



FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 1, 1990

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1990-1

Scott D. Roberts, President and Chief Executive Officer
Digital Corrections Corporation
4152 Blue Heron Boulevard West
Suite 108
Riviera Beach, FL 33404

Dear Mr. Roberts:

This responds to your letter dated December 5, 1989, as supplemented by your two letters dated January 3 and 15, 1990, requesting an advisory opinion on behalf of Digital Corrections Corporation ("DCC") concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the use of 900 line telephone services to promote candidates and political committees.

You state that DCC, a Florida corporation, is engaged in providing "900/700 inbound telephone services" to various entities. Such services allow individuals to dial into a digitalized voice program for a fee included on the caller's phone bill. The fee is set by the entities for whom the service is provided. You state that the appropriate local and national circuits are provided pursuant to agreements with AT&T and Cable & Wireless Communications, Inc. You wish to make 900 line telephone services available to candidates for Federal offices or to political committees that financially support their campaigns.^{1/}

Unlike the "listen only" capability provided by a number of companies providing 900 line service, your service allows the caller to register a response by pressing buttons on a tonepad or by use of a voice response with a rotary phone. Each program will entail a voice message to the caller and a statement as to the cost of each call. Each caller will have the opportunity to hang up and incur no charge, and those callers remaining on the line will be informed that a receipt will be forwarded within thirty days for the cost of the call. The price per call will be fixed for each campaign with a range of \$8 to \$50. There will be no additional contribution added on to the fixed amount.

You indicate that DCC is able to identify callers to ensure proper recordkeeping and to avoid corporate contributions. A feature used by DCC known as Automatic Number Identification identifies the exact telephone number from which the call was placed. The caller will be requested to provide name, address, and social security number, and, upon completion of the call, DCC can cross-reference the call to identify the person in whose name the phone number is listed. DCC would then generate receipts to be sent to the caller and provide detailed summary information to the appropriate committee or candidate, including the caller's name, address, phone number, and total individual contributions per caller. DCC is able to identify the caller further through the use of voice certification. The voice can be digitally recorded and stored, thus enabling caller verification. You state that there will be billing only for calls placed from verified, correct residential telephones and that all other calls are "disregarded."^{2/} Thus, there will be no billing for a call if the name and address of the caller do not match up with the name and address of the listed user. You state that, upon receipt of the telephone bill, each caller is permitted by law to elect not to pay the fee one time.

You state that each campaign will be purchasing this service from DCC at its usual and normal charge, with no discrimination between regional and national campaigns. According to your letters and a sample contract sent with the January 3 letter, each campaign will pay a deposit for the programming charges, initialization of a 900 number, ongoing monthly utilization of the assigned number, and bad debt reserve. The sample contract provides for a deposit of \$2,000 and states that, in the event that proceeds are less than the deposit, "DCC shall inform campaign and request either an additional deposit or at DCC's discretion commence with the termination of the 900 program." You state that each campaign is "solely liable" for the costs associated with the 900 program and that "the up front deposit will always be adequate to cover any losses."

You state that neither the campaign nor DCC will get paid until the telephone common carriers involved have received payment on the telephone bills sent to callers. According to the sample contract, the net proceeds that the campaign receives shall be determined by "[t]he difference between the DCC cost per call, sales and operating costs, telephone costs, disregarded calls, and the amount charged to the calling party." The net proceeds shall be payable to each campaign within ten days after DCC receives payment from the common carriers. According to your letters and the sample contract, telephone companies impose a hold back percentage that ranges from six to ten percent of the total calls made, and this percentage "is held indefinitely" for disregarded calls, those where the calling party wishes not to follow through, and bad debt,^{3/} and is adjusted based upon results.

The 900 number will be publicized by each campaign through various print and broadcast media, at the sole cost of the campaign. You state that DCC will not pay a sponsor fee to any campaign.

Contribution from DCC

The Act prohibits a corporation from making any contribution or expenditure in connection with any Federal election. 2 U.S.C. 441b; 11 CFR 114.2(b). The term "contribution or expenditure" is defined to include "any direct or indirect payment, loan, advance, deposit or gift of money, or any services, or anything of value...to any candidate, campaign committee, or political party or

organization, in connection with any [Federal] election." 2 U.S.C. 441b(b)(2); 11 CFR 114.1(a)(1). "Anything of value" includes services provided at less than the usual and normal charge, i.e., less than the commercially reasonable hourly or piecework charge for the services prevailing at the time the services were rendered. 11 CFR 100.7(a)(1)(iii)(B). Advisory Opinions 1987-27 and 1979-36. You present a situation in which DCC is attempting to ensure that the campaign or committee paying for the provision of 900 services does not receive any services for which DCC remains uncompensated or is compensated below the usual and normal charge for all the services provided.

