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October 7, 2011

BY HAND DELIVERY

Office of the General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

Re: Advisory Opinion Request

Dear Commissioners:

Many people would like to have an impact on their community by contributing to causes they support, but feel constrained because they have limited resources and the process for finding and supporting worthy groups can be difficult. GivingSphere™ was founded as a donor-centric internet and mobile-based processing platform that enables individuals to contribute to charitable, civic, faith-based, and educational organizations.<sup>1</sup> Taking a donor-centric viewpoint, GivingSphere focuses on the needs of the smaller or occasional donor, allowing them to manage their own customized portfolio of giving preferences from one convenient location, while also accumulating funds from which to make contributions. GivingSphere would like to include all permissible types of federal political committees, including candidate committees, political party committees, non-connected committees, and leadership PACs among the choices its customers have when deciding how to contribute their funds.

**FACTUAL BACKGROUND**

**How the GivingSphere Platform Works**

GivingSphere customers may accumulate funds for use as donations in one of two ways: by making purchases from affiliated merchants who agree to rebate a portion of the purchase price; or by transferring the customer's own funds to GivingSphere to use for contributions.

<sup>1</sup> GivingSphere™ is the registered dba of Social Financial, Inc., a California corporation.

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**Shop and Donate** GivingSphere customers can shop at a host of affiliated merchants using the GivingSphere platform, either by using the GivingSphere e-Retail Virtual Shopping Mall or by going directly to a participating merchant's website. Participating merchants agree that when a GivingSphere customer makes a purchase through the GivingSphere platform, the merchant will transfer a portion of that payment back to GivingSphere as a rebate that the customer may use to make a donation to an entity of the customer's choosing. GivingSphere notifies its customers of their accumulated rebates, and the customer tells GivingSphere where to send all or a portion of the rebate. The customer may choose to make a donation to a charity, civic, faith-based or educational group, and if approved by the Federal Election Commission ("FEC"), a federal candidate, the federal account of a political party committee ("a political party") or any other type of federal political committee. GivingSphere is premised on people joining so that they can have the opportunity to contribute to their community and to the world in which they live. Consequently, GivingSphere does not plan to give customers the option of receiving a payment or cash-back for the value of the rebates they earn through GivingSphere.

All rebates eligible for donation to a federal candidate, political party or other federal political committee would be made from funds that are the customer's property. As evidence of this, GivingSphere would only permit a customer to contribute rebated funds to a federal political committee if the customer agreed to treat the rebate as earned income and receive an IRS Form 1099 from GivingSphere.<sup>2</sup>

**Direct Giving** Customers may transfer additional funds of their own ("direct giving funds") to their GivingSphere account, and may use direct giving funds to make donations. The customer is free to select the cause or causes to which these funds will be given, including, if approved by the FEC, a federal candidate, political party or other federal political committee.

**Segregation of Funds** GivingSphere will maintain a separate bank account (the "customer-owned funds" bank account) that will contain only: (a) rebated funds recognized by a customer as their own property and reported to the IRS on Form 1099; and (b) personal funds that a customer has transferred to GivingSphere for the purpose of making contributions. All other funds under GivingSphere's control, including GivingSphere's corporate account and any account that contains rebate funds that are not customer property (i.e., any rebates for which a customer will not receive an IRS Form 1099), will be segregated from the customer-owned funds account. Contributions to federal political committees will only be made from the customer-owned funds account.

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<sup>2</sup> For other, non-FEC regulated giving, GivingSphere may allow customers to earn non-tax basis rebates which would be treated as property of GivingSphere. Any funds in such an alternative program would be segregated from customer funds used in the program described here.

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Funds transferred to GivingSphere from merchants, including rebates earned by GivingSphere's customers, will be allocated between GivingSphere's corporate account (for funds owed to GivingSphere) and a segregated GivingSphere customer-controlled account (for rebates earned by GivingSphere's customers). The funds in the customer-controlled account will be GivingSphere's property, even though the disposition of these funds will be up to GivingSphere's customers. Once the funds earned by GivingSphere's customers are in the customer-controlled account, the customers may either leave the funds in that account or direct GivingSphere to transfer the funds to the customer-owned account. Before GivingSphere will transfer any funds into the customer-owned account, each customer must agree to treat the funds as taxable income and to receive an IRS Form 1099 from GivingSphere that identifies the rebates as income to the customer. Customers may make donations to entities that are not political committees from funds in either the customer-controlled account or the customer-owned account. However, customers will be able to contribute to federal political committees only from funds in the customer-owned account. GivingSphere will not permit the transfer of funds from the customer-controlled account to any federal political committee.

