



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1991-20

Angelique E. Matney
Associate Counsel
Call Interactive
American Express Tower
World Financial Center
200 Vesey Street
New York, NY 10285-4900

Dear Ms. Matney:

This responds to your letter dated July 1, 1991, requesting an advisory opinion on behalf of Call Interactive concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the provision of 900 line services for candidates and political committees. Your letter incorporates by reference your request materials submitted in connection with Advisory Opinion Request 1990-28, in addition to presenting new information and arguments.¹

You state that Call Interactive, an equal partnership of two companies owned respectively by subsidiaries of American Telephone and Telegraph Company (AT&T) and American Express Information Services Corporation, is a service bureau providing caller paid response services for information providers. Its services are provided to a broad array of customers and "are accessible by callers, irrespective of their U.S. geographic location."² You state that 900-line technology would permit political customers to solicit contributions from thousands of individuals, particularly small contributors, "potentially more cheaply than through direct mail and fundraising events." Call Interactive intends that the charges to the caller will not exceed \$50.

Call Interactive contracts with its customer, the political committee, for the provision of various services to the committee. AT&T provides Call Interactive with tariffed interstate network services and non-tariffed premium billing services. These services are provided on an arms-length basis and fees for both services are paid to AT&T by Call Interactive as AT&T's

customer. Pursuant to AT&T's premium billing contract with Call Interactive, AT&T bills and collects, through its separate contractual arrangements with local exchange carriers (LECs), all charges for the information services. Instead of billing the callers directly, AT&T sells its receivables to the LEC which then collects from the callers. The funds received by AT&T from this sale are then remitted to Call Interactive, after AT&T deducts the network transport charges and the premium billing fees. Call Interactive, in turn, deducts its fees for the services provided by it and "then allocates and remits the net proceeds to its customer." This process, from the end of the month in which the calls are made until the committee receives the net proceeds, usually takes from 60 to 90 days.

Approximately thirty days prior to its transmittal of funds to Call Interactive, AT&T will send Call Interactive a Call Detail Report which lists the total number of calls, the date, call time and length, and caller charge for each call. This report will include the calling phone number for the 85-90% of the calls that can be so identified through "automatic number identification" ("ANI"), leaving 10-15% of the revenues that cannot be tied to a calling number. AT&T also provides a Call Refund report which lists the telephone numbers of callers who successfully refused a charge, i.e., those who called AT&T for an adjustment and were not refused, along with the date and amount of refund.

In its ordinary course of business, Call Interactive does not require a deposit from its customer for a caller- paid program. You state that there are relatively few up-front costs incurred by Call Interactive prior to when calls are made. Set-up charges, charges for programming the script, voice digitization and caller prompts are generally fixed charges, unrelated to the volume of calls, and are billed directly to the committee. Costs associated with sales and customer service, legal review, accounting and billing review are all accounted for in overhead, and such costs are absorbed by the fees deducted by Call Interactive from actual call revenues received.

As to those calls for which callers have requested billing adjustments and refunds, AT&T will bill Call Interactive the entire amount of the charge to the caller ("a chargeback"). In turn, Call Interactive will bill the committee for the entire amount of the unpaid call, which includes the charges from Call Interactive, AT&T, and the LEC. If the committee fails to pay this chargeback in a timely manner, Call Interactive can deduct that amount from any revenues collected by it. To the extent that Call Interactive doubts the committee's ability to pay these charges, it contracts for the right to retain a reasonable percentage of the proceeds on a monthly basis as security until at least 180 days after the last call billed to the program. You state that chargebacks have accounted, on average, for approximately two percent of the calls received in Call Interactive programs, but that, even if every caller requested credit, the committee would still be liable for the full amount of the call if proceeds had already been collected and remitted to the committee, or for the amount of Call Interactive's fees (including its cost recovery of the AT&T fees) if the proceeds had not yet been billed to the caller or collected by AT&T. Accordingly, if Call Interactive does not receive its fees through call proceeds, it has recourse to the committee.

You describe the information-gathering services available to a committee for obtaining contributors' names and addresses and identifying prohibited contributions. Call Interactive can provide an interactive response service to obtain such information.

In response to an audioscript, callers can be requested to "touchtone" in their telephone numbers. In addition, callers using touchtone response, e.g., for affirmative, negative, or numerical answers, could identify themselves as foreign nationals or as persons "calling on behalf of" corporations or labor unions. Such calls may be "processed" differently from calls made by persons who identify themselves as calling as individuals. Call Interactive could even provide separate scripts based on the touchtone response. You state that Call Interactive's reporting services can deliver caller supplied information to the committee within two days after it is received.

