee sponsor. Working Assets proposes to allocate these costs on the basis of the division of the wireless charges. Specifically, because each individual customer would get a ten percent rebate which could be contributed to the committee sponsor, and Working Assets would retain 90 percent of the proceeds, Working Assets would allocate the marketing costs on a ten percent (committee sponsor)/90 percent (Working Assets) basis. Working Assets would rely primarily on direct mail to communicate with prospective customers but would use a less expensive method of communication to ensure that ten percent of the solicitation costs does not exceed the fair market list rental value. If Working Assets uses a committee sponsor's list multiple times, the fair market list rental value of the multiple uses would equal or exceed ten percent of the marketing costs. Additional marketing of the program may be accomplished through the political committee sponsor's already existing means of communication with its supporters, at no cost to Working Assets.

In addition, the political committee sponsor would pay Working Assets for any costs incurred by Working Assets to process the rebates and rounded-up contributions directed to the committee sponsor and to transmit the contributions and contributor information to the committee sponsor. The committee sponsor would also pay for any space in the bills that it uses for advertisements or Citizen Action Alerts, and all expenses related to the customers' calls to decisionmakers. The individual customers would pay for their Citizen Action letters to decisionmakers.

Question Presented

Would Working Assets' proposed political committee sponsor program result in impermissible corporate contributions by Working Assets to the political committee sponsors?

Legal Analysis and Conclusions

No, the arrangements would not result in impermissible corporate contributions, so long as Working Assets complies with the conditions set out below.

The Act and Commission regulations specifically 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) and 11 CFR 100.52(a); *see also* 2 U.S.C. 441b(b)(2) and 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 various affinity programs and similar programs involving political committees and providers of credit card or telephone services. *See* Advisory Opinions 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), 1990-1 (Digital Corrections), 1988-12 (Empire of America Federal Savings Bank), and 1979-17 (RNC). In these advisory opinions, the Commission permitted each of the corporations to offer an affinity or similar program so long as the corporation and the political committee (1) enter into a commercially reasonable transaction in which the political committee pays the usual and normal charge for any services provided or such services are provided in exchange for bargained for consideration of equal value, such as the use of a committee’s mailing list (*see, e.g.*, Advisory Opinions 2003-16, 2002-07, and 1995-34); and (2) the amounts contributed to the political committee are from the individual customer’s funds and not from the corporation’s funds. *See, e.g.*, Advisory Opinions 2003-16 and 1994-33.

a. Usual and Normal Charge

In determining whether Working Assets’ proposed program would be commercially reasonable, the Commission must consider whether the political committee sponsors would provide sufficient compensation, *i.e.*, the usual and normal charge, including a reasonable profit, to Working Assets for the services that Working Assets would provide to them. *See* Advisory Opinions 2004-19 (DollarVote), 2002-07 and 1994-33; *see also* Advisory Opinion 2003-16. The Commission assumes that the commercial viability of Working Assets’ relationship with each committee sponsor would stand or fall on its own, based on your statement that the availability of the political affinity program to any given political committee would be subject to “each particular program’s commercial viability determined by common commercial principles.” Thus, Working Assets would not depend on profitability from its relationships with other clients to sustain the arrangement with a particular committee sponsor.

i. The Political Committee Sponsor Program

Working Assets proposes to pay the costs of marketing its mobile phones and wireless services to political committee sponsors’ members and supporters. The marketing would include direct mail and/or on-line communications with messages from the political committee sponsor soliciting support. Working Assets proposes to provide solicitation services in exchange for the use of the political committee sponsor’s mailing list.

The sale or rental of a political committee's mailing list is permissible under certain conditions, if the mailing list has an ascertainable market value and will be used in a commercially reasonable manner consistent with a *bona fide* arm's length transaction.² See Advisory Opinion 2003-16. You state that each political committee sponsor's mailing list would have an ascertainable market value. If, however, the value of the solicitation services provided by Working Assets to a political committee sponsor exceeds the usual and normal rental charge for the committee sponsor's mailing list, then Working Assets would be making a contribution to the committee sponsor. See 11 CFR 100.52(d).

The marketing services to be provided by Working Assets would differ from solicitation services usually provided by commercial vendors to political committees. Typically, political committees hire commercial vendors to help them raise funds by, for example, mailing requests for contributions to the political committees to potential contributors, along with postage paid return envelopes in which to send checks made out to the political committee. In some cases, a commercial vendor may be hired by or help a political committee to raise funds by selling products or services on behalf of the political committee, such as T-shirts or 900-line services, in which the entire amount of the caller's payment is a contribution to the political committee. See, e.g., Advisory Opinions 1995-34 and 1989-21 (Create-A-Craft); see also 11 CFR 100.53. In such cases, the purpose of the communication is to raise funds for the political committee, and any money raised will go to the political committee (in some cases, after the commercial vendor deducts its fees). Accordingly, the fair market value of the solicitations must be paid by the political committee.