#### **How a Customer Signs Up and Selects a Cause to Support**

When a customer joins GivingSphere, they begin by visiting a webpage called MySphere™. The customer enters certain personal information and may select the type of causes they will support from several categories, including charities, civic, faith-based and educational organizations, and, if this request is granted, federal candidates, political parties and other federal political committees.

Upon selection of a category, the customer will be taken to a search page. The customer may enter the specific name of a group they would like to contribute to or they may search for a group using a MySphere search tool.<sup>3</sup> The search could be specific, such as a search for an organization's name, or it could be general, such as a search for all of the charities in the customer's zip code.<sup>4</sup> The information the customer receives will be limited to basic factual

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<sup>3</sup> This is but one way a customer may decide which group he or she wishes to contribute to. For example, the customer may give and receive recommendations for causes or campaigns from social media network friends on Facebook, Twitter and similar platforms, or from public sources outside of GivingSphere.

<sup>4</sup> GivingSphere anticipates allowing customers to use subject matter search terms such as "Baptist" or "Republican" if they wanted to give to a Baptist church in their community, or a Republican candidate in a particular zip code. The customer, and not GivingSphere would select these search terms, and GivingSphere's search algorithm would contain no predetermined preference for any particular candidate or political viewpoint.

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information about each candidate or group, such as its name, address, party affiliation (if any), FEC identification number and a website link (if available).<sup>5</sup>

Upon selecting a cause they wish to support, the customer clicks a box and “bookmarks” that cause on their MySphere page.<sup>6</sup> A customer may select any number of causes to support by bookmarking them on the MySphere page. The customized grouping of causes creates the customer’s GivingSphere portfolio. Customers can allocate a specific portion of their rebate to a particular cause they have bookmarked, or the customer may choose to have their rebate balance allocated among some or all of the causes they have bookmarked. Each time a customer makes a donation, they will be prompted to reconfirm or adjust the proportional allocation they have previously selected.

Prior to GivingSphere processing a contribution to a political committee, the customer will be required to provide identification information including their name, address, occupation, and employer. Customers will also be asked to certify that:

- They are an individual who is a United States citizen or permanent lawful resident alien;
- They are not a federal contractor; and
- Any money (including any sums from a rebate) used to make a contribution has been earned from payments made from the customer’s own personal funds and not from the funds of a corporation or labor organization or from funds provided to them by any another person.

Customer-designated contributions to federal political committees will be transferred to the committee within ten days of the receipt of the customer’s funds by GivingSphere and the customer’s designation. GivingSphere will forward with each contribution all information the political committee would need to report the identity of the donor, as well as an acknowledgement that the customer has certified that they are a United States citizen or

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<sup>5</sup> The GivingSphere™ platform will only provide access to charities registered with the Internal Revenue Service, federal candidate campaigns and political party committees that are registered with the FEC, and other similarly legally registered groups.

<sup>6</sup> At the time a customer joins GivingSphere, a default selection would be made by the customer. All rebates unallocated within a certain period of time would be contributed to the default organization. If the customer fails to select a default organization, GivingSphere will select a default charitable organization to receive the funds. While a customer may select a federal political committee as a default organization, GivingSphere will never select a federal political committee as a default organization.

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permanent lawful resident alien and that the funds donated have been earned from payments made from their own personal funds and not from the funds of a corporation or labor organization or funds provided to them by any another person. GivingSphere will not transfer contributions that exceed the permissible contribution limits.

### **Information GivingSphere Provides To Its Customers About Federal Campaigns**

GivingSphere as an organization does not support any particular candidate, political party, or political cause. Instead, GivingSphere's goal is to provide its customers with useful giving tools. GivingSphere does not intend to create content that advocates for the election or defeat of any candidate for public office. Nor does it intend to create content that promotes, attacks, supports or opposes any candidate, political party or other political committee. Instead it will provide its customers with tools they can use to gain information about potential recipients from other sources, primarily by providing the website link to the entity a customer is considering supporting. GivingSphere would also like to provide basic factual information about the entities a customer is considering contributing to, including candidates and political committees. For candidates, this could include information such as the office the candidate is running for, the election cycle they are competing in and similar basic factual information (e.g., age, occupation, incumbent or challenger).