Call Interactive offers, on an optional basis, a call transcription service whereby callers are prompted by a recorded audioscript to speak their name, address, or other information. The sound of the spoken words is digitally recorded and later may be transcribed into writing by Call Interactive employees listening to the recording.

You state that, at the option and direction of the political committee, callers with rotary phones may be routed to a rotary script and asked to speak all of the requested information, or such callers could be restricted from accessing the program.

Call Interactive also offers a reverse directory database service containing 90 million names which will enable 40-50 percent of the calls to be matched with names and addresses. You estimate that reverse directory combined with the standard transcription can yield an average identification rate of about 90 percent of all calls, where all audio information is clearly spoken by the caller. You believe that a higher identification rate is achieved by using the caller-inputted or caller-provided number rather than relying on the numbers provided on the Call Detail Report.

In order to limit the number of calls and, accordingly, contributions, from any one phone number, Call Interactive may provide a service known as Call Limiting to advise the caller that any further calls would put his contribution level in excess of \$50 and that the political committee would contact him or her to obtain further information. You state that the effect of Call Limiting is not to prevent the caller from calling and incurring an additional charge, but rather to provide notice of the election law consequences if further calls are made. Alternatively, the caller who has reached the \$50 level, but who has called again by touchtone, may trigger the cessation of the program for that call; the caller would still be billed but could protest the call.

You state that, in Call Interactive's contracts with a political committee, the committee is responsible for ensuring that the program and its implementation comply with all applicable laws and that the content does not fall outside the premium billing guidelines of AT&T (referred to in Advisory Opinion 1990-14). In any case in which a third party is acting on behalf of a political customer, Call Interactive will require a written certification of the third party's and the committee's compliance with the applicable laws and "documented evidence of a written agreement between such third party and the political committee." In addition, Call Interactive will require compliance with certain specific guidelines and rules. It will require a preamble on all calls exceeding a total cost of \$10 (or as otherwise legally required³) which disclose to the caller the purpose of the call (including a description of the use of the funds), the cost of the call, and the political committee's name. Call Interactive would also require that all advertising promoting the 900 number "disclose conspicuously and clearly" the name of the political

customer, the fact that the entire charge will constitute a political contribution and is not tax deductible, and that contributions from such sources as corporations, labor unions, and foreign nationals are prohibited. The company reserves the right to review such materials in advance of their use to substantiate compliance with its rules.

Finally, Call Interactive's review of political program content will be limited to satisfying itself that the customer has reasonably demonstrated its intent to comply with all applicable laws. The company will only edit message content for purposes of technical implementation or to bring a program in compliance with laws and company guidelines. Unless a prospective political customer does not evidence compliance or the intent to comply with the applicable laws and guidelines, the company will accept any political program on the same material terms and conditions offered its other customers in the ordinary course of business for applications requiring the same or similar kinds of service.

You present five questions as to the permissibility of Call Interactive's proposed activities.

Question 1

You ask the Commission to confirm that, since Call Interactive does not require deposits from its customers purchasing 900 services in the ordinary course of business, it is not required to obtain a deposit from its political committee customers in order to comply with 2 U.S.C. 441b(a). You asserted in AOR 1990-28 that most other service bureaus do not require 900 customers to submit deposits.

The Commission notes that, in Advisory Opinion 1990-1, which involved the provision of 900 line services, the Commission confirmed that a service bureau's proposal would not involve a corporate contribution by the bureau because it was requiring a deposit sufficient to cover the costs of the 900 program and adequate to cover any losses, the committee was solely liable for the costs of the program, and the program would be terminated if it were a complete failure in order to ensure that losses did not exceed the deposit. As expressed in Advisory Opinion 1990-14, the Commission's concerns in Advisory Opinion 1990-1 were twofold. First, the Commission wished to ensure that none of the costs of the program would be left unpaid by the committee. Second, the Commission was concerned that, regardless of the degree of success of the effort to raise funds, the committee would retain contribution proceeds while giving up little, or the committee would assume little or no risk with the vendor bearing all, or nearly all, the risk.

In Advisory Opinion 1990-14, the Commission considered the question of whether AT&T should require a deposit when it provided 900 line services directly to the committee and when it provided its services through a service bureau. With respect to the former situation, the Commission stated that "[w]ithout a deposit paid by the committee adequate to ensure against loss by the company contracting with it, the committee will receive the benefit of the proceeds even though the company incurs the loss of the funds it advanced in the form of services provided." Advisory Opinion 1990-14. The Commission concluded that no such deposit need be paid to AT&T where it was dealing with a service bureau and the latter was receiving an adequate deposit from the committee along with other safeguards. The Commission noted that

AT&T would be dealing directly with a service bureau in most situations and did not expect to contract directly with a committee because of the cost of call termination equipment.

