June 3, 2019

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson  
Acting General Counsel

Neven F. Stipanovic  
Acting Associate General Counsel

Robert M. Knop  
Assistant General Counsel

Joseph P. Wenzinger  
Attorney

Subject: AO 2019-07 (Area 1 Security, Inc.) Draft A

Attached is a proposed draft of the subject advisory opinion.

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 June 6, 2019.

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
Dear Mr. Petalas:

We are responding to your advisory opinion request on behalf of Area 1 Security, Inc. ("Area 1"), concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the "Act"), and Commission regulations to its proposal to offer free or low-cost cybersecurity services to federal candidates and political committees. Because Area 1’s asserted business reasons for providing such services — namely, to obtain research and development opportunities and to motivate employees by creating a sense of pride — reflect inadequate consideration in return for its services, the Commission concludes that the proposal would result in prohibited in-kind contributions and thus is impermissible.

Background

The facts presented in this advisory opinion are based on your letter on behalf of Area 1, received on April 18, 2019.

Area 1 states that it can provide users of computers with “the most imaginative, comprehensive, and effective solution for eliminating phishing attacks.” AOR003; see also id. (describing Area 1’s services as “the industry’s only preemptive and comprehensive solution to stop phishing”). A phishing attack allows the aggressor to entice a victim to download a file, click on a link, visit a website, complete a form, or transfer sensitive data, and to cause harm through such actions, such as by downloading malware or stealing or purging...
credentials, data, intellectual property, or financial assets. *Id.* Area 1 preemptively tracks phishing threats and stops them before they cause damage. *Id.*

You state that under Area 1’s “standard commercial strategy,” it “often” provides its anti-phishing services for free or low cost to organizations with limited financial resources and without full-time cybersecurity staff, if it detects enough of a benefit in accepting such clients. AOR003-004. To determine whether it will receive such a benefit, Area 1 considers the strength of a client’s financial resources, the potential longevity of a relationship with the client, the opportunity the client presents for research and development of Area 1’s products, and the “special feeling of pride” Area 1 would obtain in servicing the client. AOR004, AOR009. The first two factors — the strength of the client’s financial resources and the potential longevity of a client relationship — speak to the client’s ability to pay for services and for how long. The final two factors — research and development and pride — address the benefits that Area 1 might receive from accepting clients that are unable to pay for Area 1’s services.

Applying those factors to federal candidates and national parties, Area 1 has determined that the first two factors counsel lowering costs for federal candidates and political committees (because such potential clients have few resources to pay for cybersecurity services, and they present a short-term opportunity given that their services are only needed around Election Day). AOR004. Regarding the research and development opportunity afforded in providing anti-phishing services, Area 1 asserts that federal candidates and political committees provide a particularly valuable opportunity because they are “aggressively targeted” and, if foreign actors used highly developed methods in targeting federal candidates and political committees, Area 1 “would learn from the experience.” AOR004, AOR007. The company also anticipates
benefitting from the “pride” provided by servicing federal candidates and political committees because the potential hacking of such users presents a “high-visibility problem” that, if solved by Area 1’s employees, would increase “intrinsic motivation” that, more than money, would make them “happier and more productive.” AOR004. In Area 1’s view, a provider-client relationship with federal candidates and political committees would make Area 1 as an employer more attractive to talent, and Area 1 asserts that pride differs from a mere “branding or goodwill” interest because those latter considerations are “related to marketing” as opposed to “increasing the employee’s intrinsic motivation to work hard every day.” AOR009. Thus, Area 1 has determined that it would benefit from providing free or low-cost services to federal candidates and political committees. AOR004, AOR009.

Last, Area 1 represents that it would offer its proposed services on a nonpartisan basis, would not take any political considerations into account when determining the price to charge federal candidates and political committees, and proposes to provide its services on the same terms and conditions that apply to similarly situated nonpolitical clients. AOR001, AOR007.

**Question Presented**

*May Area 1 offer anti-phishing services at little to no cost to federal candidates and political committees without making prohibited, in-kind contributions under the Act?*

**Legal Analysis and Conclusions**

No. Because Area 1’s asserted business reasons for charging federal candidates and political committees no or little cost — namely, research and development opportunities and motivating employees by creating a sense of pride — do not reflect adequate consideration in
return for its services, the provision of such services would result in prohibited in-kind
contributions.