By contrast, Working Assets' communications with potential customers would serve two distinct purposes. The primary purpose of the solicitations would be to generate customers for Working Assets from the names on the political committee sponsor's mailing list. The secondary purpose would be to generate contributions for the political committee sponsor. The fulfillment of the secondary purpose is also contingent in nature, because a solicitation could not result in a contribution to a political committee sponsor unless and until a potential customer subscribed to Working Assets' wireless services and then opted either to round up a bill payment or to instruct Working Assets to direct the customer's ten percent billing rebate to the political committee sponsor.

Under these circumstances, it would be inequitable to require a political committee sponsor to pay the full value of Working Assets' marketing services. Working Assets proposes to value its solicitation services to a political committee sponsor at ten percent of Working Assets' marketing costs, and this ten percent figure reflects the usual and normal charge for the services being provided to political committee sponsors under the facts presented. The provision of solicitation services so valued in exchange for use of the political committee sponsor's mailing list would not be a contribution to the political committee sponsor.

² In addition, the mailing list must have been developed by the political committee over a period of time in the normal course of its operations primarily for its own political or campaign use, rather than for sale or lease to others, and rental of the list must be only a small percentage of the committee's overall use of the list. See Advisory Opinions 2003-19 (Democratic Congressional Campaign Committee) and 2002-14 (Libertarian National Committee). You indicate that the committee sponsors' mailing lists would satisfy these criteria.

ii. Working Assets' Other Services

Under your proposal, the political committee sponsor would pay Working Assets directly for expenses related to processing and transmitting contributions and contributor information; expenses related to Citizen Action Alerts from the sponsor and related phone calls by individuals to decisionmakers at the sponsor's behest; and advertising space in bills sent to the customers. As part of a commercial arrangement for the types of services that Working Assets already provides in its ordinary course of business to non-profit committee sponsors, the sponsor need not pay in advance for these services, but must pay the usual and normal charge within a commercially reasonable period of time in the ordinary course of business. *See* 11 CFR 100.52(d) and 116.3(b), (c), and (d).

The Commission therefore concludes that Working Assets would act as a commercial vendor in providing solicitation services in exchange for the political committee sponsor's membership and supporter list, and other services in exchange for payment by the sponsor, and thus would not make or facilitate a corporate contribution to the political committee sponsor. *See* 11 CFR 114.2(b), (f)(1), and (f)(2)(i); *see also* Advisory Opinions 2004-19 and 2003-16. This conclusion is premised on the facts, conditions, and assumptions set out above.

b. Customer Contributions

The Commission concludes that the provision by Working Assets of rebated and rounded-up amounts to political committee sponsors would be contributions by Working Assets' customers, rather than impermissible contributions by Working Assets through its customers, for two reasons. *See* 2 U.S.C. 441f; 11 CFR 110.4(b). First, the rebates and round-ups would occur in the ordinary course of Working Assets' business.³ Although Working Assets has not offered rebates to customers in the past, its existing and developing affinity arrangements with 501(c)(3) and (c)(4) organizations, under which ten percent of Working Assets' wireless charges to customers affiliated with an organization are donated to that organization, result in a similar reduction in the amount of customer charges kept by Working Assets. You indicate that these arrangements for ten percent donations will account for 29 percent of Working Assets' wireless business by the end of 2007. Working Assets' existing affinity programs also provide for the donation of rounded-up amounts.

Second, Working Assets' customers, rather than Working Assets, would control the disposition of rebates and round-ups under your proposal. *See* Advisory Opinion 2003-16. Working Assets would forward to a political committee sponsor only rebated amounts that the customer has directed Working Assets to forward to the committee sponsor, or amounts that the customer has elected to pay as a round-up for the committee sponsor. Each customer would direct Working Assets either to forward rebated funds to a committee sponsor or to credit them to the customer's next bill, and each customer could change this direction at any time. Working Assets must not forward any contributions to a political committee sponsor until after Working

³ *See* Advisory Opinions 2004-18 (Friends of Joe Lieberman) and 1985-28 (Friends of Lane Evans) (concluding that a discount or rebate to a political committee does not result in a contribution if it is made available in the ordinary course of business, and on the same terms and conditions to the company's customers that are not political committees or organizations).

