CLC
ADVANCING
DEMOCRACY
THROUGH LAW

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October 11, 2018

RE: Comments on Advisory Opinion Request 2018-12, Draft A

The Campaign Legal Center respectfully submits these comments on Draft A of Advisory Opinion 2018-12 (Defending Digital Campaigns).

The Commission is yet again presented with a request that would advance the goal of protecting candidates and party committees from cyber threats. But yet again, the Commission is considering a draft that would reach a desirable policy outcome by improperly and dangerously bending the law.

Last month, in Advisory Opinion 2018-11, the Commission declared that a for-profit corporation providing free cybersecurity services to candidates and party committees would not be making an in-kind contribution because the company asserted business considerations for doing so. Advisory Opinion 2018-11 (Microsoft) at 2-3. Here, Draft A proposes to allow a non-profit corporation to not only provide free cybersecurity services, but also free software, transportation, and lodging, *see* AOR at 8-9, asserting that the provision of these things of value is not an in-kind contribution because the requestor claims the gifts "would not be made for the purpose of influencing or in connection with a federal election." Draft A at 11.

Draft A correctly notes that "the Act and Commission regulations recognize that corporations may engage in certain nonpartisan activities without making prohibited in-kind contributions to federal candidates or parties," such as expressly exempted activities like organizing get-out-the-vote activities, preparing voter guides, and staging candidate debates. Draft A at 14-15. It may be a reasonable policy goal to similarly exempt the provision of cybersecurity services from the definition of contribution, and the Commission might consider including such an exemption in the Commission's legislative recommendations to Congress.

But no such exemption currently exists. Instead, under current law, "Goods or services offered free or at less than the usual charge result in an in-kind contribution. Similarly, when a person pays for services on the committee's behalf, the payment is an in-kind contribution." FEC Campaign Guide: Congressional Candidates and Committees 13 (2014); 11 C.F.R. §§ 100.52(d)(1), 100.111(e)(1). Transportation, lodging, and software provided without charge to candidates and party committees constitute contributions, and a third party's payments for a candidate's cybersecurity services similarly constitute contributions.

Draft A concludes that the requestor's proposed services and goods would be offered "for the stated purpose of protecting all eligible federal candidates and parties against cyber threats," and "not for the purpose of influencing or in connection with any federal election." Draft A at 16. Incredibly, Draft A even concludes that a corporation may pay individuals to provide services to campaigns, despite the explicit statutory provision to the contrary at 52 U.S.C. § 30101(8)(A)(ii), as long as the corporation's stated reason for doing so is "to exercise its mission." Draft A at 16 n.11.

Even if an entity's stated purpose for offering goods and services of substantial value were potentially relevant to analyzing the connection between such activity and an election (which it is not, *cf. FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (noting that "a test focused on . . . intent could lead to the bizarre result" that certain spending could be legal if conducted by one corporation, "while leading to criminal penalties for another")), these assertions have no bearing on the result of this advisory opinion request. In contrast with the definition of "contribution" at 52 U.S.C. § 30101(8)(A)(i), the ban on corporate contributions does not reach only things of value given "for the purpose of influencing an election;" for purposes of that ban, the terms "contribution" and "expenditure" are defined to include "any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any election." 52 U.S.C. § 30118(b)(2); 11 C.F.R. § 114.1(a)(1).

The requestor here is a corporation, so giving free "services, or anything of value . . . to any candidate . . . or political party. . . in connection with any election" is a prohibited contribution, regardless of whether the services or things or value are given for the purpose of influencing an election. Moreover, given that the requestor's criteria for providing these goods and services is based entirely on a candidate's eligibility and viability in a federal election, Draft A at 6, AOR at 6, the only reasonable conclusion is that the goods and services will be provided in connection with a federal election.[1] And in any

[1] DDC's stated eligibility criteria include: A House candidate's committee that has at least $50,000 in receipts for the current election cycle, and a Senate candidate's committee that has at least $100,000 in receipts for the current election cycle; A House or Senate candidate's

event, the requestor's proposed payments to individuals to provide services to committees would be contributions under the plain text of 52 U.S.C. § 30101(8)(A)(ii) (defining such payments as contributions when services are rendered "to a political committee without charge *for any purpose*" (emphasis added)).

CLC reiterates that we appreciate the urgent need to prevent foreign or malicious actors from unlawfully interfering with U.S. elections. *See* Comments of Campaign Legal Center on Advisory Opinion Request 2018-11, Draft A (Microsoft). But the Commission has no authority to disregard the law, and history shows that doing so is fraught with peril.

Sincerely,

_____/s/_____
Adav Noti
Senior Director, Trial Litigation and Strategy

_____/s/_____
Brendan Fischer
Director, Federal Reform Program

committee for candidates who have qualified for the general election ballot in their respective elections; or Any presidential candidate's committee whose candidate is polling above five percent 11 in national polls. Draft A at 6, AOR at 6.