You have indicated that the upfront costs are low and are billed to the customer when they are incurred. In addition, to the extent that a committee does not pay a chargeback for a protested call in a timely manner, Call Interactive can deduct that amount from any revenues collected by it. In addition, through contractual provisions, Call Interactive can withhold funds to cover even anticipated, but not yet incurred costs. Furthermore, Call Interactive, as the recipient of funds prior to the political committee, may deduct any outstanding payables before remitting funds to the political committee. Most importantly, these practices are within the ordinary course of business of Call Interactive for nonpolitical customers. Although the two concerns described in Advisory Opinion 1990-14 may justify the requirement of a deposit or upfront payment in some situations (see Advisory Opinions 1991-18 and 1990-19), the Commission, after reviewing the facts of your proposal, concludes that the payment of a deposit, as such, need not be added on to the proposed conditions of the proposal, provided that the company is following its ordinary course of business and such a credit extension is substantially similar to credit extensions to nonpolitical debtors of similar risk and size of obligation. See 11 CFR 116.3(b) and (c).⁴

Question 2

You ask the Commission to confirm that Call Interactive is not required to maintain a separate bank account for each political customer, so long as it appropriately identifies funds for each political customer from other aggregated funds it receives in its ordinary process of accounting for and remitting these funds, and so long as it complies with 2 U.S.C. 432(b) for remittance of funds.

You point out that the company receives revenues from AT&T in a lump sum that is not separated by 900 number, by customer, or by political vs. nonpolitical customer. Call Interactive must use the Call Detail Report, together with its own records, to separate the funds received by the political committee. Once this accounting separation is accomplished, Call Interactive deducts its charges and forwards the balance to its customer. You state that this would all take place within 10 days after the receipt of proceeds from AT&T.

In view of the way that Call Interactive receives proceeds, the potentially large numbers of political customers that a service bureau may have at any one point, and the fact that Call Interactive accounts for each committee separately, the Commission concludes that Call Interactive should set up one separate bank account to contain the proceeds for all of its Federal political committee customers. With the exception of costs billed directly to the committee and thus not included in the deducted charges, the charges to be withdrawn by Call Interactive from the proceeds should be withdrawn from this account. The approval of the establishment of this account as an alternative to a separate account for each committee is premised upon the maintenance by Call Interactive of separate book accounts for each committee customer.⁵ The proceeds passing through this account should be forwarded to each political committee within ten days or thirty days of Call Interactive's receipt, depending upon the type of committee. 2 U.S.C. 432(b)(1) and (2); 11 CFR 102.8(a) and (b).

Question 3

You ask the Commission to confirm that Call Interactive can comply with the information-gathering requirements of the Act by either (a) providing its call transcription, touchtone response, and database services to the committee at standard charges for such services or (b) obtaining certification from the committee that it is obtaining comparable service elsewhere. You seek confirmation that, in the event the committee chooses to obtain comparable service elsewhere, Call Interactive is not required to audit the committee but may satisfy its responsibilities by obtaining the certification of comparable services. You also ask the Commission to define what services must be provided to the committee as a condition of doing business.

As indicated in Advisory Opinion 1990-1, the use of 900 services to obtain contributions is a political fundraising event, conducted through telephone connections, to which the caller purchases access. Through its contract with the committee, Call Interactive provides access to the means and medium used to raise funds, receives payments representing contributions to the committee, and, in effect, pays other entities from those funds before such funds reach the committee's already existing accounts. See Advisory Opinion 1980-42.

The Commission concludes that Call Interactive should offer the three types of services you have enumerated, or take steps to ensure that the committee is using comparable services. These include the touchtone and rotary services that will identify calls being made from foreign nationals or from those calling on behalf of corporations and labor unions. The audioscript should also call for touchtone or voice indications from those who are using the phones of corporations, labor unions, or foreign nationals. Consistent with the goal of identifying calls from prohibited sources, the audioscript should call for touchtone or voice indications from those who are calling from phones that are not billed in the name of an immediate family member (to minimize or avoid contributions in the name of another by reimbursement of the billed party). See 2 U.S.C. 441f; Advisory Opinion 1990-1. The services provided by Call Interactive should also include the use of audioscripts and call transcription on touchtone and rotary phones to obtain caller name and address, and the use of reverse directories, resulting, on average, in the names and addresses for 90 percent of the audible callers. The information obtained from these services must be forwarded to the committee in a timely manner to ensure proper reporting.

