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By Office of General Counsel at 5:40 pm, Sep 21, 2021

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By Office of the Commission Secretary at 8:04 am, Sep 22, 2021

September 21, 2021

Federal Election Commission
Office of General Counsel
1050 First Street, NE
Washington, DC 20463

Re: Advisory Opinion Request – Retail Benefits Inc.

Dear Sir/Madam:

Pursuant to the Commission’s regulations, 11 C.F.R. § 112.1, on behalf of Retail Benefits Inc., we request an advisory opinion confirming that a Political Affinity Program proposed to be offered by RBI to federal political committees is permissible under the Federal Election Campaign Act of 1971, as amended (the “Act”) and the Commission’s regulations.

Background

Retail Benefits Inc. (“RBI”), founded in 2010, is a closely held, privately owned, for profit corporation organized under the laws of the State of Florida. No RBI shareholder is a federal candidate or foreign national. RBI has developed unique and proprietary processes through which it can identify cashback, rebates, and other incentives (collectively, “rebates”) offered by internet merchants, and then make those rebates available to internet shoppers who use RBI’s platform to make qualifying purchases from such merchants.

RBI customers use the RBI platform to shop at a variety of affiliated internet merchants. Participating merchants agree that when an RBI customer makes a qualifying purchase through the RBI platform, the merchant will transfer a portion of that payment back to RBI as a rebate. RBI in turn shares an agreed upon portion of that rebate with the customer. This portion is accumulated in the customer’s account with RBI, which is then periodically distributed to customers at certain prearranged amounts and intervals.

Proposed Setup

RBI proposes to allow customers to use all or a portion of the rebates accumulated in their RBI accounts to make donations to federal political committees, to include candidates’ authorized committees, political party committees, nonconnected committees, and leadership PACs (“Committees”). Customers will not be permitted to donate to corporate or labor union PACs. RBI intends to limit the total donations for any individual customer to \$200 per calendar year. Customers will be able to allocate their donations as they wish among the various Committees that may be available through the portals on RBI’s platform, but their donation in total will not exceed \$200.

All rebates eligible for donation to a Committee would be made from funds that are the customer’s property. As evidence of this, RBI would only permit a customer to contribute

rebated funds to a Committee if the customer first agreed to treat the rebate as earned income and to receive an IRS Form 1099 from RBI. RBI will issue 1099 Forms to such customers as required by law. Under current IRS rules, RBI does not anticipate issuing any 1099 Forms since all donations will be limited to \$200 per person per year, below the IRS reportable threshold of \$600.

RBI will segregate these amounts in a separately maintained bank account (the “Customer Account”) that will contain only rebated funds recognized by a customer as their own property. All other funds under RBI’s control, including RBI’s corporate account and any account that contains rebate funds that are not customer property, will be segregated from Customer Accounts. Contributions to Committees will only be made from Customer Accounts.

Funds transferred to RBI from merchants, including rebates earned by RBI’s customers, will be allocated between RBI’s corporate account (for funds owed to RBI) and a segregated Customer Account (for rebates earned by RBI’s customers). Merchants normally transfer funds to RBI’s corporate account monthly. RBI in turn credits the customer’s share of these rebated into the Customer Accounts each month as soon as practicable after receipt from the merchants. Once the funds earned by RBI’s customers are in the Customer Account, such funds will in turn either be disbursed to the customers as rebates or transferred to a Committee based on the customer’s prior elections. Before RBI will transfer any funds from the Customer Account to a Committee, each customer must first have agreed to treat the funds as taxable income and to receive an IRS Form 1099 from RBI as required by law that identifies the rebates as income to the customer. Customers will be able to contribute to Committees only from funds in the Customer Account.

How a Customer Signs Up

RBI will create a separate web-based portal for each Committee that decides to use RBI’s services. In the normal course of business, RBI does not charge to set up portals and RBI does not intend to charge Committees for doing so here. RBI normally derives its revenue from the shopping activity of customers, not from the setting up of portals.

These Committees will then offer this portal to donors as a method to make political contributions by shopping online. Each Committee will be responsible for driving traffic to their portal; RBI will not solicit customers on any Committee’s behalf and RBI’s role will be limited solely to interacting with customers on matters relating to their online shopping and cashback.

When a customer first signs up to use a Committee’s portal, they will be given the option of donating all or a portion of the rebates that they will earn to that particular Committee. Customers are not required to donate at all in order to use the portal to shop. Customers who choose to donate through the Committee’s portal will earn rebates at the same rates and on the same terms as customers who choose not to donate.

