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Brad Litchfield, Esq.
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Request For Advisory Opinion

Dear Mr. Litchfield:

This letter requesting an advisory opinion pursuant to 2 U.S.C. § 437f(a)(1) and 11 C.F.R. § 112.1 (1995) is submitted by CompuServe Incorporated ("CompuServe"). CompuServe operates the most comprehensive online information service in the world, providing a variety of online information and database services to more than 3.7 million members in more than 140 countries.

On November 13, 1995, CompuServe issued a press release announcing that it was taking the lead among online information services in providing information concerning the 1996 elections to its subscribers. CompuServe announced that it was creating a nonpartisan online election headquarters, The Election Connection '96™, that will offer CompuServe members information, discussion and up-to-the-minute news on candidates, issues and elections across the United States.

In the same press release, CompuServe also announced that as a public service it will offer on a nonpartisan basis to all candidates for Federal and state-wide elective offices free member accounts. By providing free accounts to all candidates on a nonpartisan basis, CompuServe hopes to encourage the broader dissemination of information relating to election candidates, stimulate public awareness and discussion of issues of public importance, and help open direct access to candidates by voters, thereby providing another outlet, outside of the traditional filter of the media, for CompuServe members to evaluate the candidates and their positions. Candidates for election could post online their position papers on important issues, provide CompuServe members access to candidate information, and respond directly to voters' questions and concerns. For accounts similar to the ones proposed to be offered as a public service to the election candidates, CompuServe normally charges \$9.95 per month (free the first month) for membership. Membership typically includes five (5) free hours of use each month (ten free hours the first month), with additional hours billed at the rate of \$2.95 per hour.

Before its offer of a free online account was accepted by any candidate for Federal office, however, CompuServe suspended the offer in response to press reports that a representative of the Federal Election Commission ("FEC" or "Commission") stated that CompuServe's offer might violate the statutory ban on corporate contributions to candidates for Federal elective office. In order to clarify the lawfulness of its public service offer with respect to candidates for Federal elective office, CompuServe is submitting this request for an advisory opinion.

CompuServe is aware that the Federal Election Campaign Act ("FECA") generally prohibits any corporation or labor organization from making contributions or expenditures "in connection with an election." 2 U.S.C. § 441b(a). Section 441b(b)(2) states that the term "contribution or expenditure" shall include "any direct or indirect payment, distribution, 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 a Federal election." The general definitions section of FECA states that the term "contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i) (emphasis supplied).

CompuServe submits that the proposed public service offering of free accounts on a nonpartisan basis to all candidates for Federal elective office is not a prohibited "contribution" within the meaning of Section 441b because the offer is not made "for the purpose of influencing" a Federal election. The courts have found that to find a "purpose of influencing" one must prove that a gift was made for the purpose of aiding one candidate or party in an election. See Miller v. American Telephone & Telegraph Co., 507 F.2d 759, 764-65 (3d Cir. 1974). The express terms of CompuServe's offer to all candidates for Federal elective office is inconsistent with a finding of partisan activity. The purpose of Section 441b, and its predecessor statutes, is to prohibit the "use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party." U.S. v. International Union Auto Workers, 352 U.S. 567, 589 (1957) (emphasis supplied). See also U.S. v. CIO, 335 U.S. 106, 113 (1948); Pipefitters Local Union No. 562 v. U.S., 407 U.S. 385, 416 (1972).

The Supreme Court has affirmed the FEC's own conclusion that the Section 441b ban on corporate aid to a particular candidate has two main purposes: first, to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political "war chests" which could be used to incur political debts from legislators who are aided by the contributions, and, second, to protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed. FEC v. National Right To Work Committee, 459 U.S. 197, 207-08 (1982).

Neither of the aforementioned purposes of Section 441b are in any way frustrated by CompuServe's public service offer. The nonpartisan offer to any candidate creates no "debt" owed by any candidate because each candidate knows in advance that all other candidates are eligible for equivalent accounts. Nor does CompuServe's offer require CompuServe members to support some candidates to the exclusion of others. The purpose of CompuServe's public service offering is to provide an avenue through which CompuServe

members may inform themselves more effectively about the upcoming elections by accessing candidates' position papers and other information posted by the candidates and by communicating directly with any and all candidates whom they wish to contact. CompuServe's public service offering also provides its members with another outlet to evaluate the candidates, without the filtering that otherwise occurs from the traditional print and broadcast journalists.

A ruling that CompuServe's nonpartisan offer is not prohibited by Section 441b is supported by Commission's regulations and precedent. The Commission's regulations include several exceptions to the definition of contribution. If a particular corporate activity related to a Federal election comes within an exception, the costs of that activity do not result in a prohibited contribution. See Advisory Opinion 1991-17, June 14, 1996. For example, Section 114.4 of the Commission's regulations provides that corporations lawfully may make nonpartisan registration and get-out-the-vote communications to the general public. See 11 C.F.R. § 114.4(b)(2). Factors that the Commission may consider in determining whether an activity is nonpartisan include whether all candidates for a particular Federal office receive the benefit, without favoring any candidate over any other. 11 C.F.R. § 114.4(b)(2)(i)(A).

Based on the nonpartisan exception to prohibited corporate contributions, the Commission previously has held that a for-profit corporation's payment to a newspaper of general circulation for an advertisement in which the corporation, without expressing any political party preference, urged people to register to vote did not violate the prohibition of Section 441b. Advisory Opinion 1980-20 (May 1, 1980). The Commission concluded that, while Section 114.4 describes a variety of permissible nonpartisan corporate activities having election-related aspects, the regulation is not to be interpreted as prohibiting "other materially indistinguishable activity." Id. CompuServe submits that its public service offer of free access on a nonpartisan basis is "materially indistinguishable" from the nonpartisan activities expressly permitted by Section 114.4(b)(2) of the FEC regulations.

The Commission's analysis in AOR 1976-56 (September 8, 1976), cited in Advisory Opinion 1978-60 (September 1, 1978) n.4, also supports CompuServe's position. There the Commission concluded that an offer of complimentary hotel accommodations to a Federal candidate would not be presumed to be a prohibited corporate contribution upon a showing that complimentary accommodations are offered by the hotel in the ordinary course of business to non-candidates as well as candidates and that the hotel reasonably could expect to derive commensurate commercial return from the offer. Like the hotel, CompuServe does not limit free member accounts to Federal candidates but rather provides free accounts on a regular basis to persons such as journalists covering the online industry who might generate publicity for CompuServe services. Publicity obtained through such users heightens CompuServe's prestige, serves to stimulate usage by existing CompuServe members, and encourages nonmembers to subscribe to CompuServe. Like the hotel's offer of free accommodations to Federal candidates, CompuServe's public service offer of free accounts to Federal election candidates on a nonpartisan basis serves a legitimate purpose in the ordinary course of business by generating additional publicity, stimulating member usage, and encouraging more people to subscribe to CompuServe.

As discussed above, a CompuServe offer of free accounts on a nonpartisan basis to Federal election candidates would constitute an important public service in that it would encourage the broader dissemination and exchange of information relating to the elections among the American public. CompuServe's nonpartisan offer would not be made for the "purpose of influencing" a Federal election and should not be deemed an impermissible corporate contribution. CompuServe requests that the Commission issue an advisory opinion to that effect.

Please call CompuServe's undersigned attorney if you have any questions regarding this request for an advisory opinion.



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