You have stated that Call Interactive would not be relying on the Call Detail Report in obtaining the callers' telephone numbers, a difference from your request in Advisory Opinion Request 1990-28. The Call Detail and Call Refund Reports, however, appear to be useful and, perhaps, essential in determining when a payment representing an individual caller's contribution was received by Call Interactive, enabling the payment to be monitored for purposes of 11 CFR 102.8. Unless there is an alternative means developed by Call Interactive and/or the committee for determining, with comparable accuracy, when the proceeds representing a contribution were received, Call Interactive must consult the Call Detail Report for that purpose.

If the committee seeks comparable services elsewhere, such services must be similar or superior in screening ability and must be capable of yielding at least a similar rate of contributor identity. Call Interactive need not "audit" the committee in order to determine whether it obtained

comparable services. Written certification by a responsible committee officer identifying the company providing the services and briefly describing the services will be sufficient. If, however, Call Interactive has any actual knowledge that such certification is incorrect, then it should contact the committee which, in turn, should cease the program until comparable services are found.

The Commission wishes to make clear that it is ultimately the responsibility of the political committee to obtain the identity of contributors and to prevent excessive and prohibited contributions; however, this does not relieve Call Interactive from its responsibilities to follow the procedures delineated in this opinion.

Question 4

You ask the Commission to confirm that, with regard to the return of prohibited or excessive contributions, and to the proper disposition of unidentifiable contributions, Call Interactive will have discharged its responsibilities by turning over to the committee all net remittances together with all information obtained by the company pertaining to such calls. You state that Call Interactive proposes to obtain the committee's certification that it will use the information, regardless of whether it comes from Call Interactive or a company providing comparable information services, to dispose of prohibited, excessive, or unidentifiable contributions in a manner which complies with the Act. While Call Interactive would, if requested by the committee, provide information that would be useful for the lawful disposition of problematic contributions (presumably information in addition to the information required by the response to Question 3), the company would not be delegated any authority to act on the committee's behalf in disposing of such contributions and would not accept such delegation.

The Commission has set out the need for Call Interactive to provide or receive certification of the provision of adequate call transcription, touchtone response, and database services described above, in order to obtain the identity of callers and prevent prohibited and excessive contributions. The Commission also approves the obtaining of a certification from the committee that it will use the information to dispose of unlawful or unidentifiable funds.

Proper disposition of impermissible contributions or contributions which, when combined with previous contributions, exceed the section 441a limits would entail the return by the committee to the caller of the entire amount of the prohibited contribution or the amount of the excess. See Advisory Opinion 1990-1. Such a return must be accomplished within the time frame set out in 11 CFR 103.3(b).

Although each particular contribution will not exceed \$50 and certain contributions may be unidentifiable, the unidentifiable contributions may not be treated as anonymous contributions in the manner provided in Advisory Opinion 1980-99 and 11 CFR 110.4(c)(3).

Advisory Opinion 1980-99 involved several mass collection, fundraising events with hundreds of people in attendance; these persons gained admission by paying \$5 to \$25 each, most likely in cash but also by means of checks. Few people were expected to attend more than one event. The opinion noted that contributor names might be retained by the fundraising committee and that, if

so, such information should be used in checking aggregate contributions by the same donor in a calendar year. 2 U.S.C. 432(c)(3) and 11 CFR 102.9(a)(2). The opinion permitted an alternative method whereby the committee could record the name of the event, the date(s) contributions were received for the event, and the total amount of contributions received on each day for that event. See Advisory Opinion 1981-48. Section 110.4(c)(3) provides that a committee receiving an anonymous cash contribution in excess of \$50 must promptly dispose of the amount in excess and such amount may be used for any lawful purpose unrelated to any Federal election, campaign, or candidate.

