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By Office of the Commission Secretary at 4:10 pm, Jun 03, 2019



FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 19-23-A
AGENDA ITEM
For meeting of June 6, 2019
SUBMITTED LATE

June 3, 2019

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS*
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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

1 ADVISORY OPINION 2019-07

2

3 Daniel A. Petalas, Esq.

4 Garvey Schubert Barer, P.C.

5 Flour Mill Office Building

6 1000 Potomac Street, NW #200

7 Washington, DC 20007-3501

8

9 Dear Mr. Petalas:

DRAFT A

10 We are responding to your advisory opinion request on behalf of Area 1 Security, Inc.

11 (“Area 1”), concerning the application of the Federal Election Campaign Act, 52 U.S.C.

12 §§ 30101-45 (the “Act”), and Commission regulations to its proposal to offer free or low-cost

13 cybersecurity services to federal candidates and political committees. Because Area 1’s asserted

14 business reasons for providing such services — namely, to obtain research and development

15 opportunities and to motivate employees by creating a sense of pride — reflect inadequate

16 consideration in return for its services, the Commission concludes that the proposal would result

17 in prohibited in-kind contributions and thus is impermissible.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter on behalf of Area 1,

20 received on April 18, 2019.

21 Area 1 states that it can provide users of computers with “the most imaginative,

22 comprehensive, and effective solution for eliminating phishing attacks.” AOR003;

23 *see also id.* (describing Area 1’s services as “the industry’s only preemptive and comprehensive

24 solution to stop phishing”). A phishing attack allows the aggressor to entice a victim to

25 download a file, click on a link, visit a website, complete a form, or transfer sensitive data, and to

26 cause harm through such actions, such as by downloading malware or stealing or purging

1 credentials, data, intellectual property, or financial assets. *Id.* Area 1 preemptively tracks
2 phishing threats and stops them before they cause damage. *Id.*

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

14 Applying those factors to federal candidates and national parties, Area 1 has determined
15 that the first two factors counsel lowering costs for federal candidates and political committees
16 (because such potential clients have few resources to pay for cybersecurity services, and they
17 present a short-term opportunity given that their services are only needed around Election Day).
18 AOR004. Regarding the research and development opportunity afforded in providing anti-
19 phishing services, Area 1 asserts that federal candidates and political committees provide a
20 particularly valuable opportunity because they are “aggressively targeted” and, if foreign actors
21 used highly developed methods in targeting federal candidates and political committees, Area 1
22 “would learn from the experience.” AOR004, AOR007. The company also anticipates

1 benefitting from the “pride” provided by servicing federal candidates and political committees
2 because the potential hacking of such users presents a “high-visibility problem” that, if solved by
3 Area 1’s employees, would increase “intrinsic motivation” that, more than money, would make
4 them “happier and more productive.” AOR004. In Area 1’s view, a provider-client relationship
5 with federal candidates and political committees would make Area 1 as an employer more
6 attractive to talent, and Area 1 asserts that pride differs from a mere “branding or goodwill”
7 interest because those latter considerations are “related to marketing” as opposed to “increasing
8 the employee’s intrinsic motivation to work hard every day.” AOR009. Thus, Area 1 has
9 determined that it would benefit from providing free or low-cost services to federal candidates
10 and political committees. AOR004, AOR009.

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

15 ***Question Presented***

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

18 ***Legal Analysis and Conclusions***

19 No. Because Area 1’s asserted business reasons for charging federal candidates and
20 political committees no or little cost — namely, research and development opportunities and
21 motivating employees by creating a sense of pride — do not reflect adequate consideration in

1 return for its services, the provision of such services would result in prohibited in-kind
2 contributions.

3 Under the Act and Commission regulations, corporations may not make “contributions”
4 to federal candidates, political party organizations, and political committees that make
5 contributions to federal candidates and political party committees. 52 U.S.C. §§ 30118(a),
6 (b)(2); 11 C.F.R. § 114.2(b).¹ A “contribution” includes any “direct or indirect payment,
7 distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . in
8 connection with any [federal] election.” 52 U.S.C. § 30118(b)(2); *see* 11 C.F.R. § 114.2(b).
9 “Anything of value” includes all in-kind contributions, such as the provision of goods and
10 services to federal candidates and political committees without charge or at less than the “usual
11 and normal charge,” defined in context of services as the commercially reasonable prevailing
12 rate at the time the services are rendered. *See* 11 C.F.R. § 100.52(d).

13 The “usual and normal charge” generally includes goods and services provided to federal
14 candidates and political committees at a discount, as long as such discounts are provided in the
15 ordinary course of business and on the same terms and conditions available to all similarly
16 situated non-political clients. *See* Advisory Opinion 2018-11 (Microsoft) at 3 (concluding that
17 Microsoft may provide enhanced online security services at no additional charge on nonpartisan
18 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/>.

1 committees); Advisory Opinion 2004-06 (Meetup) at 1 (concluding that corporation may provide
2 federal candidates, political committees, and supporters both free and fee-based online platform
3 for arranging local gatherings). Indeed, a corporation generally “may charge different fees to
4 political committee clients than it charges to non-political clients,” with no in-kind contribution
5 resulting, as long as “any variation in fees will be based on business considerations and will not
6 be based on political considerations.” Advisory Opinion 2018-05 (CaringCent) at 5 (addressing
7 varying fees for online contribution-processing services).