The decision to donate as well as the amount of the donation may be changed or revoked prospectively at any time prior to the time the rebate is moved into the Customer Account. If a customer has an existing donation election at the time the funds are transferred to their Customer Account, that election will be implemented and the relevant portion will be transferred to the Committee within ten days of the receipt of the funds by RBI. It is RBI's intention that customers will not be permitted to revoke an existing donation election once those funds have moved into the Customer Account; the customer will not at that time be able to choose instead to have those funds paid to themselves as a rebate. However, RBI's software can be modified to allow for this if required for compliance with the Federal Election Campaign Act.

Prior to RBI processing a contribution to a Committee, the customer will be required to provide identifying information including their name, address, occupation, and employer. Customers will also be asked to certify that:

- They are an individual who is a United States citizen or permanent lawful resident alien;
- They are not a federal contractor; and
- Any money (including any sums from a rebate) used to donate has been earned from payments made from the customer's own personal funds and not from the funds of a corporation or labor organization or from funds provided to them by any another person.

Customer contributions to Committees will be transferred from the Customer Account to the Committee within ten days of the receipt of the funds by RBI. RBI will forward with each contribution all information the Committee would need to report the identity of the donor, as well as an acknowledgement that the customer has certified that they are a United States citizen or permanent lawful resident alien and that the funds donated have been earned from payments made from their own personal funds and not from the funds of a corporation or labor organization or funds provided to them by any another person. RBI will not transfer contributions that exceed the permissible contribution limits.

Information RBI Provides to Its Customers About Federal Campaigns

RBI intends to offer its platform equally to any Committee that wishes to use it. It is possible that not all Committees may be available to customers to choose as recipients, but that will be due to a Committee's decision not to participate, rather than to any filtering or gatekeeping by RBI. RBI as an organization does not support any particular candidate, political party, or political cause. RBI will not create or offer content or information that advocates for the election or defeat of any candidate for public office. Nor will it create or offer content or information that promotes, attacks, supports, or opposes any candidate, political party, or other political committee.

Funding of RBI

In the ordinary course of business, RBI may generate revenue from two different sources. First, it may receive incentives and other income from affiliated merchants based on the overall volume of purchases made by RBI shoppers. Second, it may receive rebates from affiliated merchants, some of which are designated as funds that RBI's customers will have available to make contributions with. All these fees and rebates would be set at its customary market rates for similar commercial transactions.

Questions Presented and Discussion

1. May RBI follow a customer's instruction to transfer some or all of the customer's rebates to a Committee?

RBI provides processing services to individual donors, allowing them to direct the transfer of their personal funds to any Committee of their choosing available through RBI's portals. The decisions on timing, amount, and the recipient of donations rests solely with these donors, as does the decision as to whether to give to a particular Committee. Because RBI provides its services at the request and for the benefit of its customers and is compensated for that based on commercial transactions by its customers, not the recipient Committees, RBI is serving as a vendor to its customers and its services do not result in impermissible contributions from RBI.

RBI's services fit within the range of permissible activity previously recognized in Advisory Opinions 2012-09 (Points for Politics), 2011-09 (GivingSphere), 2011-06 (Democracy Engine), and 2010-06 (Famos LLC). In these advisory opinions, which evaluate similar contribution processing services, the Commission distinguished between companies that provide services to individual donors and those that provide services to political committees. In both opinions, the Commission concluded that a company that provides contribution processing services to individual donors rather than political committees is not considered to be making contributions from the company itself See AO 2012-09, at 5; AO 2011-09, at 5; AO 2011-06, at 1; AO 2010-06, at 5; AO 2006-08, at 4.

Advisory Opinion 2011-19 (GivingSphere) addressed a virtually identical setup to the one proposed here. There, customers were permitted to accumulate funds to use as donations by making purchases from affiliated merchants who agreed to rebate a portion of the purchase price. After a customer made a qualifying purchase from a participating merchant, the merchant transferred a portion of the customer's payment back to GivingSphere, which GivingSphere then placed at the customer's control.

The Commission concluded that the funds that would be contributed to political committees under GivingSphere's proposal would be permissible contributions made by GivingSphere's customers, and not impermissible contributions made by GivingSphere itself. This was based on the fact (1) that customers would accumulate rebates in the ordinary course of business, (2) that merchants participating in GivingSphere's affiliate program would rebate the same amounts to all GivingSphere customers, regardless of whether particular customers used the rebates as political contributions, and (3) that GivingSphere would charge a commercially

reasonable fee when its customers make purchases from affiliated merchants, regardless of how the customers ultimately dispose of their rebates. Based on this, the Commission concluded that the rebates will be offered to customers in the ordinary course of GivingSphere's business. AO 2011-19, at 6.