### **Funding of GivingSphere**

GivingSphere generates revenue from four different sources. First, like all online retailers, it receives transaction fees from merchants measured by a percentage of the online commercial transactions its customers engage in. Second, it receives a processing fee from customers when they donate funds to a cause of their choosing. Third, it receives rebates from affiliated merchants, some of which are designated as funds that GivingSphere's customers will have available to make contributions with. Fourth, GivingSphere may sell advertising, as described below. All of these fees, rebates and advertising would be set at market rates for similar commercial transactions.

GivingSphere intends to sell advertising similar to that seen on existing social media sites. Merchants, groups eligible to receive donations, and other entities may purchase advertisements and/or search-placement ads (such as those sold by Google,) that list an advertiser's website, along with similar groups located by the search engine. GivingSphere has not yet determined the precise advertising formats it will use. GivingSphere would endeavor to ensure that any political advertisers complied with the FEC disclaimer rules applicable to the format of advertising that is purchased.

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### **Promotional Badges**

To expand participation, GivingSphere would like to establish an affiliates program, in which third party entities agree to place a GivingSphere Badge on a relevant portion of their website. The Badge would consist of a small box, icon or link that would encourage viewers to join GivingSphere. If a viewer clicked on the Badge, they would be directed to the GivingSphere site and encouraged to join the GivingSphere program. In return, GivingSphere would agree to pay to the entity which posted the Badge a small percentage of future transactions that resulted from the new customer joining GivingSphere. These fees will be paid from GivingSphere's corporate account, and will decline over time. GivingSphere does not intend to pay an up-front fee to a badge host. The GivingSphere Badge would not solicit contributions to federal candidates or other federal political committees.

GivingSphere anticipates that the primary source of affiliates would be bloggers, online news outlets and similar sources, but participating merchants and potential recipients of contributions would also be encouraged to use the GivingSphere Badge on their websites. Regardless of the source from which a potential new customer joined GivingSphere, the services provided would be the same, and GivingSphere would not attempt to influence customers' contribution choices based upon whether they joined GivingSphere through the use of a Badge or not.

If the third party entity that agrees to host a badge is a political committee registered with the FEC, GivingSphere will not make a payment to that political committee, even if the customer later engages in commercial transactions that otherwise would earn the badge host a fee, were it not a federal political committee. Instead, the sum that would have otherwise been earned by the badge host from that customer's transaction will be allocated to the customer's account and deposited in the donor-controlled bank account. The customer will then have the choice of whether to give those funds to a charitable, civic, faith-based, educational or political organization.

### **QUESTIONS PRESENTED AND LEGAL DISCUSSION**

- 1. May GivingSphere follow a customer's instruction to transfer some or all of the customer's rebates to a federal campaign committee?**

GivingSphere provides donation processing services to individual donors, allowing them to direct the transfer of their personal funds to an entity of their choosing. The decisions on timing, amount, and the recipient of donations rests solely with the donors, as does the decision as to whether to give to a federal political committee, or to a charitable, civic, faith-based, or educational group instead. Because GivingSphere provides its services at the request and for the benefit of its customers, and is compensated for that based on commercial transactions by its

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customers, not the recipient political committees, GivingSphere is serving as a vendor to its customers and its services do not result in impermissible contributions from the Company.

GivingSphere's donor-centric services fit within the range of permissible activity recognized in Advisory Opinions 2011-06 (Democracy Engine) and 2006-08 (Brooks). In these advisory opinions, which evaluate similar contribution processing services, the Commission distinguished between companies that provide services to individual donors and those that provide services to political committees. In both opinions, the Commission concluded that a company that provides contribution processing services to individual donors rather than political committees is not considered to be making contributions from the company itself. See AO 2011-06, at 1; AO 2006-08, at 4.

