



FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 18, 1991

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1991-1

Lyn Utrecht
Manatt, Phelps & Phillips
1200 New Hampshire Avenue, N.W.
Suite 200
Washington, D.C. 20036

Dear Ms. Utrecht:

This responds to your letter dated January 23, 1991, requesting an advisory opinion on behalf of the Deloitte & Touche Federal Political Action Committee ("the Committee") concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the solicitation of credit card contributions to the Committee by Deloitte and Touche employees.

You state that Deloitte and Touche is a general partnership providing comprehensive accounting and auditing, tax, consulting, and other professional services throughout the United States. It is a Federal contractor. Because Deloitte & Touche is a partnership, the Committee is not a separate segregated fund, but rather, a nonconnected multicandidate committee.¹ All costs incurred in connection with the administration and solicitation of contributions to the Committee are defrayed from the contributions received by the Committee.

You state that, pursuant to an agreement with American Express, the Committee has become an American Express "establishment" for the purposes of accepting credit card contributions. You state the agreement between American Express and the Committee is identical to those between American Express and other, nonpolitical establishments. The Committee is responsible for paying all service charges and fees, and Deloitte & Touche will not bear any costs related to the solicitation or the agreement.

The Committee proposes to send an annual solicitation to all Deloitte & Touche partners requesting that they make a contribution to the Committee by charging it to their American

Express cards. You state that the solicitation will suggest a guideline and will comply with the Commission's regulations concerning guidelines and notices set out in 11 CFR 110.11 and 114.5(a), even though the Committee is not a separate segregated fund. The solicitation will include a return card which each individual will be asked to complete, sign, and return, authorizing an annual charge to his or her American Express card in a specific amount. The authorization will remain in effect until revoked in writing by the contributor and the contributor may do so at any time. A contributor may also elect to have his or her contribution charged to his or her account on a monthly, rather than yearly, basis. The Committee will comply with all recordkeeping and reporting requirements applicable to these contributions.

Because the solicitation and contributor authorization may occur some time before the actual charge to the individual's American Express account in December of each year, the PAC is willing to provide individuals with a written reminder of the amount of their contributions, prior to the charge. In addition, the Committee will refund to American Express (and thus to the individual contributor) any contribution charged to an account which the individual repudiates or refuses to pay, even if a written authorization is still in effect. You state that these measures will ensure that contributors who have signed authorizations will be fully aware of the charge of the contributions to their accounts and that no inadvertent involuntary contribution is made.

Additionally, the Committee may also inform employees below the partner level of the Committee's existence and the opportunity to contribute to the Committee through the use of an American Express card. Such notification would probably be made in the Committee newsletter, not by a specific solicitation letter. You state that the notice would comply with the requirements of 11 CFR 110.11 and 114.5(a).

The Committee will accept contributions only from employees who are United States citizens and will accept only individual contributions from personal funds. (None of the partners are individually incorporated.) The partners are entitled to obtain an American Express card imprinted with the name Deloitte & Touche through a separate arrangement between Deloitte & Touche and American Express. The American Express accounts for the partners are individual and not Firm accounts, although the cards are imprinted with both the individual's name and the name of the Firm. You state that Deloitte & Touche is not responsible in any way for bills charged to these accounts, and American Express has no recourse to the Firm for any late or unpaid balances. Individuals who choose to do so may utilize these American Express cards to make a contribution to the Committee or may utilize any other American Express account which they maintain.

You state that individuals must use their own personal accounts to pay these American Express bills. They may not pay these bills by drawing on any partnership account or undistributed partnership funds. You state that, therefore, although Deloitte & Touche is a Federal contractor, the contributions will not result in the use of any partnership funds or funds commingled with partnership funds to make contributions to the Committee.

You ask whether the Committee's proposed plan may be implemented under the Act and Commission regulations.

The Commission has previously recognized that the Act and regulations allow lawful contributions to be made not only by personal check, but also by other means, including properly documented contributions by credit card. Advisory Opinions 1990-4 and 1978-68; see also Advisory Opinions 1989-26 and 1984-45.

As you know, the Act and regulations prohibit corporations from making any contributions in connection with a Federal election. 2 U.S.C. 441b(a); 11 CFR 114.2(b). A contribution results when a service is provided at less than the usual and normal charge. 11 CFR 100.7(a)(1)(iii)(A). You state that the agreement between the Committee and American Express will comply in all respects with American Express' usual and normal practice and will not result in any prohibited corporate contribution to the Committee. The Commission notes that the agreement provides for a "discount rate" depending upon the payment plan chosen by the American Express establishment and the net amount of Cardmember charges for the previous year. This discount represents American Express' charges for its credit services provided to the Committee and appears to correspond with the usual and normal discounts taken by American Express in the ordinary course of its business with all establishments that agree to honor the American Express card.²

You state that the solicitation to the partners will comply with the Commission regulations for separate segregated funds even though the Committee is not an SSF. These include requirements ensuring the voluntary nature of contributions. You also cite the disclaimer requirements of 11 CFR 110.11. The Commission notes that the Committee may not rely on the exemption from the disclaimer requirement granted to separate segregated funds in 11 CFR 110.11(a)(1)(iv)(B). The Commission further notes that a written Committee solicitation to the partners, or a contribution solicitation in the Committee newsletter, may raise the issue of whether the solicitation is by direct mail or any other form of general public political advertising. See 11 CFR 110.11(a)(1) and 110.11(a)(1)(iv)(A).