Under the Act and Commission regulations, corporations may not make “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).1 A “contribution” includes any “direct or indirect payment,
distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . in

“Anything of value” includes all in-kind contributions, such as the provision of goods and
services to federal candidates and political committees without charge or at less than the “usual
and normal charge,” defined in context of services as the commercially reasonable prevailing
rate at the time the services are rendered. See 11 C.F.R. § 100.52(d).

The “usual and normal charge” generally includes goods and services provided to federal
candidates and political committees at a discount, as long as such discounts are provided in the
ordinary course of business and on the same terms and conditions available to all similarly
situated non-political clients. See Advisory Opinion 2018-11 (Microsoft) at 3 (concluding that
Microsoft may provide enhanced online security services at no additional charge on nonpartisan
basis to election-sensitive customers, including federal candidates and national party

1 The Commission notes that the Act and Commission regulations’ prohibition on corporate contributions no
longer applies to corporations making 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); Advisory Opinion 2004-06 (Meetup) at 1 (concluding that corporation may provide federal candidates, political committees, and supporters both free and fee-based online platform for arranging local gatherings). Indeed, a corporation generally “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 (addressing varying fees for online contribution-processing services).

However, merely asserting any business considerations for charging little or nothing would not be sufficient to constitute usual and normal charge; instead, the asserted business considerations must be sufficient to show that the corporation will be receiving adequate “consideration for the services provided.” Advisory Opinion 1996-02 (CompuServe) at 4. In determining what constitutes adequate consideration, the Commission has distinguished between two categories of advisory opinions.

The first category includes Advisory Opinion 1996-02 (CompuServe), in which the Commission concluded that mere “publicity, goodwill, or other commercial benefit does not constitute consideration.” Id. at 4. In that advisory opinion, CompuServe proposed to create a website displaying information about federal candidates and to offer free accounts on a nonpartisan basis to all federal candidates, which it did “on a regular basis” to “a large number of public-service oriented users, including a wide variety of schools and charitable organizations, as well as museums, religious organizations, and governmental entities.” Id. at 2. The Commission explained that, even if a corporation provides free goods or services to similarly situated non-political clients in the ordinary course of business, publicity, goodwill, or other commercial
benefit do not constitute consideration sufficient to “avoid a prohibited corporate contribution” to federal candidates. *Id.* at 3-4; *see also* Advisory Opinion 2003-16 (Providian) at 6 (explaining that prohibited sources of contributions may not provide payments or services to political committees in exchange for mailing or membership lists and goodwill because “mailing or membership lists had little value” and “goodwill was not consideration”); Advisory Opinion 1999-17 (Bush Exploratory Committee) at 8 n.7 (explaining that “following standard business practice” or expecting to receive “promotional or goodwill” benefits not enough to avoid making in-kind contribution if the corporation’s “services otherwise might have required consideration”); Advisory Opinion 1987-27 (Bell Atlantic) at 3 (permitting corporation to provide additional services to presidential campaigns because the campaigns were subject to more stringent terms than a regular customer and those terms “constitute[d] adequate compensation for [the corporation’s] services”).

In the second category of advisory opinions, the Commission distinguished CompuServe from corporations relying on business considerations that go beyond publicity, goodwill, or similar commercial benefit. Most recently, the Commission permitted Microsoft to provide federal candidates and national parties who were existing, full-paying users of the company’s productivity and email services with add-on cybersecurity services at no additional cost. Advisory Opinion 2018-11 (Microsoft) at 1. Although the Commission noted Microsoft’s interest in collecting data that servicing federal candidates and political parties would provide, the more important benefit justifying the offer of free services was protecting Microsoft’s “brand reputation” among current clients, who might leave due to the “risk of severe and long-term damage” if they were hacked using Microsoft’s products. *Id.* at 4 (citing Advisory Opinion
2012-28 (CTIA) at 8 as “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)). Accordingly, although Microsoft proposed to offer free services to federal candidates and national party committees, it sought to receive something beyond promotion, goodwill, or similar commercial benefit from the clients in return: continued payments for standard services from existing clients.

