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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM
For Meeting of: 4-25-96

April 17, 1996

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Jonathan M. Levin
Senior Attorney

Subject: Draft AO 1996-2

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for April 25, 1996.

Attachment

DRAFT

1 **ADVISORY OPINION 1996-2**

2
3 **Stephen M. Heaton, General Counsel**
4 **CompuServe, Inc.**
5 **5000 Arlington Centre Blvd.**
6 **Columbus, OH 43220**

7
8 **Dear Mr. Heaton:**

9 **This responds to your letter dated January 15, 1995, as supplemented by your**
10 **letter dated April 2, 1996, requesting an advisory opinion on behalf of CompuServe, Inc.**
11 **("CompuServe") concerning the application of the Federal Election Campaign Act of**
12 **1971, as amended ("the Act"), and Commission regulations to the provision of free online**
13 **accounts to Federal candidates.**

14 **CompuServe has announced that it is creating a "nonpartisan online election**
15 **headquarters," named "The Election Connection '96," in order to provide information**
16 **concerning the 1996 elections to its subscribers. This service will offer CompuServe**
17 **members information, discussion, and news on candidates, issues, and elections across**
18 **the United States. In conjunction with this, CompuServe will offer free member accounts**
19 **"on a nonpartisan basis" to all candidates for Federal and statewide elective offices.¹ You**
20 **state that, by doing this, CompuServe**

21 **hopes to encourage the broader dissemination of information relating to**
22 **election candidates, stimulate public awareness and discussion of issues of**
23 **public importance, and help open direct access to candidates by voters,**
24 **thereby providing another outlet, outside of the traditional filter of the**
25 **media, for CompuServe members to evaluate the candidates and their**
26 **positions.**

¹ Although you do not specifically state what is included in the concept of all candidates on a nonpartisan basis, the Commission assumes that, with respect to Federal candidates, this group would correspond to the group of candidates set out in 11 CFR 114.4(b)(1)(i) and (ii) [60 Fed. Reg. 64276 (December 14, 1995)] who must be given the opportunity to make appearances on corporate premises if any candidate is invited to do so. In that regulation, this consists of all candidates for a House or Senate seat who request to appear and all Presidential or Vice Presidential candidates who are seeking nomination or election, who meet pre-established objective criteria under 11 CFR 110.13(c), and who request to appear. The Commission acknowledges that this situation differs slightly in that a request by a candidate for an on-line account would be made, if at all, after an offer is made to all Congressional candidates and to all Presidential and Vice Presidential candidates meeting objective criteria.

1 Candidates could post online their position papers on issues, provide CompuServe
2 members access to candidate information, and “respond directly to voters’ questions and
3 concerns.”

4 For accounts similar to the ones to be offered as a public service to candidates,
5 CompuServe normally charges \$9.95 per month for membership, with membership for
6 the first month provided at no charge. Membership typically includes five free hours of
7 use (ten hours the first month), with additional hours billed at \$2.95 per hour. You note,
8 however, that CompuServe does not limit free member accounts to Federal candidates. It
9 provides free accounts on a regular basis to persons such as journalists covering the
10 online industry who might generate publicity for CompuServe services. In addition, you
11 have presented information indicating that CompuServe provides free accounts to a large
12 number of public-service oriented users, including a wide variety of schools and
13 charitable organizations, as well as museums, religious organizations, and governmental
14 entities. Other users of free accounts include a few trade and professional associations.

15 You assert that publicity obtained through such users heightens the company’s
16 prestige and goodwill, stimulates usage by existing CompuServe members, and
17 encourages non-members to subscribe to CompuServe. You contend that providing free
18 accounts to Federal candidates will serve the same purposes.

19 You ask whether CompuServe’s proposed offer of free member accounts to all
20 Federal candidates is permissible under the Act.

21 The Act and Commission regulations prohibit any contribution or expenditure by
22 a corporation in connection with a Federal election. 2 U.S.C. §441b(a); 11 CFR 114.2(b).
23 For purposes of this prohibition, the term “contribution or expenditure” includes “any
24 direct or indirect payment, distribution, loan, advance, deposit or gift of money, or any
25 services, or anything of value ... to any candidate, campaign committee, or political party
26 or organization in connection with” any Federal election. 2 U.S.C. §441b(b)(2); see 11
27 CFR 114.1(a)(1). The term “anything of value” includes “in-kind contributions,” i.e.,
28 good or services provided at no charge or at less than the usual and normal charge for
29 such goods or services. 11 CFR 100.7(a)(1)(iii)(A). See 11 CFR 100.8(a)(1)(iv)(A). The
30 difference between the amount actually charged and the usual and normal charge is the

1 amount of the contribution. 11 CFR 100.7(a)(1)(iii)(A). In analyzing the permissibility
2 of your proposal, the Commission focuses on the provision of the on-line accounts at the
3 “usual and normal charge” and the significance of the promotional value you describe.

