



Lisa J. Stevenson  
Acting General Counsel  
1050 First Street, NE  
Washington DC 20463

September 6, 2018

RE: Comments on Advisory Opinion Request 2018-11, Draft A

The Campaign Legal Center respectfully submits these comments on Draft A of Advisory Opinion 2018-11 (Microsoft).

Microsoft proposes to offer online account security services, without charge, to certain “election-sensitive customers,” including federal candidates and national party committees, and asks whether it may do so without making an in-kind contribution. It does not propose to offer the same services without charge to its non-political customers.

CLC fully appreciates the urgent need to prevent foreign or malicious actors from unlawfully interfering with U.S. elections. But the Commission should proceed cautiously with this request, and any advisory opinion it adopts must be narrowly crafted to avoid opening the door to corporations secretly providing free goods and services to candidates simply by asserting that they have “business considerations” for doing so. Draft A fails in this regard.

A recent peer-reviewed article published in the journal *Political Communication* illustrates the importance of a careful approach.<sup>1</sup> The article describes how tech companies—including Microsoft, as well as Facebook, Google, and Twitter—are offering an increasing package of potentially below-market rate services to candidates “to facilitate relationship-building in the

---

<sup>1</sup> Daniel Kreiss & Shannon C. McGregor, *Technology Firms Shape Political Communication: The Work of Microsoft, Facebook, Twitter and Google With Campaigns During the 2016 U.S. Presidential Cycle*, 35 *Journal of Political Communication* 155 (2018).

service of lobbying efforts.”<sup>2</sup> Offering such services is a means of building relationships with the lawmakers who regulate the companies. In other words, these services serve the same purpose as contributions, and they highlight why FECA draws no distinction between contributions in the form of money and contributions in the form of other things of value.

### *Summary of the Law*

The term “contribution” includes “anything of value” given for the purpose of influencing an election or given by a corporation to a political committee in connection with a federal election. 52 U.S.C. §§ 30101(8)(A)(i), 30118(b)(2); 11 C.F.R. §§ 100.52(d)(1), 114.1(a)(1). “Anything of value” includes providing goods or services at less than the usual and normal charge. 11 C.F.R. § 100.52(d)(1). The “usual and normal charge” for goods is the price of those goods in the market from which they ordinarily would have been purchased at the time of the transaction at issue. 11 C.F.R. § 100.52(d)(2).

The sale of goods or services at a discount does not result in a contribution when the discount is made available in the ordinary course of business and on the same terms and conditions to the vendor’s other customers that are not political organizations or committees. *See, e.g.*, Advisory Opinion 2014-06 (Ryan) at 6; Advisory Opinion 2004-18 (Lieberman) at 3; Advisory Opinion 2001-08 (Specter) at 3; Advisory Opinion 1996-02 (CompuServe); Advisory Opinion 1995-46 (D’Amato) at 3.

However, the fact that a corporation “may derive substantial publicity, goodwill, or other commercial benefit does not negate or reduce the corporate contribution. Such publicity or benefit does not constitute consideration for the services provided.” Advisory Opinion 1996-02 (CompuServe) at 4. Similarly, a corporation cannot avoid making a contribution by claiming it is offering free or discounted services to political clients in order to “increase the company’s prestige and goodwill and encourage future use by present subscribers and potential subscribers,” *id.*, or by claiming it is offering such services “for civic and political purposes,” *id.* at 3 (citing Advisory Opinion 1978-45).

### *Analysis*

Draft A concludes that Microsoft’s provision of enhanced cybersecurity services is permissible and would not result in the making of a prohibited in-kind contribution because “Microsoft would be providing such services based on commercial and not political considerations, in the ordinary course of its business, and not merely for promotional consideration or to generate goodwill.” Draft A at 4.

---

<sup>2</sup> *Id.*

Of particular relevance to Draft A's analysis is Microsoft's assertion that it is offering these services "most notably to protect its brand reputation, which would be at risk of severe and long-term damage if the accounts of its election-sensitive customers were hacked." Draft A at 7.