The Commission does not view Advisory Opinion 1980-99 and 11 CFR 110.4(c)(3) as permitting merely the recording of the unidentified contributions and a retention for use in a Federal campaign because 900 line fundraising programs do not involve truly anonymous contributions such as the small cash contributions posited in the opinion. The 900 line fundraising program uses pre-existing technology and procedures that will usually result in the creation of a record of the name and address of a telephone subscriber to whom a bill is sent. Regardless of whether a number is covered by ANI and listed on a Call Detail report, the LEC will presumably have such information. According to your request in AOR 1990-28, the "necessary technological arrangements do not exist for passing this information in an appropriately sorted manner to AT&T, Call Interactive, or the political committee" and thus, as a practical matter, such information may not be obtained from the LEC. Nevertheless, Call Interactive has the technology in place to obtain, through reverse directories and voice transcription, the names and addresses for 90 percent of all audible calls and the Commission's purpose in requiring the use of such technology is to track all contributions for itemization purposes to avoid excessive and prohibited contributions. To achieve compliance in these areas, the Commission's interest in requiring the recording of names and addresses of "small" contributors is heightened in these circumstances, as opposed to the circumstances presented in Advisory Opinion 1980-99, because of the ability of callers to make repetitive calls and calls from prohibited sources. See Advisory Opinion 1990-1, fn. 7.

The Commission notes that proceeds from unidentified calls obviously may not be returned to the caller. In addition, the Commission is concerned that if the portion of the proceeds of such contributions that is normally passed on to the committee after Call Interactive's deductions is instead retained by Call Interactive, such amounts might be used to subsidize Call Interactive's services to the committee and result in reduced charges or holdbacks of funds by Call Interactive. The result would be a corporate contribution by Call Interactive to the committee. Although 11 CFR 110.4(c)(3) is not directly applicable because it pertains to anonymous cash contributions, the Commission concludes that the committee should use a similar remedy for all of the post-deduction proceeds received by it as a result of unidentified contributions. Therefore, all proceeds from such contributions, not just proceeds representing amounts in excess of \$50, may be used only for lawful purposes unrelated to any Federal election campaign or candidate.

Question 5

You ask the Commission to clarify that, in reporting to the political committee the service fees associated with the 900 campaign, Call Interactive need only provide the gross fees charged by

Call Interactive to the committee. You also ask whether Call Interactive must provide a breakdown of fees charged to Call Interactive by those entities providing service to it.

You state that, although Call Interactive's fees are calculated to cover all of its costs, including premium billing charges and charges for other services under agreements with third parties, Call Interactive does not, in its ordinary course of business, break out these costs to its customer because the customer's relationship is with, and the customer's debts are owed to, Call Interactive. The other entities have no contractual privity to, or direct relationship with, the customer.

Based upon the representation that the proposed practice is in the ordinary course of business for Call Interactive, the nature of the relationship between Call Interactive and the committee, and the lack of direct relationship between the committee and the other business entities involved, the Commission concludes that your proposed practice is permissible under the Act. Hence, in disclosing the dollar amounts deducted from the original contributions, the committee may report the amounts as expenditures to Call Interactive without further itemization of payments deducted by or made to the LECs, AT&T, or third party vendors to Call Interactive. In reporting these expenditures, the committee will have to include on its reports an adequate description of each expenditure. See Advisory Opinion 1983-25. The Commission contemplates that in most situations, a general description such as "services and charges for 900 line program" will be adequate. Charges for services that are not included in the fees deducted by Call Interactive but, instead, are directly billed to the committee should also be separately described.

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.

Sincerely,

(signed)

John Warren McGarry
Chairman for the Federal Election Commission

Enclosures (AOs 1991-18, 1990-19, 1990-14, 1990-1, 1983-25, 1981-48, 1980-99, and 1980-42)

P.S. Commissioners Aikens and Thomas recused themselves from any participation or voting in this opinion.

1/ On January 31, 1991, the Commission failed, by a vote of 2-2, to approve a draft response to Advisory Opinion Request 1990-28.

2/ You describe Call Interactive as providing "information processing and transport services" as well as several support services such as transcription, data base services, data analysis and reporting services, live operator service, contest and order fulfillment and credit card

authorizations. Customers ordering the basic information processing and transport services may, but are not required to order one or more of the support services.

3/ It appears that this is a reference to rules that may be promulgated by the Federal Communications Commission.

4/ In determining whether credit is being extended in the ordinary course of business, the Commission will consider whether the commercial vendor is following its established procedures and past practice in approving the extension of credit, whether the commercial vendor received prompt and full payment if it previously extended credit to the same candidate or committee, and whether the extension of credit conforms to the usual and normal practice in the vendor's trade or industry. 11 CFR 116.3(c)(1)-(3).

5/ Another concern addressed by the maintenance of an account for political committee proceeds separate from Call Interactive's existing accounts is the prevention, insofar as it is practicable, of the commingling of political committee funds with corporate funds. 2 U.S.C. 441b(a). See 2 U.S.C 432(b)(3) and 11 CFR 102.15.