



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

January 27, 1995

CERTIFIED MAIL,  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1994-33

Paul E. Sullivan  
Attorney-at-Law  
The Singletary Mansion  
1565 The Alameda  
San Jose, CA 95126

Dear Mr. Sullivan:

This responds to your five letters (dated September 2 and 28, November 2, and December 5, 1994, and January 5, 1995) on behalf of VITEL International Inc. ("VITEL"), which request an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to the sale and use of prepaid phone calling cards to make contributions to political committees.

You state that VITEL is a domestic corporation specializing in various aspects of the telecommunications field including interactive voice response and operator service, and long distance product development and marketing. VITEL is an authorized distributor for AT&T, MCI, and other long distance telephone carriers. It has additional agreements with specialized interactive and operator service providers. VITEL is exploring the use of a prepaid calling card which can be used to make phone calls and is marketing services related to the card to businesses and to non-profit entities.

VITEL proposes to market such services to facilitate fundraising by all types of political committees, including separate segregated funds ("SSFs") of trade associations and corporations, authorized committees, non-connected committees, national party committees, and convention committees and related host committees. In general, VITEL's proposal will enable a client political committee or connected organization to collect contributions from persons holding a personalized phone card issued by the client. Individual members of a connected organization's solicitable class, or supporters of a political committee, would have the incentive of obtaining the card to purchase discounted phone time. When they purchase phone time, they can designate as a

contribution a portion of the dollar value purchased with their personal credit card. A trade association or other connected organization may offer the card to the persons in its solicitable class through a mailing that complies with the voluntariness requirements of 11 CFR 114.5(a), or a political committee may advertise the card by direct mail and include an 800 number for a person to call and order the card. The card for the trade association would be unique to that association, similar to an affinity credit card. The name and logo of the association would appear on the card's face, and dialing instructions and the caller-participant's unique ID number would appear on the back. You anticipate that the card for other committees may be similar (e.g., with a picture of the candidate and committee name for an authorized committee.)

To purchase time, an individual with a calling card would call an 800 number which connects him or her to a live operator. On the first use of a calling card, the operator is able to obtain the name, address, employer, credit card number and the date on which the customer purchased time on the card. An individual who wishes to purchase additional time on the card provides the operator with a unique PIN number and requests that the calling card be "refreshed" with a certain dollar value. During the initial call, or when the caller chooses to refresh the card, the operator will ask if the caller wishes to contribute to the particular political committee.

If the caller decides to make a contribution, he or she would be able to designate a percentage of the newly purchased dollar amount to be treated as a voluntary contribution to the political committee. For example, the caller/phonecard holder could ask that \$100 be charged to his credit card to purchase, at a rate of 50 cents per minute, 200 minutes of phone time. He directs that ten percent of the \$100 be designated as a contribution. Then \$10 would be designated as a contribution from the cardholder to the committee and the cardholder's card is credited with \$90 worth of phone time or 180 minutes. The purchased amount of phone time and the contribution are immediately debited against the individual's credit card in separate transactions. VITEL uses a merchant bank to provide the credit card debit services. VITEL, therefore, does not control, nor will it be in possession of, the funds debited against the individual's credit card for the political contribution.

The caller may also be offered other phone options if VITEL's client has purchased access to them. For example, after dialing in the PIN number, the caller could dial "2" and hear a weekly message promoting a candidate or an issue (in the case of a trade association), or a message from the candidate (in the case of an authorized committee), or "3" to leave a message for the trade association or candidate.

The caller may make a contribution only to the political committee designated for that calling card, i.e., a card issued pursuant to a particular contract between an entity and VITEL. For example, the phone card issued by a trade association to the individual in that association's solicitable class may be used to authorize political contributions only to the trade association's SSF, and the operator is authorized to accept only those contributions. It is not anticipated that earmarked contributions to candidates through the SSF will be part of the menu of services.

The costs and charges for this proposal are as follows. VITEL is able to purchase long distance telephone time at a volume discount. Through use of the calling card, the individuals associated with the client corporation or trade association or contributors to the client committees may make

calls at "a below commercial market rate." VITEL and the client arrive at a contract price, which is a negotiated per minute rate. The contract rate will provide VITEL with the revenue necessary to cover the program's administration and overhead expenses, e.g., operators, interactive voice response menu platforms, on-line card validations, services of the merchant bank, and still maintain a profit for VITEL. The client organization or committee will be responsible for any upfront expenses, e.g., for art work on the phone card or phone card production. This may be paid by a retainer up front or billed on a regular thirty day basis.

