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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**AGENDA DOCUMENT NO. 22-37-B**  
**AGENDA ITEM**  
**For meeting of August 11, 2022**  
**SUBMITTED LATE**

August 10, 2022

**MEMORANDUM**

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*  
Acting General Counsel

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Subject: Draft AO 2022-14 (Google LLC) Draft B

We have been asked to place this draft on the Agenda by one or more Commissioners.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 9:00 am (Eastern Time) on August 11, 2022.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2022-14

2

3 Claire Rajan, Esq.  
4 Allen & Overy LLP  
5 1101 New York Avenue, NW  
6 Washington, DC 20005

**DRAFT B**

7

8 Dear Ms. Rajan:

9 We are responding to your advisory opinion request on behalf of Google LLC  
10 (“Google”) concerning the application of the Federal Election Campaign Act, 52 U.S.C.  
11 §§ 30101-45 (the “Act”), and Commission regulations to Google’s proposal to offer a  
12 pilot program to test new Gmail design features at no cost on a nonpartisan basis to  
13 authorized candidate committees, political party committees, and leadership PACs. The  
14 Commission concludes that the proposed pilot program would not be permissible under  
15 the Act and Commission regulations because it would result in the making of a prohibited  
16 in-kind corporate contribution.

17 ***Background***

18 The facts presented in this advisory opinion request are based on your letter  
19 received on July 1, 2022, your email dated August 10, 2022, and publicly available  
20 information.

21 Google is a subsidiary of Alphabet, Inc., a publicly traded company that is  
22 incorporated in Delaware with its principal place of business in Mountain View,  
23 California.<sup>1</sup> A core product of Google’s is Gmail, an email platform provided to all users  
24 (including both political and non-political, individuals and organizations, and senders and

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<sup>1</sup> Advisory Opinion Request (“AOR”) at AOR002.

1 receivers of email) at no cost.<sup>2</sup> As explained in the request and further below, Google is  
2 planning to launch a pilot program to test new features in its spam filtering regarding  
3 emails from bulk senders to Gmail addresses.

#### 4 I. Spam Filtering Under Current Program

5 According to the request, “[r]oughly half of all email traffic across the Internet  
6 consists of unwanted spam”<sup>3</sup> and, without spam filtering, “the volume of spam reaching  
7 inboxes would be overwhelming.”<sup>4</sup> Therefore, Gmail employs spam filters with the  
8 stated purpose of enabling users “to be more secure and efficient in their use of the  
9 product.”<sup>5</sup> Spam filtering allows spam to be placed automatically into a user’s spam  
10 folder, as opposed to directly into the user’s inbox.

11 Google’s terms of service and policies — including Gmail’s spam filter policies  
12 — apply to emails from all senders regardless of political affiliation.<sup>6</sup> Under these  
13 policies, Gmail employs “a number of filters” to determine whether an email is classified  
14 as spam,<sup>7</sup> and “[o]ne of the most important factors” is user preference because users’

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<sup>2</sup> You explain that “[p]aid advertising and other sponsored content on certain Google platforms help Google provide many products for anyone to use for free, including its Gmail service.” AOR003. In addition, you indicate that “Gmail is also a foundational component of the ‘Google Workspace’ product, which bundles a set of secure collaboration and productivity apps created for businesses of all sizes and which can be purchased for a fee.” *Id.*

<sup>3</sup> AOR003-004.

<sup>4</sup> AOR004.

<sup>5</sup> AOR002.

<sup>6</sup> AOR004.

<sup>7</sup> *Id.* These filters “look at a variety of signals, including characteristics of the IP address, domains/subdomains, whether bulk senders are authenticated, and user input.” *Id.*

1 actions “teach Gmail how best to sort the received email based on preferences.”<sup>8</sup> For  
2 example, if a user moves a message to the spam folder, future emails from the sender  
3 generally are filtered to that user’s spam folder, and if a user adds a sender to their  
4 contact list, future messages from that email address generally are placed in the user’s  
5 inbox.<sup>9</sup>

6 Moreover, Google provides information to bulk senders on how to maximize  
7 deliverability,<sup>10</sup> both publicly available in the form of Bulk Sender Guidelines  
8 establishing steps bulk senders may take to improve their deliverability, and privately  
9 through Postmaster Tools, an account associated with a particular sender’s domain which  
10 any bulk sender may create to access data and diagnostics regarding their email  
11 campaign.<sup>11</sup> Information provided in Postmaster Tools includes data and diagnostics  
12 regarding the reputation of a sender’s domain and IP address, as well as the rate at which  
13 a sender’s emails pass various authentication standards.<sup>12</sup> As with the email platform,  
14 Gmail provides this information at no cost.