4 In previous advisory opinions, the Commission has applied the usual and normal
5 charge principle to a variety of situations where a corporation provides goods or services
6 at a discount, or with a rebate, to a Federal candidate or political committee. The
7 Commission has permitted a number of the proposed transactions on the basis that the
8 discount or rebate is made available in the ordinary course of business, and on the same
9 terms and conditions (e.g., business volume), to the company’s other customers that are
10 not political committees or organizations. Such transactions have included a publisher’s
11 sale of books to the author’s principal campaign committee at a “bulk rate” purchase
12 price, subject to certain conditions, where such a rate is a standard price available for
13 large purchasers who agree to those conditions; a bank’s grant of fee waivers on loans to
14 candidates where it has provided waivers, based on similar business considerations (e.g.,
15 estimated profitability of an account), to commercial customers; the offer of catering and
16 reception services to political committees at a reduced rate available on equal terms to
17 other customers; and the offer by a hotel corporation of discount or complimentary rooms
18 and other amenities to campaigns that reserve a certain number of rooms at the
19 appropriate rate where the same offer is made to other customers satisfying the same
20 conditions. Advisory Opinions 1995-47, 1994-10, 1989-14, and 1987-24.

21 Applying the usual and normal charge standard to a corporation’s offer of a
22 reduced billboard advertising rate to a Federal candidate’s campaign committee, the
23 Commission concluded that the discounted rate would represent a prohibited corporate
24 contribution. The rate at issue was a reduced rate that the corporation had a “practice” of
25 providing “for civic and political purposes.” The Commission reasoned that, because this
26 rate was not routinely offered in the ordinary course of business to the corporation’s
27 nonpolitical clients, it could not be offered to Federal candidates. Advisory Opinion
28 1978-45; see also Advisory Opinion 1988-25.

29 The Commission has also applied the usual and normal charge standard with
30 respect to the provision of free goods or services to a Federal candidate. In Advisory

1 Opinion 1978-60, the Commission concluded that a television network corporation could
2 give the candidate a copy of a videotape segment in which the candidate appeared, so
3 long as the company's policy was to provide a videotape copy free of charge to any
4 member of the public appearing in a newscast.² In a footnote, that opinion cited to Re:
5 AOR 1976-56 in which the Commission concluded that a hotel could provide
6 complimentary hotel accommodations to a Federal candidate if the hotel provides such
7 accommodations in the ordinary course of business to non-candidates, as well as
8 candidates, and that the hotel could "reasonably expect to derive a commensurate
9 commercial return from the offer," e.g., to bring increased prestige or future customers to
10 the hotel. Nevertheless, Advisory Opinion 1978-60 did not rely on the commensurate
11 commercial return as a factor in reaching its decision.

12 The Commission has subsequently examined the issue of such commercial
13 return, i.e., promotional value derived by the vendor in the provision of free goods or
14 services, and has generally concluded that the asserted promotional or goodwill value to a
15 corporate vendor from the acceptance and use of free goods and services by a candidate
16 or committee would not avoid a prohibited corporate contribution. See Advisory
17 Opinions 1991-23, 1988-25, 1987-22, and 1986-30. See also Advisory Opinion 1988-
18 12.³ The Commission has also stated that the opinions allowing corporate vendors to
19 provide discounts in the ordinary course of business "do not establish the rule that
20 valuable goods and services may be given without charge to, or payment by, a Federal
21 candidate or political committee." Advisory Opinion 1988-25.

² In another opinion involving a media corporation, the Commission permitted a cablecast television station to provide free time to the DNC and the RNC so that each party could air a two-hour presentation discussing public issues from the party's perspective and soliciting contributions to the national party committee. Advisory Opinion 1982-44. The Commission concluded that this donation of time would not constitute a prohibited corporate contribution because such activity was a form of commentary falling within the exemption for a news story, editorial, or commentary distributed through the facilities of a broadcasting station, newspaper, magazine, or other periodical publication. 2 U.S.C. §431(9)(B)(i); 11 CFR 100.7(b)(2) and 100.8(b)(2). Since neither CompuServe nor its described on-line services is a facility qualifying for the media exemption, as described in the Act, the Commission's conclusion in that opinion is inapplicable to your proposal.