The Commission has considered a number of situations in which the vendor providing goods or services is not paid directly by the political committee but is instead compensated wholly or in part by payments from third parties. In Advisory Opinion 1976-50, a candidate committee authorized a corporation to produce and market t-shirts bearing the candidate's name. Apart from distributing order forms, the committee would incur no expense but would receive one dollar from the company for every shirt sold. The Commission concluded that because the company paid all the expenses for producing and marketing the shirt, the committee received something of value from the company; in effect, the corporation would be advancing funds to assist the committee in fundraising. See also Advisory Opinion 1989-21. Advisory Opinion 1979-36 involved an agreement between a direct mail fundraising company and a principal campaign committee whereby the company would use direct mail fundraising techniques to obtain contributions for the committee. Under the agreement, the contribution proceeds would be deposited in the committee's account and three quarters would be designated for return to the company to cover the company's costs and profits on a monthly basis. One quarter of the proceeds would be available for other committee uses. The company would incur initial expenses in preparing and mailing the earliest fundraising materials. If, during the initial testing period, the company determined that the program was less successful than anticipated, all the funds raised would be available to the company. The Commission concluded that the amounts expended by the company would not be contributions, on the assumptions that the proposed agreement represented an ordinary mode of operation within the direct mail industry and that the company's charges were normal for the services rendered.

The Commission concludes that the proposed transactions would not result in an impermissible corporate contribution. In the situation presented, DCC proposes to require that the committee pay a deposit which you assert will be sufficient to cover all the costs associated with the 900 line program and adequate to cover any losses. You state that each campaign is solely liable for the costs of the program. You also state that, if the program is a complete failure, it will be terminated in order to ensure that losses do not exceed the initial deposit. Your proposal is, therefore, consistent with the Commission's conclusion in Advisory Opinion 1979-36.

You have stated that the net proceeds going to the committee shall be determined by the difference between costs (including the costs of disregarded calls) and the amounts charged to the calling parties. The Commission assumes that included in the calculation of DCC's costs will be an amount providing profit to the company or a fee for services provided, so that services are provided at the usual and normal charge, rather than at cost. 11 CFR 100.7(a)(1)(iii)(A). See Advisory Opinions 1988-17 and 1980-42. The Commission notes that the telephone companies will hold back indefinitely a percentage from the amounts transmitted to DCC in order to

account for disregarded calls, calls where the calling party wishes not to follow through, and bad debt. The Commission assumes that DCC will be otherwise paying the telephone companies the usual and normal charges for the access and services provided to it. Thus, the transaction will not involve an impermissible contribution resulting from reduced charges from those companies that ultimately permit greater net proceeds to go to the committee. See footnote in Advisory Opinion 1988-28.^{4/}

Contributions from Callers

In addition to the commercial benefit for DCC, the acknowledged purpose of the proposed activity is to raise funds for the candidates or committees purchasing DCC's services. Under the Commission regulations, the entire amount paid to attend a fundraiser or other political event and the entire amount paid as the purchase price for a fundraising item sold by a political committee is a contribution. 11 CFR 100.7(a)(2). In this situation, the caller purchases access to a fundraising and political event conducted through telephone connections and sponsored by a political committee that has contracted with DCC to provide political communication services. The caller makes a contribution to obtain access, while the committee makes expenditures to DCC in order to convey its message and then obtain net fundraising proceeds. Therefore, as is the case with monies paid in any political fundraising venture of a political committee, the amount paid by the caller, not just the net proceeds to the campaign, is a contribution subject to the limitations and prohibitions of the Act. See Advisory Opinions 1989-21, 1988-27 (fn. 1), 1982-24, and 1977-22.

The Commission assumes, given your statement that there will be billing only for calls from verified residential phones, that calls from telephone users such as corporations or labor organizations will not be charged to their telephone bills and, therefore, will not be paid by the user. The Act also prohibits contributions from foreign nationals. 2 U.S.C. 441e; 11 CFR 110.4(a). Therefore, DCC should also apply its screening process to prevent billing for telephone numbers outside the United States.^{5/}

DCC as Agent of the Committee

As a participant in the solicitation of contributions and the recipient of contributions, DCC is an agent of the contracting committees, thus imposing certain obligations on DCC and the committees. You have stated that the 900 line number campaign would be publicized by each campaign committee at the sole cost of the committee. You should advise your clients that the print advertisements or broadcasts publicizing the program should contain a disclaimer stating the name of the committee authorizing the activity and the person or entity paying for the solicitation. 2 U.S.C. 441d(a); 11 CFR 110.11(a)(1). The ads should notify potential callers that they will be contributors under the Act in order to help avert contributions from prohibited sources. See Advisory Opinion 1980-42. In addition, since the payments by the callers are contributions to the committees, you must obtain and forward to the respective committees the information necessary to comply with the recordkeeping and reporting requirements of the Act. This includes the name and address of any person whose previous contributions to a particular committee in the same calendar year aggregate over \$200, together with the date and full amount of the person's 900 line contribution, as well as their occupation and name of employer. 2 U.S.C.

432(c)(1) and (c)(3) and 434(b)(3)(A); 11 CFR 102.9(a)(2) and 104.3(a)(4)(i);^{6/} see Advisory Opinion 1980-99 with respect to recordkeeping for contributions of \$50 or less.