Similar considerations were asserted by the corporations in advisory opinions concerning digital contribution-processing services. In Advisory Opinion 2012-31 (AT&T), the Commission allowed AT&T to establish a lower rate structure for text messaging for political committees on the basis that, among other reasons, AT&T sought to “ensure that AT&T recovers its cost and receives a return” and “protect[] [its] brand and relationship with its wireless customers.” Id. at 4. Likewise, in Advisory Opinion 2012-26 (m-Qube II), the Commission permitted a wireless service provider to charge text-messaging rates that “reflect[ed] commercial considerations, such as volume of text messages, refund rates, customer satisfaction, and technical level of effort,” id. at 9; in that case, however, there was no indication that the provider was planning to offer discounts to committees below the usual and normal charge. Last, in Advisory Opinion 2018-05 (CaringCent), a corporation was permitted to charge lower fees to political committees on the basis that it planned to charge a more-than-nominal “commercially reasonable fee.” Id. at 5.

At bottom, the advisory opinions described above establish that a corporation proposing to offer federal candidates and political committees free or low-cost services, even in the ordinary course of its business, must do so for business considerations beyond publicity,
goodwill, or similar commercial benefit, such as to preserve existing relationships with paying
clients or to otherwise receive adequate compensation.

Here, Area 1 asserts that it would provide federal candidates and political committees
with free or nominal-cost services under its “standard business strategy” and on “identical” terms
it now provides similarly situated, nonpolitical clients. AOR007. But as explained above,
Area 1 must show that its business considerations are sufficient to justify its charges regardless
of its ordinary business. The only two business considerations asserted by Area 1 that could
potentially provide value are “research and development benefits” and a “greater sense of pride”
to solve the problem of hacking in elections. AOR004. Like the publicity and goodwill asserted
by CompuServe, research and development and pride do not provide the type of consideration
that is sufficient to adequately compensate Area 1 for the potentially highly valuable services it
would provide federal candidates and political committees. See Advisory Opinion 1996-02
(CompuServe) at 4. Area 1 attempts to distinguish pride from branding and goodwill by the fact
that the latter considerations “are related to marketing” while pride “is oriented to increasing the
employee’s intrinsic motivation to work hard every day,” AOR009, but pride is similar to
branding and goodwill in that it is intangible and vague and thus of uncertain value.

See also Advisory Opinion 2003-16 (Providian National Bank) at 6 (explaining that “mailing or
membership lists had little value” and thus did not constitute adequate consideration); Advisory
Opinion 1987-27 (Bell Atlantic) at 3 (permitting corporation to provide extra services to
presidential campaigns because, in return, it imposed terms that were more stringent than those
imposed on regular customers). Because of the unknown value associated with research and
development and pride, Area 1 would not be receiving adequate consideration from the federal candidates and political committees.

Moreover, unlike in the post-CompuServe category of advisory opinions, Area 1 would not be receiving any benefit in preserving an existing client relationship or otherwise receiving any other compensation beyond nominal payment. As Area 1 acknowledges in its request, in Advisory Opinion 2018-11 (Microsoft), “Microsoft wanted to give free services to pre-existing clients,” while Area 1 “wants to provide services at little to no cost to new clients.” AOR007. In other words, while Microsoft sought to preserve the consideration received from the federal candidates and national parties in the form of continued payments for standard services, Area 1 seeks to receive essentially nothing except the research and development and pride benefits discussed above. Indeed, Area 1 does not propose to cover its costs and recover a return, as in Advisory Opinion 2012-31 (AT&T) at 4, or to establish a new rate structure reflecting more-than-nominal reasonable fees, see Advisory Opinion 2012-26 (m-Qube II) at 9; Advisory Opinion 2018-05 (CaringCent) at 5. Thus, the post-CompuServe category of advisory opinions do not apply to Area 1’s situation.

In conclusion, because Area 1 does not propose sufficient business considerations justifying charging federal candidates or political committees little or nothing in return for its services, the Commission concludes that Area 1’s proposal would result in impermissible in-kind contributions and is thus impermissible.

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 you 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,

Ellen L. Weintraub
Chair