The Commission has, in other situations, concluded that the prior authorization of periodic contributions is permissible under the Act. The Commission has approved such arrangements with respect to automatic monthly bank withdrawals by a principal campaign committee as a result of an authorization signed by a contributor. Advisory Opinion 1989-26. The Commission has also approved such arrangements with respect to contributions via payroll deduction or checkoff. Advisory Opinions 1986-7 and 1981-14. The permissibility of these arrangements is conditioned upon the continuing right of the contributor to revoke such authorization. You have made it clear that the authorization to charge a contributor's American Express account may be revoked by the contributor at any time.

Federal contractors are prohibited from making, directly or indirectly, any contribution or expenditure of money or other thing of value, or to promise expressly or impliedly to make any such contribution or expenditure, to any political committee or other person for any political purpose or use. 2 U.S.C. 441c(a)(1); 11 CFR 115.2.³ Although the assets of a partnership which is a Federal contractor thus may not be used to make contributions in connection with a Federal election, Commission regulations allow individual partners to make contributions in their own names from their personal assets. 11 CFR 115.4(b). In addition, employees of a partnership which is a Federal contractor may make contributions from their own personal assets. 11 CFR

115.4(c). Because no accounts of the partnership will be used to make the contributions or pay the American Express bills and because the partners and employees must use their own personal, non-partnership accounts to pay the bills, the contributions would not be prohibited under section 441c. See Advisory Opinion 1985-23.

The Federal contractor prohibition also extends to the use of the partnership funds for the Committee's establishment, administration, and solicitation costs. The Act does not extend to a partnership the ability granted to corporations to set up a separate segregated fund and conduct itself as a connected organization. Thus, payments for such costs would be contributions, rather than exempt costs. Advisory Opinions 1990-20, 1982-63, 1981-56, and 1981-54; see also California Medical Association v. Federal Election Commission, 453 U.S. 182 (1981). By providing that no charges, fees, or other costs related to the solicitation or agreement will be borne by Deloitte & Touche, the Committee will have avoided a prohibited contribution.

Based on the foregoing analysis, the Commission concludes that the Committee's proposed plan may be implemented under the Act and Commission regulations. You have referred to the Committee's intention to comply with all applicable reporting and aggregation requirements. Although Advisory Opinion 1990-4 provided that a credit card contribution was received when the contributor's authorization to charge his or her credit card account was received, that situation did not involve deferring the charge to the account until a specific time after the contributor's authorization. Your situation involves the receipt of the contributor's authorization well in advance, probably a period of months, of the charge to the contributor's American Express account. The Committee should, therefore, consider the receipt of the contribution to occur on the date the contributor's credit card account is charged, i.e., on the date the Committee transmits necessary documentation to American Express to authorize crediting the Committee's account and debiting the cardholder's account. That is the date on which the Committee will obtain possession of the contribution. See, by analogy, 11 CFR 102.8(b)(2). In view of the contributor's ability to revoke the authorization, the contributor will be considered to relinquish control over the contribution, and thus to have made the contribution, on the date that his or her American Express account is charged, the same date referred to above. See 11 CFR 110.1(b)(6).

The amount of any contribution by credit card is the amount authorized by the contributor. Any deductions or discounts taken by American Express, the credit card issuer, against the proceeds of such contributions should be reported by the Committee as operating expenditures. See 2 U.S.C. 434(b)(4)(A) and (5)(A); 11 CFR 104.3(b)(1)(i) and (3)(i).

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)

John Warren McGarry
Chairman for the Federal Election Commission

Enclosures (AOs 1990-20, 1990-4, 1989-26, 1986-7, 1985-23, 1984-45, 1982-63, 1981-56, 1981-54, 1981-14, and 1978-68)

1/ You state that Deloitte & Touche was formed in December 1989 upon the merger of Deloitte, Haskins & Sells and Touche Ross. Prior to the merger each firm had established nonconnected multicandidate political committees. After the merger, the two committees considered themselves as affiliated. In February 1990, the Committee changed its name from Touche Ross Partners PAC to its present name. The Deloitte, Haskins & Sells Good Government PAC transferred its funds to the Committee in October 1990 and filed a termination report in January 1991.

2/ The agreement also provides that, if the establishment includes the Optima Card as a method of payment in all of its catalogues and order forms, it will receive an "Optima Dividend," calculated at approximately one percent of the net dollar volume of charges incurred by those using the Optima Card. You have stated by phone to the Office of General Counsel that the Committee has no intention of participating in this plan. The Commission, therefore, expresses no opinion with respect to the Optima Dividend.

3/ This prohibition does not apply to contributions or expenditures in connection with state and local elections. 11 CFR 115.2(a).