## 15 II. Spam Filtering Under Pilot Program

16 As explained below, Google proposes to create a pilot program for registered  
17 authorized candidate committees, political party committees, and leadership PACs

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<sup>8</sup> AOR005.

<sup>9</sup> *Id.* You state that users flag emails as spam for a variety of reasons, which may include not wanting to be subscribed to an email list, the amount and frequency of emails, or “simply cleaning up a cluttered inbox.” *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

1 (“Eligible Participants”) that send bulk emails to Gmail addresses and that choose to be  
2 part of the pilot.<sup>13</sup>

3 Eligible Participants may become aware of the availability of the pilot program  
4 through announcements on Google’s website, Postmaster Tools, and social media;  
5 Google also plans to directly reach out to “multiple party committees” to inform them of  
6 the program and encourage the party committees to disseminate the information to  
7 affiliated candidate committees.<sup>14</sup> To be part of the pilot, Eligible Participants would be  
8 required to seek participation by contacting Google for identification purposes using their  
9 FEC-registered email address and providing their FEC ID number.<sup>15</sup> Google will, in  
10 turn, verify that the sender represents the committee it purports to represent by ensuring  
11 that the email was sent by the email listed on the committee’s Statement of Organization,  
12 which Google will retrieve with the FEC ID number.<sup>16</sup> Google will then ensure that  
13 Eligible Participants satisfy certain objective criteria to establish that their emails are  
14 “legitimate, securely configured, and authenticated.”<sup>17</sup> Eligible Participants would be  
15 included in the program on a nonpartisan basis and free of charge.<sup>18</sup> Eligible Participants

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<sup>13</sup> AOR001; AOR007.

<sup>14</sup> AOR009.

<sup>15</sup> AOR007.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* Google’s request lays out these eligibility criteria in considerable detail, explaining that the aim of these criteria is to “exclude senders who might use the additional capabilities provided under the pilot to reach Gmail users with harmful content” and “prevent imposters or fraudsters from posing as a candidate or a political party to solicit fraudulent contributions.” *Id.* For example, you state that Eligible Participants would be required to provide “one-click” unsubscribe in their messages, approve and follow unsubscribe requests within 24 hours of the user’s choice, and ensure that all links in the message can be scanned by Google for phishing and malware protection. AOR008.

<sup>18</sup> AOR011.

1 who are included in the pilot (“Pilot Participants”) would be used to test two new features  
2 of Gmail’s spam filtering.

3 First, Pilot Participants would be used to test a feature whereby bulk emails sent  
4 by the Pilot Participants to Gmail users would not be detected by Gmail’s spam detection  
5 algorithms; instead, whether bulk emails are classified as spam would be determined  
6 based on direct feedback from the user.<sup>19</sup> Specifically, the first email from each sender to  
7 a particular user would display a “prominent notification” placed by Gmail asking the  
8 user whether the user wishes to continue receiving messages from the sender, and if the  
9 user opts out in that message or a subsequent message — which would not contain the  
10 original prominent notification but would be subject to a requirement on the sender to  
11 allow “one-click unsubscribe” in the sender’s emails — future emails from that sender to  
12 a particular user would be placed in the spam folder.<sup>20</sup> Unless a user opts out in the first  
13 message or any subsequent messages from a particular sender, the user would continue  
14 receiving messages from that sender. Moreover, Gmail users would be able to express  
15 their preferences at any time and affect future delivery by marking a sender’s message as  
16 either spam or not spam.

