



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

September 11, 2018

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2018-11

Jan Witold Baran, Esq.  
Eric Wang, Esq.  
Wiley Rein LLP  
1776 K Street NW  
Washington, D.C. 20006

Dear Messrs. Baran and Wang:

We are responding to your advisory opinion request on behalf of Microsoft Corporation (“Microsoft”), concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and Commission regulations to Microsoft’s proposal to offer a package of enhanced online account security services at no additional charge on a nonpartisan basis to its election-sensitive customers, including federal candidates and national party committees. The Commission concludes that the provision of such services is permissible and would not result in the making of a prohibited in-kind contribution.

***Background***

The facts presented in this advisory opinion are based on your letter received on August 21, 2018.

Microsoft provides more than 60 million users with O365 cloud-based productivity software (at a cost to the users), and Outlook.com and Hotmail.com web-based email services (at no cost to the users).<sup>1</sup> Advisory Opinion Request at AOR002. In providing those products, “Microsoft is in a unique position to protect election-sensitive users of its products against . . . hacking.” *Id.* Accordingly, as part of its “AccountGuard” initiative, Microsoft plans to provide a package of enhanced online account security protections for election-sensitive users of O365, Outlook.com, and Hotmail.com products on a nonpartisan basis for no additional cost. *Id.*

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<sup>1</sup> You state that Microsoft makes a profit from its unpaid services by selling advertisements within those products. AOR002.

According to the request, “election-sensitive customers” eligible for the AccountGuard program include federal, state, and local candidate committees; national and state political party committees; campaign technology vendors; and “[t]hink tanks and democracy advocacy non-profits.” AOR002. To take part in the program, eligible users will need to opt in by providing Microsoft certain information about their online accounts. *Id.*

Once enrolled in the program, participants will have access to three primary services. First, they will receive documentation, webinars, and potentially in-person cybersecurity trainings “tailored to the specific needs of the campaign community.” AOR002. Second, Microsoft will investigate, confirm, and notify participants if their accounts have been targeted or breached by a nation-state actor. AOR002-003. To provide this service, Microsoft will use its existing threat intelligence division that tracks hackers who may interfere with customers’ use of Microsoft’s products or breach Microsoft’s systems. AOR002. Third, Microsoft will provide users of AccountGuard with email and telephone technical support, to assist in securing online accounts and remediating any breaches. AOR003.

Currently, Microsoft offers nearly every customer some basic level of telephone and email technical support, including help with unauthorized account access, but business customers may receive a higher level of support for an additional fee, which Microsoft occasionally waives for “certain high-priority customers.” AOR003. The technical support provided to its election-sensitive customers under the AccountGuard program would be similar to, but not as extensive as, that provided to customers in the paid support programs. *Id.*

You assert that Microsoft has “strong business considerations for implementing this program”:

- Providing free enhanced security services to election-sensitive entities will help Microsoft maintain and increase market share among those entities;
- Microsoft’s election-sensitive customers, which are generally not-for-profit entities, have fewer resources to spend on cybersecurity than Microsoft’s for-profit customers;
- Data received about online security threats from the accounts of election-sensitive customers — a type of threat intelligence that is of such value to Microsoft’s product development that it occasionally purchases this type of data from other companies — would be “highly valuable” to Microsoft’s development of products in the cybersecurity space; and
- The AccountGuard program would help Microsoft maintain its brand reputation, at risk of experiencing severe and long-term damage if hackers were to breach Microsoft accounts in order to interfere with upcoming elections, given the public scrutiny regarding foreign attempts to influence elections.

AOR003-004.

Moreover, you state that the AccountGuard program is “consistent with Microsoft’s ordinary course of business and existing marketing practices.” AOR004. As you explain, Microsoft offers different packages and pricing for its O365 customers, including public-sector entities, educational institutions, teachers and students, small and large businesses, start-up companies, and 501(c)(3) non-profit organizations. *Id.* Additionally, Microsoft routinely offers free workshops and trainings, including cybersecurity trainings, tailored to specific types of customers. *Id.*

### ***Question Presented***

*May Microsoft offer the AccountGuard program at no additional charge on a nonpartisan basis to its election-sensitive customers, including federal candidates and national party committees, with no prohibited in-kind contribution resulting?*

### ***Legal Analysis and Conclusions***

Yes, Microsoft may offer the AccountGuard program at no additional charge on a nonpartisan basis to election-sensitive customers, including but not limited to federal candidates and national party committees, with no prohibited in-kind contribution resulting, 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.