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

14 The first category includes Advisory Opinion 1996-02 (CompuServe), in which the
15 Commission concluded that mere “publicity, goodwill, or other commercial benefit does not
16 constitute consideration.” *Id.* at 4. In that advisory opinion, CompuServe proposed to create a
17 website displaying information about federal candidates and to offer free accounts on a
18 nonpartisan basis to all federal candidates, which it did “on a regular basis” to “a large number of
19 public-service oriented users, including a wide variety of schools and charitable organizations, as
20 well as museums, religious organizations, and governmental entities.” *Id.* at 2. The Commission
21 explained that, even if a corporation provides free goods or services to similarly situated non-
22 political clients in the ordinary course of business, publicity, goodwill, or other commercial

1 benefit do not constitute consideration sufficient to “avoid a prohibited corporate contribution” to
2 federal candidates. *Id.* at 3-4; *see also* Advisory Opinion 2003-16 (Providian) at 6 (explaining
3 that prohibited sources of contributions may not provide payments or services to political
4 committees in exchange for mailing or membership lists and goodwill because “mailing or
5 membership lists had little value” and “goodwill was not consideration”); Advisory Opinion
6 1999-17 (Bush Exploratory Committee) at 8 n.7 (explaining that “following standard business
7 practice” or expecting to receive “promotional or goodwill” benefits not enough to avoid making
8 in-kind contribution if the corporation’s “services otherwise might have required consideration”);
9 Advisory Opinion 1987-27 (Bell Atlantic) at 3 (permitting corporation to provide additional
10 services to presidential campaigns because the campaigns were subject to more stringent terms
11 than a regular customer and those terms “constitute[d] adequate compensation for [the
12 corporation’s] services”).

13 In the second category of advisory opinions, the Commission distinguished CompuServe
14 from corporations relying on business considerations that go beyond publicity, goodwill, or
15 similar commercial benefit. Most recently, the Commission permitted Microsoft to provide
16 federal candidates and national parties who were existing, full-paying users of the company’s
17 productivity and email services with add-on cybersecurity services at no additional cost.
18 Advisory Opinion 2018-11 (Microsoft) at 1. Although the Commission noted Microsoft’s
19 interest in collecting data that servicing federal candidates and political parties would provide,
20 the more important benefit justifying the offer of free services was protecting Microsoft’s “brand
21 reputation” among current clients, who might leave due to the “risk of severe and long-term
22 damage” if they were hacked using Microsoft’s products. *Id.* at 4 (citing Advisory Opinion

1 2012-28 (CTIA) at 8 as “finding no prohibited in-kind contribution where discounts for political
2 committees ‘were available . . . as part of a pre-existing business relationship’” (quoting
3 Advisory Opinion 1994-10 (Franklin National Bank) at 2)). Accordingly, although Microsoft
4 proposed to offer free services to federal candidates and national party committees, it sought to
5 receive something beyond promotion, goodwill, or similar commercial benefit from the clients in
6 return: continued payments for standard services from existing clients.

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

20 At bottom, the advisory opinions described above establish that a corporation proposing
21 to offer federal candidates and political committees free or low-cost services, even in the
22 ordinary course of its business, must do so for business considerations beyond publicity,

1 goodwill, or similar commercial benefit, such as to preserve existing relationships with paying
2 clients or to otherwise receive adequate compensation.

3 Here, Area 1 asserts that it would provide federal candidates and political committees
4 with free or nominal-cost services under its “standard business strategy” and on “identical” terms
5 it now provides similarly situated, nonpolitical clients. AOR007. But as explained above,
6 Area 1 must show that its business considerations are sufficient to justify its charges regardless
7 of its ordinary business. The only two business considerations asserted by Area 1 that could
8 potentially provide value are “research and development benefits” and a “greater sense of pride”
9 to solve the problem of hacking in elections. AOR004. Like the publicity and goodwill asserted
10 by CompuServe, research and development and pride do not provide the type of consideration
11 that is sufficient to adequately compensate Area 1 for the potentially highly valuable services it
12 would provide federal candidates and political committees. *See* Advisory Opinion 1996-02
13 (CompuServe) at 4. Area 1 attempts to distinguish pride from branding and goodwill by the fact
14 that the latter considerations “are related to marketing” while pride “is oriented to increasing the
15 employee’s intrinsic motivation to work hard every day,” AOR009, but pride is similar to
16 branding and goodwill in that it is intangible and vague and thus of uncertain value.
17 *See also* Advisory Opinion 2003-16 (Providian National Bank) at 6 (explaining that “mailing or
18 membership lists had little value” and thus did not constitute adequate consideration); Advisory
19 Opinion 1987-27 (Bell Atlantic) at 3 (permitting corporation to provide extra services to
20 presidential campaigns because, in return, it imposed terms that were more stringent than those
21 imposed on regular customers). Because of the unknown value associated with research and

1 development and pride, Area 1 would not be receiving adequate consideration from the federal
2 candidates and political committees.

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

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

20 This response constitutes an advisory opinion concerning the application of the Act and
21 Commission regulations to the specific transaction or activity set forth in your request.
22 *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts

1 or assumptions presented, and such facts or assumptions are material to a conclusion presented in
2 this advisory opinion, then you may not rely on that conclusion as support for its proposed
3 activity. Any person involved in any specific transaction or activity which is indistinguishable in
4 all its material aspects from the transaction or activity with respect to which this advisory
5 opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B). Please
6 note that the analysis or conclusions in this advisory opinion may be affected by subsequent
7 developments in the law including, but not limited to, statutes, regulations, advisory opinions,
8 and case law. Any advisory opinions cited herein are available on the Commission's website.

9 On behalf of the Commission,

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Ellen L. Weintraub
Chair