17 Second, Pilot Participants would receive a “the Inbox Rate associated with  
18 their emails, expressed as a percentage.”<sup>21</sup> Accordingly, an Eligible Participant “could  
19 view in Postmaster Tools information about the volume of messages that land in Gmail

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<sup>19</sup> *Id.*

<sup>20</sup> AOR008.

<sup>21</sup> Advisory Opinion Request Supplement (Aug. 10, 2022).

1 users' inboxes vs. the spam folder.”<sup>22</sup> Google would gather feedback from both senders  
2 and users on the “efficacy and ease of use to consider whether the features tested in the  
3 pilot are commercially feasible, either for this group or other groups of senders.”<sup>23</sup>

4 Based on the feedback received from users in the program — which would begin  
5 running only after the Commission issues a favorable advisory opinion and go through  
6 January 2023 unless the pilot proves unsuccessful earlier than that date — Google may or  
7 may not continue, discontinue, or expand the features tested in the pilot.<sup>24</sup> Moreover,  
8 Google may consider expanding the features to other bulk senders, such as government  
9 agencies, entities related to government agencies or involved in providing government  
10 services, senders of class-action notices, and non-profit organizations, depending on user  
11 feedback.<sup>25</sup> At this time, however, Google has proposed including only political  
12 committees among its Eligible Participants.<sup>26</sup>

13 You state that the “pilot program achieves a number of commercial goals,”<sup>27</sup>  
14 particularly that the “purpose of the pilot is to test whether the features employed in the  
15 pilot enable users to receive more wanted email from bulk senders without degrading the  
16 user experience.”<sup>28</sup> Improving the user experience, in turn, “enhances the Google

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22 *Id.*

23 *Id.*

24 AOR009.

25 AOR006, AOR011.

26 AOR001; AOR007.

27 AOR006.

28 AOR008.

1 brand.”<sup>29</sup> You further explain that Google proposes to start the pilot program with  
2 Eligible Participants rather than other industries for testing because it is able to verify  
3 entities registered with the Commission; the upcoming election season and its expected  
4 increase and sustained engagement by an identifiable group of bulk senders; the bulk  
5 senders’ strong incentive to keep users engaged for a long period; and the ease of  
6 participant feedback for this group of senders because of the concentrated group of email  
7 vendors.<sup>30</sup>

8 ***Question Presented***

9 *May Google launch a free and non-partisan pilot program to test Gmail design*  
10 *features, which will be open to authorized candidate committees, political party*  
11 *committees, and leadership political action committees, where spam detection as applied*  
12 *to messages from a Pilot Participant will rely predominately on direct feedback from the*  
13 *recipient rather than standard spam detection, and each Pilot Participant will receive*  
14 *information regarding the rate of emails delivered into Gmail users’ inboxes, as long as*  
15 *the Pilot Participant is in compliance with the program’s requirements?*

16 ***Legal Analysis***

17 No, Google may not offer the proposed pilot program to Eligible Participants  
18 because doing so would constitute an prohibited corporate in-kind contribution.

19 The Act and Commission regulations prohibit corporations from making  
20 contributions to federal candidates, political party organizations, and political committees

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<sup>29</sup> AOR006.

<sup>30</sup> AOR011.



1 that make contributions to federal candidates and political party committees.<sup>31</sup> A  
2 “contribution” includes any “direct or indirect payment, distribution, loan, advance,  
3 deposit, or gift of money, or any services, or anything of value . . . in connection with any  
4 [federal] election . . . .”<sup>32</sup> “[T]he provision of any goods or services without charge or at  
5 a charge that is less than the usual and normal charge” is an “in-kind” contribution.<sup>33</sup>  
6 The value or “amount of the in-kind contribution is the difference between the usual and  
7 normal charge for the goods or services at the time of the contribution and the amount  
8 charged the political committee.”<sup>34</sup> The “usual and normal charge” for services is the  
9 commercially reasonable rate prevailing at the time the services were rendered.”<sup>35</sup>

10 In Advisory Opinion 2004-06 (Meetup), the Commission considered a proposal  
11 by a corporation that offered its users a web-based platform for arranging local  
12 gatherings. The corporation offered a free basic service to all users and a premium  
13 service for a fee. The Commission concluded that a corporation may provide its basic  
14 service free of charge to federal candidates and political committees because the  
15 corporation would provide the service in the ordinary course of its business and on the