The Act and Commission regulations prohibit corporations from making contributions to federal candidates, political party organizations, and political committees that make contributions to federal candidates and political party committees. 52 U.S.C. §§ 30118(a), (b)(2); 11 C.F.R. § 114.2(b).<sup>2</sup> A “contribution” includes any “direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . in connection with any [federal] election . . .” 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). “Anything of value” includes all in-kind contributions, such as the provision of goods and services without charge or at a charge that is less than the usual and normal charge. *See* 11 C.F.R. § 100.52(d)(1). The “usual and normal charge” for services is the commercially reasonable prevailing rate at the time the services were rendered. *See* 11 C.F.R. § 100.52(d)(2).

A corporation may provide goods and services to political committees without being considered to have made an in-kind contribution so long as it does so “on the same terms and conditions available to all similarly situated persons in the general public.” Advisory Opinion 2004-06 (Meetup) at 1 (concluding that corporation may provide federal candidates, political

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<sup>2</sup> 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/>.

committees, and supporters both free and fee-based online platform for arranging local gatherings). Indeed, a corporation “may charge different fees to political committee clients than it charges to non-political clients,” with no in-kind contribution resulting, as long as “any variation in fees will be based on business considerations and will not be based on political considerations.” Advisory Opinion 2018-05 (CaringCent) at 5 (concluding that corporation would be making no in-kind contribution to political committees in providing online contribution-processing services partly because any variation in fees with non-political clients would be based on commercial considerations and not political considerations). Mere “promotional or good will purposes” will not suffice to show that services are offered for commercial and not political considerations. Advisory Opinion 1999-17 (Bush Exploratory Committee) at 8 n.7 (concluding that website owner would be making in-kind contribution to political committee by charging committee less than similarly situated nonpolitical organization or entity for posting link to committee’s website); *see also* Advisory Opinion 1996-02 (CompuServe) at 4 (concluding that promotional consideration or goodwill derived by corporation in return for providing free electronic bulletin board service to political committee would result in corporation making prohibited in-kind contribution).

The Commission has applied these principles most notably in the context of corporations that provide text messaging services to political committees, explaining that corporations may charge lower rates to political committees without being considered to have made a prohibited in-kind contribution as long as the rate structure “reflects commercial considerations and does not reflect considerations outside of a business relationship.” Advisory Opinion 2012-31 (AT&T) at 4; *see also* Advisory Opinion 2012-26 (m-Qube *et al.*) at 8-9 (finding no prohibited in-kind contribution where lower rates applicable to political committees “reflect[ed] commercial considerations”); Advisory Opinion 2012-28 (CTIA) at 8 (finding no prohibited in-kind contribution where discounts for political committees “were available . . . as part of a pre-existing business relationship”) (quoting Advisory Opinion 1994-10 (Franklin National Bank) at 2). For example, in Advisory Opinion 2012-31 (AT&T), AT&T established a lower rate structure for political committees based on the volume of transactions AT&T expected to process, the dollar amounts of those transactions, and the volume of work the transactions would generate for AT&T’s call centers, as well as for the purpose of protecting AT&T’s brand relationship with those customers. The Commission found that these considerations represented commercial, not political, concerns, and thus that the lower rate structure did not result in the making of a prohibited in-kind contribution. *See id.* at 4; *see also* Advisory Opinion 2012-26 (m-Qube *et al.*) at 9 (considering commercial, non-political considerations to include “volume of messages, refund rates, customer satisfaction, and technical level of effort”).

Here, Microsoft plans to offer AccountGuard for no additional cost to protect a group of its similarly situated customers — election-sensitive users, including not only political committees but also non-profit organizations and vendors of political committees and non-profit organizations — from security breaches. Microsoft plans to offer this service for a variety of commercial reasons beyond mere promotion or goodwill, 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, and to obtain “highly valuable” data about online security threats. Importantly, Microsoft would offer this service on a non-partisan basis. The free

offering of AccountGuard also resembles other commercial offerings by Microsoft, including varying packages and prices to different types of users, and free workshops and trainings tailored to specific types of customers. Microsoft has noted the particular importance of providing AccountGuard at this time given the public scrutiny regarding foreign attempts to influence U.S. elections. Accordingly, because Microsoft would provide the AccountGuard program to its election-sensitive customers based on commercial and not political considerations, in the ordinary course of its business and not merely for promotional consideration or to generate goodwill, the provision of such services would not constitute a prohibited in-kind contribution. Moreover, the Commission notes that the provision of the AccountGuard program would further the Commission's implementation of the ban on foreign participation in elections at 52 U.S.C. § 30121. Microsoft therefore may offer such services at no additional cost to its election-sensitive customers, including federal candidates and national party committees.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. Any advisory opinions cited herein are available on the Commission's website.

On behalf of the Commission,



Caroline C. Hunter  
Chair