Assets receives and deposits the customer's bill payment. Otherwise, the contributions would constitute an advance of corporate funds, prohibited by 2 U.S.C. 441b(a). *See* 2 U.S.C. 441b(b)(2); 11 CFR 114.1(a)(1).

c. Collection and Transmittal of Contributions

You indicate that all rebates directed by the customer to the political committee sponsor would be credited to the committee sponsor's depository account through an automated clearinghouse transaction within 24 hours of Working Assets' receipt of the bill payment, and that contributions of rounded-up amounts would also be forwarded within 24 hours of receipt. When corporate commercial vendors receive one payment that includes both amounts to be forwarded to political committees and amounts sent to the corporation, the corporation must keep the funds separate to avoid commingling corporate funds with contributions. *See* Advisory Opinions 2004-19, 1999-22 (Aristotle Publishing), and 1991-20, n.5. Hence, Working Assets would have to place the contributed amounts from rebates and round-ups in an account separate from its other accounts, *i.e.*, a separate bank account for payments by check, or a merchant account for credit card transactions, before transmitting them to the political committee sponsors, rather than transmitting funds from Working Assets' usual treasury accounts. *See* Advisory Opinions 2004-19 and 2002-07. Working Assets may establish one separate merchant account and one bank account for payments by check for all political committee sponsors, so long as Working Assets maintains separate records for contributions to each committee sponsor. *See* Advisory Opinion 1999-22.

You indicate that the donation form would inform the customer of the contribution limits and source prohibitions of the Act,⁴ and that Working Assets would obtain and forward contributor information to the committee sponsor in time for the committee sponsor to meet its reporting obligations. Please be advised that, under 2 U.S.C. 432(b)(2)(B) and 11 CFR 102.8(b)(2), Working Assets must transmit contributor information for any contribution exceeding \$50, and the contribution, within ten days of receipt of the bill payment, even if a later transmittal of the information would enable the committee sponsor to meet its reporting obligations.⁵

d. Solicitations and Other Communications

You state that solicitations sent to prospective individual customers would include a message from the committee sponsor asking for support, but would not refer to current or future elections or current Federal candidates. This aspect of the proposal is consistent with the solicitations to prospective customers approved by the Commission in Advisory Opinion 2003-16.

⁴ The Commission notes that the initial and any follow-up solicitations to prospective customers must also provide that the contributions will be subject to the Act's limitations and prohibitions. *See* 11 CFR 102.5(a)(2)(iii).

⁵ In addition, any contribution of \$50 or less must be forwarded to the sponsor within 30 days of Working Assets' receipt of the bill payment. *See* 2 U.S.C. 432(b)(2)(A); 11 CFR 102.8(b)(1). You have already indicated that each contribution would be forwarded within 24 hours of the bill payment's receipt by Working Assets.

The Commission notes your representations that the bills would include disclaimers pursuant to 11 CFR 110.11. Since the political committee sponsors are not authorized committees, the bills must contain the disclaimers required by 2 U.S.C. 441d(a)(3) and 11 CFR 110.11(b)(3). The initial and any follow-up solicitations to prospective customers must also include the disclaimer described by 2 U.S.C. 441d(a)(3) and 11 CFR 110.11(b)(3). *See also* 2 U.S.C. 441d(c) and 11 CFR 110.11(c)(2).

e. Impact of Proposal on QNCs

Unlike other corporations, QNCs may engage in political spending by making independent expenditures and electioneering communications. *See* 11 CFR 114.10(d)(1) and (2). Only a non-profit 501(c)(4) corporation that meets certain specified criteria will be deemed a QNC. *See* 11 CFR 114.10(c)(5). These criteria include the requirement that the corporation have “[n]o persons who are offered or who receive any benefit that is a disincentive for them to disassociate themselves with the corporation on the basis of the corporation’s position on a political issue.”⁶ 11 CFR 114.10(c)(3)(ii).

Under your proposal, Working Assets would offer affinity wireless service to supporters of a QNC sponsor, with the accompanying ten percent rebate that could be applied as a credit on the customer’s next bill. Based on your request, the Commission assumes that the service and rebate would be available on the same terms to individuals who are not members of the QNC, and that individuals could continue to be eligible for the service and rebate even after they terminate their membership with the QNC. In light of this, a corporation would not lose its QNC status by becoming a committee sponsor.

The Commission expresses no opinion regarding any tax ramifications of the proposed activities because those issues are not within the Commission’s 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 requestor may not rely on that conclusion as support for its proposed activity. All cited advisory opinions are available on the Commission’s website at www.fec.gov.

Sincerely,

(signed)

Robert D. Lenhard
Chairman

⁶ The corporation must also: (1) have as its only express purpose the promotion of political ideas; (2) not engage in business activities; (3) have no shareholders or other persons (other than employees or creditors) who are affiliated in such a way that they could have a claim on the corporation’s assets or earnings; and (4) not be established by a business corporation or labor organization, nor accept donations from such organizations. *See* 11 CFR 114.10(c)(1), (2), (3)(i), and (4).