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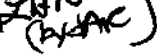
2002 SEP 19 P 4:24

**MEMORANDUM**

September 19, 2002


TO: The Commission

THROUGH: James A. Pehrkon   
Staff Director

FROM: Lawrence H. Norton   
General Counsel

Rosemary C. Smith   
Acting Associate General Counsel

Mai Dinh   
Acting Assistant General Counsel

Michael Marinelli   
Staff Attorney

SUBJECT: Advisory Opinion 2002-07

**AGENDA ITEM**  
For Meeting of: ~~10-08-02~~  
10-10-02

Attached is a proposed draft of the subject advisory opinion. This draft represents a redraft of Agenda Document 02-47 first circulated to the Commission for the July 18, 2002 open meeting. Following the receipt of a July 16 comment from the requestor, Agenda Document 02-47 was withdrawn from consideration. Following a review of the comment, previously received request materials, and additional materials received August 19, this Office has prepared the following draft which substantially changes the analysis and conclusions of the Agenda Document 02-47. We request that this draft be placed on the Agenda for October 8, 2002.

Attachment

1 ADVISORY OPINION 2002-07

2

3 Richard F. Carrott, President

4 Careau & Co.

5 PO Box 94073

6 Simi Valley, CA 93094-0733

7

8 Dear Mr. Carrott:

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10 This refers to your letters dated August 18, July 16, May 21, and May 6, 2002, on  
11 behalf of Careau & Co. ("Careau") and Mohre Communications ("Mohre"), an affiliate of  
12 Careau, (collectively, "the Companies") concerning the application of the Federal  
13 Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to  
14 what you describe as "the sale and use of Internet Service Provider ("ISP") services for  
15 Internet-based political fundraising to make contributions to Federal political  
16 committees." <sup>1</sup>

17 You state that Careau, a California corporation, is a marketing company that  
18 develops programs for the Internet. It has two pending patent applications that it has  
19 licensed to Mohre, a Nevada corporation, to facilitate their joint proposed program for the  
20 making of Federal election contributions. As part of this program, Mohre will provide  
21 services as an Internet Service Provider and Portal. You state that individuals who  
22 access the Internet site operated by the requestors will be able to subscribe to the ISP  
23 services they offer. However as part of the service, subscribers will be required to make  
24 two monthly categories of payments: one for the cost of the ISP service and the other in  
25 the form of a contribution to either a Federal political committee or a charitable donation

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<sup>1</sup> You submitted an earlier version of your proposal on November 21, 2001 which became Advisory Opinion Request 2001-20. This request was later withdrawn by letter dated January 19, 2002.

**DRAFT**

1 to a 501(c) organization.<sup>2</sup> You affirm that an individual will not be able to subscribe or  
2 maintain a subscription to the ISP services without making either a donation or a political  
3 contribution as described below.

4 The various Federal political committees participating in the program ("the  
5 America Plan") will direct their supporters to the Mohre and Careau's registration  
6 website in the hope that the supporter will make two choices: subscribe to the ISP and  
7 choose the option to make a contribution to Federal political committees (rather than a  
8 donation to a charitable organization). You explain that "individuals who choose to  
9 subscribe to this full service ISP may do so over the Internet by credit card and may elect  
10 to earmark a small portion of the monthly service fees as contributions to specific Federal  
11 election committees or 501(c)(3) organizations."<sup>3</sup> In order to subscribe, the individual  
12 must complete a series of form questions. You state that these questions, and the answers  
13 to them, also serve to satisfy the Act and Commission's screening procedures. This is  
14 intended to ensure that those who participate in that part of the program are qualified to  
15 make contributions to Federal political committees.

16 According to the request, the price of the ISP services that Mohre offers will be  
17 \$17.76 per month. Of this targeted price, \$15.76 will be paid to the Careau and Mohre  
18 for the ISP services provided. Subscribers will be allowed to contribute a total of up to  
19 \$2.00 per month in various amounts to as many as five Federal political committees

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<sup>2</sup> A 501(c)(3) organization is, generally, a tax-exempt, non-profit corporation or other entity organized and operated exclusively for charitable, religious, or educational purposes not involved in influencing legislation or involved in influencing elections. See 26 U.S.C. 501(a) and (c)(3). You offer the Boys and Girl Club and United Way as an example of the 501(c)(3) organizations that may be included in the plan.

<sup>3</sup> You explain that your use of the term "credit card" is meant to encompass credit cards, debit cards, and any other commonly accepted form of electronic transfer of funds in commerce over the Internet.

1 and/or 501(c)(3) organizations.<sup>4</sup> The Federal political committees that would receive the  
2 contributions will be determined by where the subscriber lives. When the subscriber  
3 completes the transaction, the amount of the transaction that consists of the payment for  
4 the ISP services would be transferred directly to Careau and Mohre. The portion that  
5 represents the contribution to the Federal political committee would be directly sent into a  
6 separate merchant account. Following the deduction of the usual and normal service  
7 charges of the credit card issuers and other processing expenses, the Federal political  
8 committee would receive the contribution.<sup>5</sup> You state that this ensures that the Federal  
9 political committees receiving each contribution would pay all the applicable processing  
10 fees and any associated merchant account charges.