Certainly, Microsoft's brand reputation might be damaged if any of its high-profile clients—such as a major corporation, news outlet, or celebrity—were hacked, whether or not those customers were deemed "election-sensitive." Yet Microsoft does not assert that it offers enhanced security services, without charge, to all high-profile or high-risk customers in its ordinary course of business, without regard for whether those customers are political organizations or committees. Instead, Microsoft states that it charges its nonpolitical customers for such services. AOR at 3.

Under the Commission precedent noted above, a vendor offering free or discounted services only to its political clients cannot avoid making a contribution by claiming it is "protecting [its] brand reputation," when it does not offer those same services in the ordinary course of business to nonpolitical clients. Draft A relies on Advisory Opinion 2018-05 (CaringCent), but the Commission in that matter explicitly cited as a material fact that the requestor planned to charge political committees a "commercially reasonable fee" that exceeded the requestor's "operational costs" for providing services to the committees, included "a reasonable profit," and would represent the "usual and normal charge" for its services. *Id.* at 3, 5. Nothing in Advisory Opinion 2018-05 (CaringCent) or the other advisory opinions Draft A cites (at 6) supports the proposition that FECA permits a corporation to provide services to campaigns for less than the cost of doing so — much less *for free*.

If the Commission were to accept the "brand reputation" justification for providing free services to campaigns, almost any service could be shoehorned into that excuse. The campaign's caterer could provide extra liquor at no charge because of the damage to the caterer's reputation if a campaign event were to run out of refreshments. A security company that does business with campaigns could provide free 24-hour bodyguard protection to "election-sensitive" clients because of the damage to the company's reputation if a candidate were harmed. Facebook could provide free consulting services to campaigns to prevent brand harm from campaigns focusing their social media efforts on Twitter.

Draft A also references Microsoft's claim that offering such enhanced services will help "Microsoft maintain and increase market share among [political clients]." Draft A at 3. Consistent with its past precedent, the Commission should state expressly that a company offering free or discounted services to "maintain and increase market share" cannot render a corporate contribution as anything but. For example, the requestor in Advisory Opinion 1996-04

(CompuServe) sought to offer free accounts to federal candidates to “encourage future use by present subscribers and potential subscribers,” but the Commission in that advisory opinion correctly found such a justification unavailing. The Commission explained that a company receiving such a “commercial benefit” from the provision of services to political clients without charge “does not negate or reduce the corporate contribution.” *Id.* at 4.

Finally, we note that approving Microsoft’s request under the rationale of Draft A would result in the public being provided no information whatsoever about Microsoft’s gifts to campaigns. As Draft A notes, some of the campaigns to whom Microsoft wishes to provide its free services do not otherwise make payments to Microsoft. *See* Draft A at 1. For these campaigns, if Microsoft’s request is approved, Microsoft would be giving extensive and important services — services that would not be disclosed on the campaigns’ reports in any way, whether as paid transactions or as in-kind contributions. Such secret transactions cannot possibly be squared with FECA’s mandate that political committees disclose all of their receipts and disbursements to the public. *See* 52 U.S.C. § 30104(b).

### *Conclusion*

Given the Commission’s broad mandate to prevent foreign interference in elections, the most appropriate method of addressing the question presented here might be for the Commission to consider whether FECA provides it the authority to adopt regulations specifically addressing campaigns’ receipt of services necessary to defend against foreign attacks.

If the Commission nonetheless adopts an advisory opinion approving Microsoft’s request, rather than by laboring to justify the provision of such services for commercial purposes, the Commission should transparently and forthrightly state that it is doing so to implement FECA’s ban on foreign participation in elections, 52 U.S.C. § 30121, and that the opinion is limited only to services that are necessary to directly further that ban.

Sincerely,



Adav Noti  
Senior Director, Trial Litigation and Strategy



Brendan Fischer  
Director, Federal Reform Program