³ In that opinion, the Commission indicated that the goodwill value of an endorsement by political party officials that would assist in the bank's commercial promotion of its credit cards to party members would not validate payments by the bank as consideration for a contractual relationship with the political party.

1 In Advisory Opinion 1986-30, the Commission concluded that Federal candidates
2 could not obtain the free use of a houseboat owned by the corporate manufacturer for a
3 campaign tour through lakes and waterways in their congressional districts, even though
4 the corporation offered the houseboat without charge in order to promote commercial
5 sales during the tour. Furthermore, in Advisory Opinion 1991-23, the Commission
6 concluded that a corporate donation of a car for a trade association SSF's raffle, where
7 the corporation was not an association member, was prohibited by 2 U.S.C. §441b, and
8 that the promotional aspects of the donation did not affect that conclusion.⁴

9 The narrow exception to these conclusions has been in the context of national
10 nominating conventions. Advisory Opinion 1988-25 presented a situation in which an
11 automobile manufacturer proposed to provide a fleet of cars without charge for both
12 major parties to use at their Presidential nominating conventions. After analyzing prior
13 opinions and affirming that allowing discounts in the ordinary course of business does not
14 give sanction to the provision of free goods or services in return for promotional value,
15 the Commission reviewed its convention regulations pertaining to the provision of
16 automobiles, to discounted sales or leases of goods and services, and to the donation of
17 funds or services commensurate with the commercial return reasonably expected to be
18 derived by the business. The Commission concluded that the proposed program was
19 permissible, stating that it fell "within the parameters of the kind of activity sanctioned
20 by" those regulations. The conclusion was explicitly predicated "on several factors, most
21 of which would be evident in qualifying under the specific exemptions," such as the
22 company's established practice of providing proportionate value in other non-political
23 events, the fact that commercial benefit equal to the value provided will be derived, and
24 "the unique promotional versus political opportunities that a national nominating
25 convention presents." The opinion's analysis of Commission precedent rejecting a
26 reliance on promotional value and the emphasis on the special aspects of a national

⁴ The Commission also rejected a proposal by a computer corporation to furnish free computers, software, and technical training to Federal candidates who promised to use the computer and software solely for FECA compliance. Advisory Opinion 1989-13. Although the concept of promotional value is not discussed in the opinion, its conclusion, that the services were not within the contribution exception for legal and accounting compliance services to a campaign, implies that, even if promotional value was asserted, it would not have changed the result. See 2 U.S.C. §431(8)(B)(ix)(II); 11 CFR 100.7(b)(14).

1 nominating convention indicate, however, that promotional value is not generally an
2 exception to the prohibition of corporate contributions.⁵

3 You have demonstrated that CompuServe provides free member accounts to a
4 number of organizations and entities with a variety of public service orientations. You
5 indicate that such free accounts increase the company's prestige and goodwill and
6 encourage future use by present subscribers and potential subscribers. Even if the
7 categories of free customers you describe is varied enough to indicate that your proposal
8 may be in the ordinary course of business, the Commission still concludes that your
9 proposed gift to Federal candidates of valuable services which enable them to
10 communicate with voters and advocate their candidacies would constitute in-kind
11 contributions to those candidates and would be prohibited by 2 U.S.C. §441b(a). As
12 indicated in the opinions addressing the relevance of promotional value, the fact that
13 CompuServe may derive substantial publicity, goodwill, or other commercial benefit
14 does not negate or reduce the corporate contribution. Such publicity or benefit does not
15 constitute consideration for the services provided. See Advisory Opinions 1988-25 and
16 1988-12. Moreover, the Commission has applied this principle to situations where goods
17 or services are provided without charge, and it has explicitly noted that the allowance for
18 providing goods or services at a discount does not (except under narrow circumstances
19 not present here) extend to providing them without any charge. Advisory Opinion 1988-
20 25.

⁵ In Advisory Opinion 1991-23, the Commission made reference to one other narrow exception in addition to the national party convention context, i.e., "where certain general promotional amenities, discounts, and rebates were offered within a pre-existing business relationship." The example referred to was Advisory Opinion 1987-24 where some free rooms and certain amenities were provided to customers who reserved a larger block of rooms (see above). This, however, constitutes a discount or rebate situation, rather than a provision of free goods or services.