Within a certain limit, the contributor has discretion over the amount of the contribution. There would be a maximum amount eligible to be designated by the contributor to the Federal committee, since VITEL must ensure that administrative expenses and operational costs are covered and a profit margin is maintained. You state that, under no situation, however, will the amount contributed represent any fees or profits which otherwise represent VITEL's interest or that of the carrier. VITEL will maintain transaction records for all purchases of air time and provide quarterly reports to the client. These reports will also reflect the contributions and are adaptable for the committee's reporting requirements.

### Legal Analysis

VITEL's proposed arrangements with connected organizations and political committees raise a number of issues for analysis. These are: (1) whether the in-kind services provided by VITEL will result in the making of corporate contributions; (2) the use of credit cards for contributions by the callers; (3) the payment of expenses by connected organizations rather than committees; (4) the obtaining of contributor information and providing it to the committee; and (5) requirements with respect to particular types of committees.

The primary concern in addressing the permissibility of the described arrangements is whether prohibited in-kind corporate contributions or expenditures will result under 2 U.S.C. 441b(a) and 11 CFR 114.2(b). 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 ... to any candidate, campaign committee, or political party or organization, in connection with any [Federal] election." 2 U.S.C. 441b(b)(2); 11 CFR 114.1(a)(1). See 2 U.S.C. 431(8)(A)(i) and (9)(A)(i); 11 CFR 100.7(a)(1) and 100.8(a)(1). "Anything of value" includes the provision of services at less than the usual and normal charge, i.e., less than a commercially reasonable hourly or piecework charge for the services prevailing at the time the services were rendered. 11 CFR 100.7(a)(1)(iii)(B).

The Commission has considered a number of business arrangements between political committees and companies to assist the committees in raising funds. See Advisory Opinions 1992-24, 1991-26, 1991-20, and 1991-18. The Commission has stated that, if the vendor does not receive the usual and normal charge for its services, it will have made an in-kind corporate contribution. In discussing the proper charge, the Commission has focused with particularity on the need for an adequate profit and on the advance of services or contribution proceeds without assurance of adequate compensation to the vendor. Advisory Opinions 1991-20, 1991-18 and 1990-19. Here, however, the vendor would receive payment of an agreed upon contract rate that would cover all of VITEL's expenses, plus a reasonable profit. Assuming that the contract rate

(along with payments for up-front expenses) guarantees a profit to VITEL regardless of the success or failure of the transaction with a particular committee, your proposal would satisfy the concerns as to profit and advances. The Commission also assumes that the profit for these transactions comports with those for transactions with non-political customers. Advisory Opinion 1992-24.

The use of credit cards raises the question of the use of VITEL funds or other corporate funds to process the credit card transactions. In the past, the Commission has permitted the use of credit cards in a variety of circumstances. See Advisory Opinions 1990-4, 1984-45, and 1978-68. The Commission has approved plans by authorized committees and separate segregated funds whereby contributors would charge contributions to their individual credit cards. In the case of contributions to the authorized committee, the amount actually remitted to the committee would be reduced by charges deducted by the card issuer (although this would not reduce the amount of the reportable contribution). The set-offs or service charges would be expenditures by the committee. In the case of contributions to separate segregated funds, the connected organizations could pay charges by the credit card company; such payment would be exempt administrative or solicitation costs under 2 U.S.C. 441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii) and 102.6(c)(2). As you describe it, VITEL is utilizing its own fulfillment and merchant bank services. The cost for these services is included in the contract rate and is paid for by the committee or connected organization. Thus, no corporate contribution results. This bears similarity to the arrangement in Advisory Opinion 1989-26 whereby an authorized committee's bank would debit the checking accounts of contributors on a prearranged regular basis. The authorized committee paid its depository a set-up fee, monthly handling fees, and a per entry fee.

Contributions by VITEL are also avoided by the immediate debiting of the caller's credit card for the making of the contribution. This eliminates the concern that VITEL or a subcontractor company is financing the political contributions made by the cardholders during a certain period and, thereby, making advances of corporate funds. Compare with the concerns expressed as to 900 lines in Advisory Opinions 1991-20 and 1990-14.

In the case where the connected organization, and not a political committee, is the contracting entity, the Commission notes that VITEL will attempt to take precautions to ensure that the corporate entity does not make a corporate contribution or expenditure in its solicitation of contributions, or in the optional election advocacy messages it may make available to callers. As stated above, costs incurred by a connected organization in administering its SSF and soliciting contributions to it are exempt from the definition of contribution. 2 U.S.C. 441b(b)(2)(C). To stay within this exemption, the connected organization may only solicit contributions from a restricted class to its own SSF, or one affiliated with it, and may communicate election advocacy only to that class. 2 U.S.C. 441b(b)(2)(A) and (4)(A); 11 CFR 114.1(a)(2)(i) and (c), 114.5(g)(1), and 114.3(a). By permitting operators to accept use of the card issued by a client connected organization for contributions to that organization's SSF only, connected organizations would avoid paying for solicitation services in support of a political committee that is not its SSF or affiliated with its SSF. The proposed use of the unique PIN number (referred to above) as a prerequisite for accessing an election advocacy message would avoid unlawful distribution of those communications.

