

July 11, 2002

NOTICE AO DRAFT COMMENT PROCEDURES

The Commission has approved a revision in its advisory opinion procedures that permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2002-07 is available for public comments under this procedure. It was requested by Richard F. Carrot, on behalf of the Careau & Co., and Mohre Communications. The draft may be obtained from the Public Disclosure Division of the Commission.

Proposed Advisory Opinion 2002-07 will be on the Commission's agenda for its public meeting of Thursday July 18, 2002.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (EDT) on July 17, 2002.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case by case basis in special circumstances.

4) All comments timely received will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Disclosure Division.

CONTACTS

Press inquiries: Ron Harris (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copy of draft AO 2002-07 contact Public Records Office-
Public Disclosure Division (202) 694-1120, or 800-424-9530.

For questions about comment submission procedure contact
N. Bradley Litchfield, Associate General Counsel, (202) 694-1650.

ADDRESSES

Submit single copy of written comments to:

Commission Secretary
Federal Election Commission
999 E Street NW
Washington, DC 20463



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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MEMORANDUM

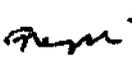
AGENDA ITEM
For Meeting of: 7-18-02

TO: The Commission

THROUGH: James A. Pehrkon 
Staff Director

FROM: Lawrence H. Norton 
General Counsel

Rosemary C. Smith 
Acting Associate General Counsel

Michael G. Marinelli 
Staff Attorney

SUBJECT: Draft AO 2002-07

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for July 18, 2002.

Attachment

1 **ADVISORY OPINION 2002-07**

2
3 **Richard F. Carrott, President**
4 **Careau & Co.**
5 **PO Box 94073**
6 **Simi Valley, CA 93094-0733**

DRAFT

7
8 **Dear Mr. Carrott:**

9
10 **This refers to your letters dated May 21 and May 6, 2002, on behalf of Careau &**
11 **Co. ("Careau") and Mohre Communications ("Mohre"), an affiliate of Careau,**
12 **concerning the application of the Federal Election Campaign Act of 1971, as amended**
13 **("the Act"), and Commission regulations to what you describe as "the sale and use of**
14 **Internet Service Provider ("ISP") services for Internet-based political fundraising to make**
15 **contributions to Federal political committees." ¹**

16 **You state that Careau, a California corporation, is a marketing company that**
17 **develops programs for the Internet. It has two pending patent applications that it has**
18 **licensed to Mohre, a Nevada corporation, to facilitate their joint proposed program for the**
19 **making of Federal election contributions. As part of this program, Mohre will provide**
20 **services as an Internet Service Provider and Portal ("ISP"). You state that individuals**
21 **who access the Internet site operated by the requestors will be able to subscribe to the ISP**
22 **services they offer. However as part of the service, subscribers will be required to make**
23 **two monthly categories of payments: one for the cost of the ISP service and the other in**
24 **the form of a contribution to either a Federal political committee or a charitable donation**

25

¹ You submitted an earlier version of your proposal on November 21, 2001 which became Advisory Opinion Request 2001-20. This request was later withdrawn by letter dated January 19, 2002.

1 to a 501(c) organization.² You affirm that an individual will not be able to subscribe or
2 maintain a subscription to the ISP services without making either a donation or a political
3 contribution as described below.

4 The various Federal political committees participating in the program ("the
5 America Plan") will direct their supporters to the Mohre and Careau's registration
6 website in the hope that the supporter will make two choices: subscribe to the ISP and
7 choose the option to make a contribution to Federal political committees (rather than a
8 donation to a charitable organization). You explain that "individuals who choose to
9 subscribe to this full service ISP may do so over the Internet by credit card and may elect
10 to earmark a small portion of the monthly service fees as contributions to specific Federal
11 election committees or 501(c)(3) organizations."³ In order to subscribe, the individual
12 must complete a series of form questions. You state that these questions, and the answers
13 to them, also serve to satisfy the Act and Commission's screening procedures. This is
14 intended to ensure that those who participate in that part of the program are qualified to
15 make contributions to Federal political committees.

16 According to the request, the price of the ISP services that Mohre offers will be
17 \$17.76 per month. Of this targeted price \$15.76 will be paid to the Careau and Mohre for
18 the ISP services provided. Subscribers will be allowed to contribute a total of up to \$2.00
19 per month in various amounts to as many as five Federal political committees and/or

² A 501(c)(3) organization is, generally, a tax-exempt, non-profit corporation or other entity organized and operated exclusively for charitable, religious, or educational purposes not involved in influencing legislation or involved in influencing elections. See 26 U.S.C. 501(a) and (c)(3). You offer the Boys and Girl Club and United Way as an example of the 501(c)(3) organizations that may be included in the plan.

