



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

December 11, 1992

CERTIFIED MAIL,  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1992-40

Patrick M. Poor  
Leading Edge Communications  
P.O. Box 7178  
Riverside, CA 92513

Dear Mr. Poor:

This responds to your letter of October 9, 1992, and the letters and supplemental documents sent by you on October 19 and November 5, requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to a planned fundraising proposal involving Leading Edge Communications, Inc. ("LEC") and various state political parties.

You state that LEC is a telecommunications marketing company selling the discounted long-distance phone services of several carriers. LEC proposes to sign up various state political parties, as non-profit organizations, to do a telephone service fundraiser. Supporters of the state parties would sign up for their long-distance service with LEC and pay their monthly long-distance phone bill to LEC. LEC, in turn, would send a percentage to the political parties each month as a commission (11% of long-distance charges maximum). You state that you have contacted twenty five state Republican parties which have shown interest of varying degrees.<sup>1/</sup>

Your inquiry includes a sample contract for your proposal. It obligates a signatory organization to market LEC's program to customers. You state that your proposal would not involve the selling of membership lists to LEC, rather the participating state party would contact its supporters, explain the service contract, obtain their signature on a long-distance phone service contract and forward the information to LEC. LEC's role would then be to provide the service, bill the telephone customer, and send the commission to the participating party committee.

The sample contract and further information included in your inquiry indicates that LEC would still have rights regarding the content of the marketing. You state that any "hard copy" materials, which participants develop and distribute, must be approved by LEC to ensure that it is accurate and legal. The general restrictions LEC intends to place on participating organizations are that they do not violate their contract with LEC, do not engage in misrepresentation, and do not violate the law. Otherwise, you state that the participants are to be given freedom to promote the program as they wish.

You pose three questions regarding this transaction:

1. Would the commission LEC pays to a state political party be considered a contribution from LEC to the state political party or would it be earned income?
2. If it is a contribution, is it a contribution from LEC or from the political party's supporters?
3. If it is not a contribution, can LEC sign up business phones on the service?

Your inquiry properly characterizes the proposed transaction as a fundraising device, as does the sample telephone solicitation included with your materials. The Commission notes that the situation in this inquiry is similar to other advisory opinions where political committees use committee assets, in this case, goodwill and party identification, to generate income through ongoing business or commercial ventures. The Commission has found these to be fundraising in another form. See Advisory Opinions 1991-34, 1990-3, and 1988-12.

Only in certain circumstances has the Commission concluded that contributions do not result from these activities. The Commission has specifically permitted isolated sales of political committee assets without inherent contribution consequences, however, when the assets had been purchased or developed for the committee's own particular use, rather than for sale in a campaign fundraising activity, and such assets had ascertainable market value. Advisory Opinions 1989-4 (mailing lists and computer hardware), 1986-14 (campaign van), 1981-53 (mailing list) and 1979-24 (yard sign material and office equipment).

While your transaction seeks to benefit from the specific identification of voters with a political party, the proposal does not fall into any of the above categories. LEC is not seeking to engage in an isolated sale or disposal of a committee asset, but to invite a state political party to engage in an ongoing enterprise, similar in scope to those fundraising efforts examined in past. Advisory Opinions 1991-34 (use of a mailing list and computer equipment to generate funds to maintain the computer system during the non-election year) and 1983-2 (use of the computer on a "fee for services basis" by state committees, political candidates and private businesses). Therefore in response to your first and second questions, the Commission concludes that the payments LEC makes under its proposal to any entity that is a political committee under the Act would be considered contributions by LEC.<sup>2/</sup>

The Act prohibits corporations from making any contribution or expenditure in connection with a Federal election. 2 U.S.C. 441b(a).<sup>3/</sup> Other than an exception for certain bank loans, there are

no explicit exceptions to section 441b(a) that would permit a corporation to view the payments it makes to a political committee as consideration for services rendered rather than as prohibited contributions.<sup>4/</sup> The fact that a contributor received something of value in exchange for a political contribution in the style of a commercial sale/purchase transaction does not change the contribution nature of the transaction. See Advisory Opinion 1979-17.