You have described in detail the ability of DCC to identify individual callers and repeat callers and to safeguard against the receipt of corporate and other prohibited contributions. It appears, however, that DCC will not receive the proceeds from the telephone company, i.e., contribution funds, until weeks or, perhaps, months after a call is made, and there is no indication that, when proceeds are received, the individual contributions received will be separately identified. In order to ensure proper recordkeeping and reporting as to the contributions received, DCC should request the telephone company to provide the names of the individuals whose payments are included in the proceeds.^{7/} If the telephone company is unable to provide such information to DCC, the program may not be implemented. Such information is necessary for the committee to report correctly as to the date of receipt of the contributions. This information is also essential to ensure the timely return of any prohibited or excessive contributions not discovered in your screening and recordkeeping processes. See 11 CFR 103.3(b).^{8/} You will also need to inform the committee of the amounts retained by DCC from proceeds for its costs and fees, as well as the amounts retained by the telephone companies. Such amounts are operating expenditures of the committee and are reportable by it pursuant to the Act. 2 U.S.C. 432(c)(5) and 434(b)(5)(A); 11 CFR 102.9(b) and 104.3(b)(and (4)

It appears from your proposal that the funds sent to DCC by the telephone company, which result from the callers' payments of their telephone bills, will be deposited into a DCC account and, after deduction of DCC's costs and fees, the remainder is sent to the committee. Such funds, however, may not be commingled with the funds of DCC, which is a corporation. See 2 U.S.C. 441b(a); compare 2 U.S.C. 432(b)(3); 11 CFR 102.15. None of the proceeds, therefore, may be deposited in any of the DCC's existing accounts. DCC will need to establish a separate bank account with respect to each committee at a bank or depository institution designated by the committee. 2 U.S.C. 432(h)(1); 11 CFR 103.2 and 103.3(a). The proceeds must be deposited in the appropriate designated account, i.e., the account of the committee benefiting, within 10 days of DCC's receipt. 11 CFR 103.3(a). See Advisory Opinions 1989-21 and 1980-42. As stated above, the disbursements made from the proceeds for DCC's costs and fees and the amounts retained by the telephone companies will be operating expenditures of the committee.

The Commission notes that the sample contract contains a clause stating that DCC shall have the rights to assign or license all or any part of the agreement to an affiliated marketing entity. Steps should be taken by you to ensure that any assignee or licensee complies with the requirements set out in this opinion.

This response constitutes an advisory opinion concerning application of the Act or regulations prescribed by the Commission to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

(signed)

Lee Ann Elliott
Chairman for the Federal Election Commission

Enclosures (AOs 1989-21, 1988-28, 1988-27, 1988-17, 1987-27, 1982-24, 1980-99, 1980-42, 1979-36, and 1977-22)

1/ Because you have not indicated that any 1992 or other presidential campaign has proposed to contract with DCC, this advisory opinion does not address the separate and additional issues raised by 26 U.S.C. 9031--9042 and related Commission regulations at 11 CFR Parts 9031--9039.

2/ You state that ascertaining the difference between a residential phone and a business phone is relatively straightforward. All telephone companies have different exchange codes for business phones and residential phones. In addition, there are companies that can verify whether a phone is a private phone listed for residential use.

3/ The Commission assumes that the term "bad debt" includes those calls for which payment is not made after billing.

4/ You indicate that the deposits paid by the committees and the receipts from the phone calls should be sufficient and that, if not, DCC will ask for an additional deposit or terminate the program. It is conceivable, however, that, in the course of deciding to terminate or continue a marginal program, DCC may make an additional incidental payment that, for a period of time, remains uncompensated by the committee or by the payments received. In Advisory Opinion 1989-21, the Commission determined that advances from the existing non-committee accounts of the vendor after proceeds from fundraising sales had been received would be contributions. That conclusion was based upon a determination that any advances by the vendor in that proposal were contributions. Based on the conclusions stated above as to your proposal, the Commission concludes that such additional incidental payments would be extensions of credit in the ordinary course of business assuming that DCC is repaid within a reasonable period of time. 11 CFR 114.10(a).

5/ The Commission notes the possibility of calls being made from foreign nationals residing in areas bordering the United States that receive U.S. broadcast media and that have access to U.S. telephone connections.

6/ For contributions in excess of \$50 and up to \$200, a record of the same information must be kept minus the occupation and employer's name. 2 U.S.C. 432(c)(2) and 102.9(a)(1).

7/ The Commission notes that the caller will not be stating his or her employer or occupation when making the phone call. In light of the contribution range proposed by you, a caller may make enough calls resulting in contributions aggregating in excess of \$200 to a committee. In addition, a caller who has contributed already to a committee may bring his aggregate above \$200 by making a call. DCC, therefore, may wish to amend its voice request for contributor information by asking for the caller's employer and occupation or arrange with the committee, upon receipt of the proceeds, to have the appropriate contributors contacted.

8/ The Commission notes that, since the entire payment by the caller is a contribution to the committee, the amount returned to the contributor, whether by the committee or DCC, should be the entire amount of the prohibited contribution or the amount in excess of the applicable limit.