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<sup>31</sup> 52 U.S.C. §§ 30118(a), (b)(2); 11 C.F.R. § 114.2(b). Corporations may, however, make contributions to nonconnected political committees that make only independent expenditures, *see, e.g.*, Advisory Opinion 2011-11 (Colbert); *Citizens United v. FEC*, 558 U.S. 310 (2010); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (*en banc*), and to non-contribution accounts of hybrid political committees, *see* Press Release, FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011), <https://www.fec.gov/updates/fec-statement-on-carey-fec/>.

<sup>32</sup> 52 U.S.C. § 30118(b)(2); *see also* 52 U.S.C. § 30101(8)(A)(i); 11 C.F.R. §§ 114.2(b), 100.52(a).

<sup>33</sup> 11 C.F.R. § 100.52(d)(1).

<sup>34</sup> *Id.*

<sup>35</sup> 11 C.F.R. § 100.52(d)(2).

1 same terms and conditions on which it was offered to all similarly situated persons in the  
2 general public.<sup>36</sup> Significantly, the corporation in that advisory opinion provided the free  
3 service to *all users* “without any obligation to purchase other services.”<sup>37</sup> The  
4 Commission concluded that, in such circumstances, the usual and normal charge for a  
5 service “is always zero,” and thus no contribution would result when providing the  
6 service for free to candidates and political committees.<sup>38</sup>

7 In reaching this conclusion, the Commission distinguished Advisory Opinion  
8 1996-02 (CompuServe), in which the services provided by an incorporated electronic  
9 bulletin board service provider were normally offered for a fee and were only offered  
10 without charge to a select group, and therefore resulted in in-kind contributions when  
11 provided to political committees.<sup>39</sup> In that matter, CompuServe proposed providing free  
12 member accounts to all Federal candidates, as it had with a “large number of public-  
13 service oriented users.”<sup>40</sup> There, the Commission noted that “[e]ven if the categories of  
14 free customers you describe is varied enough to indicate that your proposal may be in the  
15 ordinary course of business, the Commission still concludes that your proposed gift to

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<sup>36</sup> Advisory Opinion 2004-06 (Meetup) at 4.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*; see also Advisory Opinion 1996-11 (National Right to Life Conventions) (concluding that corporate membership organization may provide candidate speakers with free audio and video tapes of their own speeches because tapes would be provided to all speakers, including candidates); Advisory Opinion 1978-60 (Sawyer) (concluding that television network may provide to the candidate copy of videotape segment in which candidate appeared, so long as company’s policy was to provide videotape copy free of charge to any member of the public appearing in a newscast).

<sup>39</sup> Advisory Opinion 2004-06 (Meetup) at 4 (distinguishing Advisory Opinion 1996-02 (CompuServe)).

<sup>40</sup> Advisory Opinion 1996-02 (CompuServe) at 2.

1 Federal candidates of valuable services which enable them to communicate with voters  
2 and advocate their candidacies would constitute in-kind contributions to those  
3 candidates.”<sup>41</sup>

4 In Advisory Opinion 2018-11 (Microsoft Corporation), the Commission  
5 concluded that Microsoft may offer a group of “election-sensitive customers,” which  
6 included political committees, a program of enhanced online security at no charge,  
7 because doing so would protect its brand reputation and allow it to obtain valuable data  
8 on security threats. In that advisory opinion, the Commission stressed that the program  
9 would be offered to political committees on a non-partisan basis, Microsoft faced a  
10 particularly high threat of damage to its brand reputation given the “public scrutiny” on  
11 their political clients in the “upcoming elections,” and that Microsoft would provide the  
12 service to all similarly situated entities, including political committees and “election  
13 sensitive” non-profit organizations and vendors.<sup>42</sup>

14 Google proposes to modify its service only for certain political committees and  
15 would not include other types of entities in the pilot program; Google contends that it  
16 would be doing so for commercial, as opposed to political, reasons.<sup>43</sup>

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<sup>41</sup> *Id.* at 4.