³ You explain that your use of the term "credit card" is meant to encompass credit cards, debit cards, and any other commonly accepted form of electronic transfer of funds in commerce over the Internet.

1 501(c)(3) organizations.⁴ The Federal political committees that would receive the
2 contributions will be determined by where the subscriber lives. When the subscriber
3 completes the transaction, the amount of the transaction that consists of the payment for
4 the ISP services would be transferred directly to Careau and Mohre. The portion that
5 represents the contribution to the Federal political committee would be directly sent into a
6 separate merchant account. Following the deduction of the usual and normal service
7 charges of the credit card issuers and other processing expenses, the Federal political
8 committee would receive the contribution.⁵ You state that this ensures that the Federal
9 political committees receiving each contribution would pay all the applicable processing
10 fees and any associated merchant account charges.

11 Careau has been in discussions with several Federal political committees that have
12 expressed an interest in participating. These include the campaign committees for
13 members of Congress of both the Democratic and Republican Parties, as well as the
14 Democratic National Committee and Republican National Committee.

15 Your request includes further information regarding how the funds would be
16 accounted for and transferred to various candidate committees, as well as the various
17 security procedures Careau and Mohre would take to prevent the making of prohibited

⁴ After subscribing to the program, the contributor may discontinue any or all of the contributions but to continue to receive the ISP services they must always make new contributions or donations of \$2.00 per month.

⁵ You explain that Mohre and Careau have entered into preliminary third party agreements with vendors for other necessary services; e.g. merchant account services, credit card authorization and processing, billing name, address services, etc. These services will be obtained from various vendors at the usual and normal charge for similar services and the rate will include expenses plus a reasonable profit to the vendor(s).

1 contributions. You assert that these procedures are in accord with the relevant past
2 advisory opinions dealing with contributions made through the Internet.⁶

3 You ask whether the above proposal is permissible under the Act and
4 Commission regulations.

5 **ACT AND COMMISSION REGULATIONS**

6 Under 2 U.S.C. 441b(a), it is unlawful for "any corporation whatever" to make a
7 contribution or expenditure in connection with any election at which presidential and vice
8 presidential electors or a Senator or Representative in, or a Delegate or Resident
9 Commissioner to, Congress are to be voted for, or in connection with any primary
10 election, or political convention or caucus, held to select candidates for any of these
11 Federal offices. It is likewise unlawful for any candidate, political committee, or other
12 person knowingly to accept or receive any contribution prohibited by this section, or any
13 officer or any director of any corporation or any national bank or any officer of any labor
14 organization to consent to any contribution or expenditure by the corporation, national
15 bank, or labor organization, as the case may be, prohibited by this section. *Id.*

16 For purposes of 2 U.S.C. 441b(a), the term "contribution or expenditure"
17 is defined to include:

18 any direct or indirect payment, distribution, loan, advance, deposit,
19 or gift of money, or any services, or anything of value to any
20 candidate, campaign committee, or political party or organization
21 in connection with any election to any of the offices referred to in
22 [section 441b(a)].

⁶ You should be aware that the Bipartisan Campaign Reform Act of 2002 ("the BCRA"), Pub. L. 107-155, 116 Stat. 81 (March 27, 2002), substantially amends the Act. In particular, the BCRA revises and expands the Act's treatment of prohibited contributions. These changes take effect after November 5, 2002. The application of this Advisory Opinion in discussing your screening procedures is limited to contributions made before that date.

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

3
4 **APPLICATION TO PROPOSAL**

5
6 The Commission has considered a number of business arrangements between
7 political committees and corporations to assist political committees in raising funds. In
8 several past opinions the Commission has reviewed fundraising efforts by political
9 committees using certain "affinity marketing arrangements." *See* Advisory Opinions
10 1992-40, 1988-12 and 1979-17. Although the opinions addressed different types of
11 services, the proposals examined were very similar to "the America Plan" in their basic
12 approach. A corporation (sometimes a bank) would offer to market its services to
13 potential customers who were also identified as supporters of a particular political party
14 or candidate. The party or other political committee would endorse the product or service
15 offered by the corporation. In some of these proposals, the corporation would pay a fee to
16 the political party in return for the endorsements. *See* advisory opinions cited above.⁷
17 Rather than viewing these as commercial transactions, the Commission regarded them as
18 fundraising efforts by political committees. The Commission specifically concluded that
19 the fact that a business corporation received something of value (an endorsement of its
20 product or service) in exchange for payments that purported to be the proceeds of a
21 commercial sale did not change the contribution nature of the transaction. The payments

⁷ In Advisory Opinion 1979-17 a national bank proposed to market its credit card services to members of the Republican National Committee. In return, among several options, it offered to pay either a one-time fee to the RNC or a portion of the membership fee paid by each subscriber to the credit card service. Similarly, in Advisory Opinion 1988-12, a county Democratic Party committee proposed to give access to its list of supporters so that a bank could market its credit card services. A portion of each membership fee would be remitted to the local party committee. In Advisory Opinion 1992-40, a company selling long distance telephone services proposed to sell, with the marketing support of political party committees, its services to party members or donors. Again a percentage of the sales generated would be paid to a political party committee as a commission.