Similarly, the Commission concluded that the rebates that GivingSphere would transmit to political committees would be the property of GivingSphere's customers, rather than GivingSphere, since GivingSphere would transfer to political committees only those funds that an individual customer agreed to treat as personal income for IRS purposes, and which GivingSphere had placed in a customer-owned account. In addition, GivingSphere would transfer funds to political committees only when directed to do so by GivingSphere's customers. Moreover, GivingSphere's customers would have the ability to direct these funds to any political committee available on GivingSphere's platform. *Id.*

Advisory Opinion 2010-06 (Famos LLC) addressed another virtually identical setup to the one proposed here. There, customers were permitted to accumulate funds to use as donations by making purchases from affiliated internet merchants and to then use all or a portion of such funds to make donations to political committees. The Commission concluded that "it is permissible for affinity programs to generate revenue in the form of rebates or rewards to individual customers or users, who then choose to pass their earned revenue on to a political committee affinity partner. . . . In considering these programs, the Commission focused on the facts that (1) the revenue or rebate was offered to individual customers or users in the ordinary course of business, and (2) the revenue was the property of the individual customer who – rather than the corporate affinity partner – controlled the disposition of the revenue." AO 2010-06, at 7.

Advisory Opinion 2012-09 (Points for Politics) involved a similar arrangement where "points" rather than cashback was accumulated by internet shopping. These points were permitted to be converted into donations to political committees. Based on this setup, the Commission reached a similar conclusion that "Points for Politics may implement its proposed system without itself making contributions, or violating the Act or Commission regulations." AO 2012-09, at 7.

In Advisory Opinion 2011-06 (Democracy Engine), a company proposed a web-based payment service that would provide individual subscribers the opportunity to make donations to various entities, including federal political committees. The company did not intend to contract with political committees, except for the limited purpose of electronic funds transfers. The Commission concluded that the company's services were permissible, and that they were materially indistinguishable from the services approved by the Commission in Advisory Opinion 2006-08 (Brooks). In Advisory Opinion 2006-08 (Brooks), the Commission concluded that a company providing online services that assist individuals in making contributions was "similar to corporations that provide delivery services, bill paying services, or check writing services." AO 2006-08, at 4. In both opinions, the Commission concluded that the companies' donor-focused services would not result in impermissible contributions by the company to any political committee.

RBI's services fit squarely within these permissible activities. As with the companies in Advisory Opinions 2012-09 (Points for Politics), 2011-09 (GivingSphere), 2011-06 (Democracy Engine), and 2010-06 (Famos LLC), RBI intends to enter into service agreements with individual donors. Fees for RBI's services will be charged to its customers to transmit customer funds to recipient Committees. Any funds transmitted to such Committees will be funds belonging to the customers in the form of rebates the customer has earned and chosen to treat as income. RBI will maintain a separate account for these customer funds, segregated from its corporate accounts. Finally, decisions on when, how much, and to whom a contribution is transferred are made by the customer and not by RBI or by any Committee.

Therefore, based on the Commission's analysis and conclusions in Advisory Opinions 2012-09 (Points for Politics), 2011-09 (GivingSphere), 2011-06 (Democracy Engine), and 2010-06 (Famos LLC), because RBI will "process contributions at the request and for the benefit of its subscribers, and not the recipient political committees," RBI's services will similarly not result in impermissible contributions by the Company.

2. Must RBI file any reports with the Federal Election Commission based on the activities described herein?

As noted in the discussion of Question 1, RBI's services are provided at the request and for the benefit of its customers. RBI agrees to receive customer funds in the form of rebated funds from merchants, to hold them, and allocate them as the customer directs. Any funds that a customer decides should be used as a contribution to a Committee will be funds belonging to that customer in the form of rebated funds the customer has chosen to earn as income and receive an IRS Form 1099. The customers choose when, how much, and to whom to contribute using their own funds. In this way, RBI operates in these transactions much as a bank, credit card company or overnight mail service might, in transmitting funds to the recipient. RBI will include all the appropriate individual contributor information with its transfers to Committees necessary for the Committees to comply with their reporting obligations, and the reports of those Committees will provide complete and accurate information as to the identity of the donor.

RBI does not solicit contributions for its own use or on behalf of Committees. In addition, RBI does not engage in express advocacy on its platform. Because RBI does not accept contributions or make expenditures under the Act, but merely provides a service for its customers to make contributions, RBI will not be required to file reports to the Commission based on the activities described herein.

Conclusion

For all the foregoing reasons, RBI therefore request an advisory opinion confirming that it may include federal political committees among the choices it offers its customers. Such federal political committees will include candidates' authorized committees, political party

committees, nonconnected committees, and leadership PACs but will exclude corporate and labor union PACs.

Please do not hesitate to contact the undersigned if you have any questions.

Sincerely,



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