<sup>42</sup> Advisory Opinion 2018-11 (Microsoft Corporation) at 2, 4.

<sup>43</sup> The Commission has been clear that where corporations provide services to political committees on any different basis than to the general public, the corporation must do so for commercial, and not political, reasons, to avoid making an in-kind contribution. *See, e.g.*, Advisory Opinion 2018-11 (Microsoft Corporation) at 5 (concluding that no in-kind contribution results from offering “election-sensitive” customers, including political committees, enhanced services at no charge if done “based on commercial and not political considerations, in the ordinary course of its business and not merely for promotional consideration or to generate goodwill”); Advisory Opinion 2018-05 (CaringCent) at 5 (concluding that corporation “may charge different fees to political committee clients than it charges to non-political clients,” as long as it charges “a commercially reasonable fee at the ‘ordinary and usual charge’” and “any variation in fees will be based on business considerations and will not be based on political

1 Even assuming that Google’s assertions about its commercial purposes are true,<sup>44</sup>  
2 the Commission has never approved the provision of a free and enhanced service by a  
3 corporation to a group consisting solely of political committees. In Advisory Opinion  
4 2004-06 (Meetup), the Commission noted that the “provision of a service that is always  
5 provided without charge to every person” would not result in a prohibited contribution.<sup>45</sup>  
6 Google’s proposed Pilot Program would be offered without charge, but not to every  
7 person, or indeed to any other persons. The service proposed by Google is completely  
8 unique and is thus not akin to the activity contemplated by Advisory Opinion 2004-06.

9 Google provides Gmail services — including any feature related to spam filtering  
10 — for free to all of its users, including bulk senders, without any obligation on the user to  
11 purchase other services, even as part of the proposed pilot program.<sup>46</sup> However, the Pilot  
12 Program is not providing a benefit to users of the free Gmail services, the recipients of  
13 the emails that could otherwise be potentially filtered as spam. Instead, it is providing a

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considerations”); Advisory Opinion 2012-31 (AT&T) at 4 (approving a rate structure for processing text message contributions to political committees that charged less than what AT&T charged for commercial content providers but more than it charged for donations to charities as long as the rate structure “reflects commercial considerations and does not reflect considerations outside of a business relationship”).

<sup>44</sup> Publicly available information suggests that political considerations may have factored into the proposal. See Letter from Sen. Josh Hawley to Google CEO Sundar Pichai, April 27, 2022, available at [https://www.hawley.senate.gov/sites/default/files/2022-04/2022-04-27%20letter%20to%20Google%20re%20Gmail%20SFA%20bias\\_FINAL.pdf](https://www.hawley.senate.gov/sites/default/files/2022-04/2022-04-27%20letter%20to%20Google%20re%20Gmail%20SFA%20bias_FINAL.pdf); Press Release, Kennedy, Thune introduce Political Bias Emails Act to hold Big Tech accountable for political bias (June 16, 2022) (emphasis added), available at <https://www.kennedy.senate.gov/public/2022/6/kennedy-thune-introduce-political-bias-emails-act-to-hold-big-tech-accountable-for-political-bias>.

<sup>45</sup> Advisory Opinion 2004-06 (Meetup) at 3 (emphasis in original).

<sup>46</sup> Gmail is a “foundational component” of the fee-based “Google Workspace” product, which bundles certain collaboration and productivity apps for business. AOR003. As part of that service, however, Gmail is not separately charged for, nor is there any obligation for any user to purchase Google Workspace to enable the user to use Gmail. Moreover, you explain that, while “1.5 billion” people use Gmail, 5 million are customers of the paid Google Workspace product.

1 premium service not offered to any other type of individual or organization to a limited  
2 group of senders, all of whom would be political committees. Unlike a minor adjustment  
3 to an existing program, Google’s proposal would allow Pilot Participants to wholly  
4 bypass its existing systems and gain unprecedented access to its users. As such, it  
5 appears that the services under the Pilot Program would expand beyond those offered  
6 through Google’s ordinary course of business.