In past advisory opinions, the Commission has considered the participation of corporations in fundraising activities of political committees. See Advisory Opinions 1991-34, 1988-12 and 1979-17. In the affinity credit card transactions discussed in Advisory Opinions 1988-12 and 1979-17, banking entities wished to enter into agreements whereby they would gain access to a political party's membership list and use the party's name and goodwill to market credit card services.<sup>5/</sup> In exchange, the political committee would receive the payment of commissions based on a percentage of the total amount generated by the offering. The Commission concluded that these proposed payments were contributions from the banking entities to the political parties and could violate section 441b. See Advisory Opinions 1988-12 and 1979-17.

The facts in your inquiry closely resemble these two opinions. LEC wishes to profit from the political party's goodwill and party identification and to gain access to its membership. That the political party, rather than the corporate entity, is marketing the service is not a meaningful distinction.<sup>6/</sup>

Therefore, while the activity you wish to engage in is not directly prohibited by the Act or Commission regulations, since the commissions received from the LEC telephone service billings are contributions for purposes of the Act, the corporate prohibitions of section 441b apply. This restricts the political party committees that may be parties to your proposal. The Act and regulations do not prohibit State or local committees with only nonfederal accounts from participation in the LEC proposal, but such participation would be subject to State or local law. State or local committees with both Federal and nonfederal accounts may participate only if the commissions they receive are placed in their nonfederal account, if permitted under State or local law, and used for purposes other than influencing any Federal election or the payment of the Federal share of administrative and fundraising costs. See 11 CFR 102.5(a) and 106.5; also see Advisory Opinions 1991-34 and 1986-40.

Regarding your third question, the contribution in this transaction is the commission from LEC to a participating political party committee, rather than the amount paid by a party supporter to receive the service. Therefore, because commissions resulting from LEC billings to business telephone customers are no different than commissions paid on calls billed to other LEC telephone customers, businesses may be signed up in the proposal.

The Commission expresses no opinion as to the possible application of any state law to the described activity, nor as to any tax ramifications, since those issues are outside its jurisdiction.

This response constitutes an advisory opinion concerning the 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)

Joan D. Aikens  
Chairman for the Federal Election Commission

Enclosures (AOs 1991-34, 1990-3, 1989-4, 1988-12, 1986-14 1983-2, 1981-53, 1980-34, 1979-24 and 1979-17)

#### ENDNOTES

1/ These are the state Republican parties of Arizona, California, Colorado, Georgia, Illinois, Indiana, Iowa, Idaho, Kansas, Kentucky, Minnesota, Montana, Missouri, Nebraska, Nevada, New Mexico, New Jersey, Oklahoma, Ohio, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Wyoming.

2/ Your request notes that the Internal Revenue Service would view the commission paid to the participating political organizations as earned income rather than as a contribution. The Commission notes that the Internal Revenue Code and regulations, and the Act and Commission regulations, were drafted with different regulatory purposes in mind. Therefore, certain determinations, including what constitutes a contribution, will differ. For example, while the Commission has viewed payments to political committees for the sale of artwork as contributions, the Internal Revenue Service has not. Compare Rev Rul. 80-103, 1980-1 C.B. 120 with Advisory Opinion 1980-34.

3/ For purpose of section 441b(a), the term "contribution or expenditure" is defined to include:

any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or state bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in [section 441b(a)].

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

4/ Commission regulations allow the earned interest from the investment of committee funds without such amounts being termed as "contributions" to the political committee. See 11 CFR 103.3(a).

5/ In Advisory Opinion 1979-17, several banks planned to market credit card services to members of the Republican National Committee. In Advisory Opinion 1988-12, the Empire of America Federal Savings Bank ("Empire Bank") wished to sell credit card membership to Democratic voters as identified by the lists maintained by the Erie County [New York] Democratic Party ("Erie County Committee"). These advisory opinions dealt with the specific prohibition of the making of any election contribution, Federal or nonfederal, by a national bank

or corporation organized under the authority of Congress. However, the analysis adopted by the Commission in these opinions is applicable to the more generic corporate prohibitions of section 441b.

6/ In Advisory Opinion 1988-12, while Empire Bank had primary responsibility for marketing the service, the Erie County Committee also undertook to advertise the credit card service at various party functions.