1 received by the political committees were regarded as contributions subject to the
2 prohibitions of 2 U.S.C. 441b.⁸

3 Your plan differs somewhat, from these opinions. You have described your
4 proposal as one in which the customers of Mohre would directly " earmark" contributions
5 to various political committees. A subscriber would always be required to contribute or
6 donate the \$2.00 per month portion of the fee and that amount (minus certain transaction
7 costs) is always forwarded to a Federal committee or a 501(c)(3) organization through the
8 use of a merchant account. Therefore, this amount would never become corporate
9 treasury funds of Careau and Mohr and these funds could not by themselves be deemed
10 corporate contributions to the Federal committees.

11 However, this difference is not material since the question of compensation for
12 their Internet marketing service provided to political committees remains. You state that
13 the Careau and Mohre have contracted with vendors that will provide various processing
14 services that make the America Plan possible. These vendors would receive
15 compensation when their fees are deducted from the contributions transmitted to the
16 political committees. However, you indicate that no fee will be paid to either Mohr or
17 Careau for arranging these processing services and creating a website that facilitates

⁸ This is in contrast to those situations where a political committee pays a telemarketing firm a commercially reasonable fee in exchange for the firm's efforts to market services that offer an opportunity for a purchaser to contribute to the committee. See Advisory Opinions 1999-22, 1995-34, 1994-33, and 1990-14. For example, in Advisory Opinion 1994-33 a telecommunications company proposed to market prepaid phone cards using the endorsements of various authorized candidate committees, as well as political party entities. The cards were produced by the telecommunications company to be distributed by the client political committees. For each instance when time was purchased on the phone card, through use of the purchaser's credit card, a portion of the dollar value of the card so purchased could be designated as a contribution to the client political committee. The political committee, however, paid the telemarketing firm a fee which included all processing costs and a commercially reasonable profit. The Commission found this proposal was permissible under the Act and Commission regulations.

1 contributions to the individual Federal political committee. The services of these
2 corporations to the political committees would be uncompensated.⁹ The Commission
3 notes that Mohr and Careau, by offering to include political committees in the America
4 Plan, are contributing something of value to these political committees. This would meet
5 the definition of "contribution" under 2 U.S.C. 441b(a). Since they are not receiving any
6 payment for their Internet marketing services, your proposal, as presented, is subject to
7 the corporate prohibitions of 2 U.S.C. 441b.

8 The Commission notes that while this conclusion does not prohibit the proposal
9 entirely, it does significantly restrict its scope and the type of committees that may
10 participate in the America Plan. The Act and regulations would not prohibit State or local
11 committees with only non-Federal accounts from participation in the described activity,
12 but such participation would be subject to State or local law. State and local committees
13 with both Federal and non-Federal accounts may participate only if the proceeds or
14 payments they receive from Careau and Mohre are placed in their non-Federal accounts,
15 if permitted under State or local law, and are not used in connection with Federal
16 elections. *See* 11 CFR 102.5(a) and 106.5; *also see* Advisory Opinion 1992-40. The
17 authorized committees of Federal candidates, such as those identified in your request,

You cite Advisory Opinion 1994-33 and the opinions above in support of your proposal. However, the unlike these opinions, Careau and Mohre do not seem to be in a vendor relationship with the political committees who participate in the program. See discussion below.

⁹ You argue that Careau and Mohre do receive additional compensation in that the burden of marketing the fundraising proposal falls on the participating Committees. The Commission notes that creation of the website with the option to contribute to a Federal political committee is itself a form of marketing. Further, in past affinity marketing opinions, which party bears the marketing burden has not been viewed as a meaningful distinction. See Advisory Opinion 1992-40. You also point out that the Careau and Mohre would receive compensation from its subscribers for its ISP services. However, this does not address the issue of whether Careau and Mohre are being paid the usual and normal charge by the Federal political committees for the services they provide to the Federal political committees.

1 could not participate in your proposal, while candidates for non-Federal offices and their
2 committees could participate, subject to State or local law.

3 This response constitutes an advisory opinion concerning the application of the
4 Act, or regulations prescribed by the Commission, to the specific transaction or activity
5 set forth in your request. *See* 2 U.S.C. 437f.

6 Sincerely,

7

8 David M. Mason
9 Chairman

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11 Enclosures: AOs 2001-12, 1999-22, 1995-34, 1994-33, 1990-14, 1992-40, 1988-
12 12, and 1979-17

13

14