11 You also affirm that a portion of the contributions to the Federal political  
12 committees deposited in the merchant account would in turn be disbursed to the  
13 Companies as payment for the services Careau and Mohre would be offering to the  
14 participating political committees in creating the "America Plan." You state in your  
15 August 18 letter:

16 The committees will pay the companies and other vendors for their  
17 services in an amount that will ensure that no vendor is  
18 compensated below the usual and normal charge for its services  
19 and that will ensure a profit to the Companies and to the other  
20 vendors. The Companies will be paid a flat fee from each  
21 subscriber's monthly payment, which will be disbursed from the  
22 committee's merchant account.  
23

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<sup>4</sup> After subscribing to the program, the contributor may discontinue any or all of the contributions but to continue to receive the ISP services, they must always make new contributions or donations of \$2.00 per month.

<sup>5</sup> You explain that Mohre and Careau have entered into preliminary third party agreements with vendors for other necessary services; e.g. merchant account services, credit card authorization and processing, billing name, address services, etc. These services will be obtained from various vendors at the usual and normal charge for similar services and the rate will include expenses plus a reasonable profit to the vendor(s).

1 Careau has had discussions with several Federal political committees that have  
2 expressed an interest in participating. These include the campaign committees for  
3 members of Congress of both the Democratic Party and Republican Party, as well as the  
4 Democratic National Committee and Republican National Committee.

5 Your request includes further information regarding how the funds would be  
6 accounted for and transferred to various candidate committees, as well as the various  
7 security procedures Careau and Mohre would take to prevent the making of prohibited  
8 contributions. You assert that these procedures are in accord with the relevant past  
9 advisory opinions addressing with contributions made through the Internet.<sup>6</sup>

10 You ask whether the above proposal is permissible under the Act and  
11 Commission regulations.

## 12 ACT AND COMMISSION REGULATIONS

13 Under 2 U.S.C. 441b(a), it is unlawful for "any corporation whatever" to make a  
14 contribution or expenditure in connection with any election at which presidential and vice  
15 presidential electors or a Senator or Representative in, or a Delegate or Resident  
16 Commissioner to, Congress are to be voted for, or in connection with any primary  
17 election, or political convention or caucus, held to select candidates for any of these  
18 Federal offices. It is likewise unlawful for any candidate, political committee, or other  
19 person knowingly to accept or receive any contribution prohibited by this section, or any  
20 officer or any director of any corporation or any national bank or any officer of any labor

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<sup>6</sup> You should be aware that the Bipartisan Campaign Reform Act of 2002 ("the BCRA"), Pub. L. 107-155, 116 Stat. 81 (March 27, 2002), substantially amends the Act. In particular, the BCRA revises and expands the Act's treatment of prohibited contributions. These changes take effect after November 5, 2002. The application of this Advisory Opinion in discussing your screening procedures is limited to contributions made before that date.

1 organization to consent to any contribution or expenditure by the corporation, national  
2 bank, or labor organization, as the case may be, prohibited by this section. *Id.*

3 For purposes of 2 U.S.C. 441b(a), the term "contribution or expenditure"  
4 is defined to include:

5 any direct or indirect payment, distribution, loan, advance, deposit,  
6 or gift of money, or any services, or anything of value .... to any  
7 candidate, campaign committee, or political party or organization  
8 in connection with any election to any of the offices referred to in  
9 [section 441b(a)].

10  
11 2 U.S.C. 441b(b)(2). *See also* 11 CFR 114.1(a)(1).

12  
13 ***APPLICATION TO PROPOSAL***

14  
15 The Commission has considered a number of business arrangements between  
16 political committees and corporations to assist political committees in raising funds. In  
17 several past advisory opinions the Commission has reviewed fundraising efforts by  
18 political committees using certain "affinity marketing arrangements." *See* Advisory  
19 Opinions 1992-40, 1988-12 and 1979-17. Under these affinity marketing arrangements, a  
20 corporation (sometimes a bank) would offer to market its services to potential customers  
21 who were also identified as supporters of a particular political party or candidate. The  
22 party or other political committee would endorse the product or service offered by the  
23 corporation. In some of these proposals, the corporation would pay a fee to the political

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1 party in return for the endorsements. See advisory opinions cited above.<sup>7</sup> Rather than  
2 viewing these as commercial transactions, the Commission regarded them as fundraising  
3 efforts by political committees. The Commission specifically concluded that the fact that  
4 a business corporation received something of value (an endorsement of its product or  
5 service) in exchange for payments that purported to be the proceeds of a commercial sale  
6 did not change the nature of the transaction as a contribution. The payments received by  
7 the political committees were regarded as contributions subject to the prohibitions of 2  
8 U.S.C. 441b.