The example of connected organization you specifically pose, i.e., the trade association, creates difficulties for your proposal. The restricted class for receiving trade association solicitations for SSF contributions includes the executive and administrative personnel of the trade association, persons holding trade association membership as individuals, and the families of those persons. In addition, the restricted class for contribution solicitations is composed of the stockholders and executive and administrative personnel of the trade association's member corporations, and the families of such stockholders and personnel, if the member corporation has separately and specifically approved the solicitations and the member corporation has not approved a solicitation by any other trade association for the calendar year. 2 U.S.C. 441b(b)(4)(D); 11 CFR 114.8(c), (d), and (i)(2). A communication with election advocacy regarding a candidate, which is not a contribution solicitation for the SSF, may be made to a different class that only partially overlaps with the solicitable class, i.e., representatives of a member corporation (regardless of solicitation approval by the member corporation) with whom the trade association normally conducts association activities, as well as the executive and administrative personnel and individual members of the trade association and their families. 11 CFR 114.8(h) and (i)(1); 114.3(a)(2). In view of the principal goal of soliciting contributions for the SSF and the intention to distribute cards only to eligible solicitees, the trade association may wish to eliminate election advocacy communications from its caller choices, rather than delivering them to a narrower class of persons who may be both solicited for SSF contributions and eligible to receive election advocacy communications.

Your proposal also appears to avoid impermissible contributions by solicitees and to facilitate recordkeeping and reporting as required by the Act and Commission regulations. Through use of a live operator, information for itemization purposes will be obtained. 2 U.S.C. 434(b)(3)(A); 11 CFR 104.8(a) and (b). The Commission notes that you will have to provide reports to your client more frequently than on a quarterly basis to ensure their compliance with some of the reporting deadlines, e.g., as to pre-election and post-election reports and as to monthly filers. In addition, VITEL will be able to verify that the credit card being used is that of an individual rather than a corporation. Further screening of impermissible contributions may be performed by the committee, e.g., for contributions by Federal contractors or foreign nationals. 2 U.S.C. 441c and 441e. In order to help avoid prohibited contributions and contributions in the name of another, VITEL should suggest to the client committee or corporation that its solicitations include cautions as to the types of impermissible contributions, including a prohibition against the cardholder receiving reimbursement for the debit to his or her card. See 2 U.S.C. 441f.1/

The types of committees that present a unique situation as to contributors are the national political party convention committees and convention city host committees. Party convention committees that are publicly funded in full may not accept private contributions. If, however, a major or minor party convention committee elects to receive part of its entitlement in public funds or if there is a deficiency in the Presidential Election Campaign Fund, the committee may receive private contributions that are subject to the limits and prohibitions of Title 2. 11 CFR 9008.6(a)(2) and (3). Any agreement between VITEL and the party convention committee should take into account the limits on the amounts that may be raised. Host committees may receive donations from individuals, but they must be from local persons, e.g., within the Metropolitan Area of the convention city. 11 CFR 9008.52(c)(1)(and (2)). An arrangement by

VITEL with a host committee should ensure screening by the operator as to the address of the donor.

The Commission notes that different fundraising methods may have different requirements applied to them in other advisory opinions, e.g., 900 lines and other telephone fundraising. See Advisory Opinions 1991-26, 1991-20, and 1991-18. Those requirements were applied to comport with unique needs raised by the different methods, and nothing in this opinion should be construed as modifying those requirements.<sup>2/</sup>

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. See 2 U.S.C. 437f.

Sincerely,

(signed)

Danny L. McDonald  
Chairman

Enclosures (AOs 1992-33, 1992-24, 1992-20, 1991-26, 1991-20, 1991-18, 1990-19, 1990-14, 1990-4, 1989-26, 1984-45, and 1978-68)

1/ VITEL should also suggest to its clients that are connected organizations that solicitations should be in compliance with the voluntariness requirements of 11 CFR 114.5(a).

2/ The Commission notes your footnoted statement that VITEL anticipates offering its services to corporations, trade associations, and national and state political parties as a means of raising treasury funds or “soft dollar” contributions at the national and state levels. You state that, “[s]ince these types of transactions are not specifically within the jurisdiction of the Commission, VITEL will not present a detailed discussion of those components in its proposal.” The Commission cautions against the assumption made with respect to it’s jurisdiction. See Common Cause v. Federal Election Commission, 692 F. Supp. 1391 (D.D.C. 1987); 11 CFR 106.5 and 106.6; Advisory Opinions 1992-33 and 1992-20. Without further information as to the proposed methods of raising treasury funds or soft dollars, the Commission does not comment on such activity.