7         The activity proposed by Google is more similar to the activity described in  
8 Advisory Opinion 1996-02 (CompuServe) where the Commission concluded its proposed  
9 gift of access to a member account would constitute a provision of “valuable services  
10 which enable [the federal candidates] to communicate with voters and advocate their  
11 candidacies” and that any commercial benefit the proposal would provide the requestor  
12 did not “negate or reduce the corporate contribution.”<sup>47</sup> The expanded access that Pilot  
13 Participants would have to Google’s users’ inboxes to advocate their candidacies and  
14 solicit funds is of undeniable value. Further, the selected group of political committees  
15 who become Pilot Participants would receive more detailed information about their  
16 inboxing rate than a non-participating political committee or a similarly situated entity  
17 who was not a political committee. Insight into how Google email recipients interact  
18 with their messages could be quite valuable to a Pilot Participant sender.

19         Google would be modifying its service only for certain political committees and  
20 would not include other entities in the pilot program. Approving the provision of a free  
21 service by a corporation to a group consisting solely of political committees is without

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<sup>47</sup> Advisory Opinion 1996-02 (CompuServe) at 4.

1 precedent in prior Commission opinions.<sup>48</sup> Even in Advisory Opinion 2018-12  
2 (Defending Digital Campaigns, Inc.), the proposed services were offered not only to  
3 political committees, but also to “think tanks” and other public-policy focused NGOs  
4 (and Google’s request presents none of the “unusual and exigent circumstances,” notably  
5 the threat of foreign cyberattacks, that factored into the Commission’s decision in that  
6 advisory opinion).<sup>49</sup> Nor is this request comparable to the situations presented in  
7 advisory opinion requests by vendors who proposed to offer different rate structures to  
8 different types of clients (some higher and some lower than the rates proposed for  
9 political committees), based on commercial and not political considerations.<sup>50</sup> The  
10 Commission has never before approved proposal by a corporation to create a unique, free  
11 service exclusively for political committees. Although Google states that it *may* at some  
12 point extend the program to other entities (including government agencies, entities related  
13 to government agencies or involved in providing government services, senders of class-  
14 action notices, and non-profit organizations), it also may not. That extension is not part  
15 of Google’s current proposal, and the Commission cannot base its opinion on speculation  
16 about what the requestor may or may not do in the future.<sup>51</sup>

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<sup>48</sup> See Advisory Opinion 2012-28 (CTIA II) at 8 (“A corporation may not, however, provide a discount to a political committee ‘where a political committee [is] accorded preferential treatment different from other customers, or the treatment [is] outside of a business relationship.’”) (quoting Advisory Opinion 1994-10 (Franklin National Bank) at 3, n. 4).

<sup>49</sup> Advisory Opinion 2018-12 (Defending Digital Campaigns, Inc.) at 8.

<sup>50</sup> See footnote 48.

<sup>51</sup> AOR006, AOR011.

1 For the reasons explained above, the Commission concludes that the proposed  
2 pilot program would not be permissible under the Act and Commission regulations and  
3 would result in the making of a prohibited in-kind contribution.

4 This response constitutes an advisory opinion concerning the application of the  
5 Act and Commission regulations to the specific transaction or activity set forth in your  
6 request.<sup>52</sup> The Commission emphasizes that, if there is a change in any of the facts or  
7 assumptions presented, and such facts or assumptions are material to a conclusion  
8 presented in this advisory opinion, then the requestor may not rely on that conclusion as  
9 support for its proposed activity. Any person involved in any specific transaction or  
10 activity that is indistinguishable in all its material aspects from the transaction or activity  
11 with respect to which this advisory opinion is rendered may rely on this advisory  
12 opinion.<sup>53</sup> Please note that the analysis or conclusions in this advisory opinion may be  
13 affected by subsequent developments in the law including, but not limited to, statutes,  
14 regulations, advisory opinions, and case law. Any advisory opinions cited herein are  
15 available on the Commission's website.

16 On behalf of the Commission,

17 Allen J. Dickerson  
18 Chairman

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<sup>52</sup> See 52 U.S.C. § 30108.

<sup>53</sup> See *id.* § 30108(c)(1)(B).