9 The foregoing category of cases stands in contrast to those advisory opinions  
10 where a political committee pays a telemarketing firm a commercially reasonable fee in  
11 exchange for the firm's efforts to market services that offer an opportunity for a purchaser  
12 to contribute to the committee. These latter opinions dealt with *bona fide* commercial  
13 relationships between political committees and the service providers, and did not result in  
14 contributions from the service providers to the political committees. See Advisory  
15 Opinions 1999-22, 1995-34, 1994-33, and 1990-14.<sup>8</sup>

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<sup>7</sup> In Advisory Opinion 1979-17 a national bank proposed to market its credit card services to members of the Republican National Committee. In return, among several options, it offered to pay either a one-time fee to the RNC or a portion of the membership fee paid by each subscriber to the credit card service. Similarly, in Advisory Opinion 1988-12, a county Democratic Party committee proposed to give access to its list of supporters so that a bank could market its credit card services. A portion of each membership fee would be remitted to the local party committee. In Advisory Opinion 1992-40, a company selling long distance telephone services proposed to sell, with the marketing support of political party committees, its services to party members or donors. Again a percentage of the sales generated would be paid to a political party committee as a commission.

<sup>8</sup> For example, in Advisory Opinion 1994-33 a telecommunications company proposed to market prepaid phone cards using the endorsements of various authorized candidate committees, as well as political party entities. The cards were produced by the telecommunications company to be distributed by the client political committees. For each instance when time was purchased on the phone card, through use of the purchaser's credit card, a portion of the dollar value of the card so purchased could be designated as a contribution to the client political committee. The political committee, however, paid the telemarketing firm a fee which included all processing costs and a commercially reasonable profit. The Commission found this proposal was permissible under the Act and Commission regulations.

1           Your plan more closely follows the situations involving commercially reasonable  
2 relationships in which a vendor receives the usual and normal charge for its services,  
3 including an adequate profit and compensation (See Advisory Opinion 1994-33), than the  
4 affinity marketing arrangements described above. .

5           The Commission finds three factors determinative in the transaction you propose.  
6 The first factor focuses on the issue of compensation. You state that the Careau and  
7 Mohre have contracted with vendors that will provide various processing services to  
8 implement the America Plan. These vendors would receive compensation when their  
9 fees are deducted from the contributions transmitted to the political committees. You  
10 have also affirmed that a Federal political committee would pay a fee to Mohr and Careau  
11 for arranging these processing services and creating a website that facilitates  
12 contributions to the individual Federal political committees. Therefore, the services of  
13 these corporations to the political committees would be compensated. The Commission  
14 notes that Mohr and Careau, by offering to include political committees in the America  
15 Plan, are contributing something of value to these political committees. However, you  
16 affirm that they will also receive a commercially reasonable payment for their services  
17 and, thus, will avoid making an illegal corporate contribution to the political committees  
18 and violating 2 U.S.C. 441b. <sup>9</sup>

19           Moreover, you have described your proposal as one in which the customers of  
20 Mohre would directly " earmark " contributions to various political committees. A

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<sup>9</sup> In your July 16 letter you state that " agreements with all vendors for costs and fees associated with the Program [will be] consistent with the usual and normal charges for non-political customers within the industry. This includes the Companies who also will be providing contract service to the Committees at a usual and normal charge for non-political customers within the industry."



1 subscriber would always be required to contribute or donate the \$2.00 per month portion  
2 of the fee and that amount (minus certain transaction costs) is always forwarded to a  
3 Federal committee or a 501(c)(3) organization through the use of a merchant account.  
4 Therefore, this amount would not become corporate treasury funds of Careau and Mohr  
5 and these funds would not by themselves be deemed corporate contributions to the  
6 Federal committees.

7 As a final matter, the Commission notes that the screening procedures in your  
8 proposal for the electronic payment of the contributions are well within the "safe harbor"  
9 discussed in previous opinions. See Advisory Opinions 1999-9 and 1999-22.<sup>10</sup>  
10 Therefore, your proposal is permissible under the Act and Commission Regulations

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 and assumptions are material to a  
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<sup>10</sup> In those opinions, the Commission approved screening procedures similar to those found in your proposal. In approving these procedures, the Commission noted that the procedures adopted "allow the Committee to verify the identity of those who contribute via credit card with the same degree of confidence that political committees generally accept checks via direct mail and other forms of solicitation that are consistent with Commission regulations." See Advisory Opinion 1999-9. Furthermore, past opinions on Internet contributions have provided a "safe harbor" as to the security measures political committees may adopt. Once basic security and verification concerns as identified in past advisory opinions were addressed, these opinions did not purport to restrict or delineate the specific type of technology that must be utilized. See Advisory Opinions 1999-03, 1999-09, 1999-22 and 2001-04.

1 conclusion presented in this opinion, then the requestor may not rely on that conclusion as  
2 support for its proposed activity.

3 Sincerely,

4

5 David M. Mason  
6 Chairman

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8 Enclosures: AOs 2001-12, 2001-04, 1999-22, 1999-9, 1999-3, 1995-34, 1994-33,  
9 1990-14, 1992-40, 1988-12, and 1979-17

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