In Advisory Opinion 2011-06 (Democracy Engine), a company proposed a web-based payment service that would provide individual subscribers the opportunity to make donations to various entities, including federal political committees. The company did not intend to contract with political committees, except for the limited purpose of electronic funds transfers. The Commission concluded that the company's services were permissible, and that they were materially indistinguishable from the services approved by the Commission in Advisory Opinion 2006-08 (Brooks). In Advisory Opinion 2006-08 (Brooks), the Commission concluded that a company providing online services that assist individuals in making contributions was "similar to corporations that provide delivery services, bill paying services, or check writing services." AO 2006-08, at 4. In both opinions, the Commission concluded that the companies' donor-focused services would not result in impermissible contributions by the company to any political committee:

Yes, the Corporation may receive and distribute deposits for subscribers' contributions. ... [T]he Corporation's receipt and distribution of subscribers' contributions would be permissible under the Act and Commission regulations. AO 2006-08, at 4.

Therefore, because the Vendor is providing services only to the subscribers, and not to any political committee, the Vendor's proposal would not result in impermissible contributions by the Vendor to any political committee. AO 2011-06, at 5-6.

GivingSphere's services fit squarely within these permissible activities. As with the companies in Advisory Opinions 2011-06 (Democracy Engine) and 2006-08 (Brooks), GivingSphere intends to enter into service agreements with individual donors. Fees for GivingSphere's services will be charged to its customers to transmit customer funds to recipient committees. Any funds transmitted to political committees will be funds belonging to the customers, either in the form of rebates the customer has earned and chosen to treat as income, or as "direct giving funds." GivingSphere will maintain a separate account for these customer

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funds, segregated from its corporate accounts. Finally, decisions on when, how much, and to whom a contribution is transferred are made by the customer and not GivingSphere or any political committee.

Prior to Advisory Opinion 2006-08 (Brooks), the Commission evaluated several proposals for contribution processing services from companies that contracted directly with political committees for these services. *See* AO 2007-04 (Atlant); 2004-19 (DollarVote); 2002-07 (Careau). Because these companies provided services to political committees involving the transfer of contributions, the Commission analyzed whether the companies met the “commercial vendor” exception to the prohibition on corporate facilitation of contributions. *See* AO 2007-04, at 3; 2004-19, at 3; 2002-07, at 5; *see also* 11 C.F.R. § 114.2(f)(1) (commercial vendor exception). In Advisory Opinion 2011-08 (Democracy Engine), however, the Commission concluded the “commercial vendor” analysis was inapplicable to situations where the company was providing services to its customers and not to political committees. AO 2011-06, at 5 n.4. Because GivingSphere’s services are designed to benefit the donors, the “commercial vendor” analysis is not required here, as well.

Therefore, based on the Commission’s analysis and conclusions in Advisory Opinions 2011-06 (Democracy Engine) and 2006-08 (Brooks), because GivingSphere will “process contributions at the request and for the benefit of its subscribers, and not the recipient political committees,” GivingSphere’s services will similarly not result in impermissible contributions by the Company.

**2. May GivingSphere provide customers with a search engine and database with which to identify potential federal candidates, national political parties and other federal committees they might contribute to?**

As noted in the discussion of Question 1, GivingSphere’s services are provided at the request and for the benefit of its customers, not recipient political committees. Federal political committees will be included based on their active registration status with the FEC. GivingSphere intends to be as inclusive as possible and will not employ subjective criteria when adding or removing committees.

In Advisory Opinion 2011-06 (Democracy Engine), the Commission approved a web-based payment system that offered subscribers a “directory of potential recipients,” which included political committees. *See* AO 2011-06, at 2. GivingSphere intends to offer a similar, searchable directory of political committees, which relies exclusively on the input of the individual customer to locate and select potential recipients from a universe of all eligible political committees.

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GivingSphere intends to list federal committees that are registered with the Commission, drawing its information from the Commission's public database. GivingSphere's use of FEC records for information on political committees is permissible under the Commission's prior advisory opinions. Though 2 U.S.C. § 438(a)(4) prohibits certain commercial uses of the Commission's data, the Commission has interpreted this statute to protect against the use of *contributor* information. See AO 2004-24 (NGP) ("However, the Act and Commission regulations do not restrict the sale or use of the name and address of a political committee for solicitation purposes.") (citing examples); AO 1983-44 (Cass Communications) ("In a number of advisory opinions the Commission has relied on the legislative history of 2 U.S.C. 438(a)(4), construing that the purpose of the restriction on use of information specifically is to protect contributor information and lists from being used for commercial purposes. ... Moreover, the Commission previously has concluded, based on a similar factual situation presented in Advisory Opinion 1981-38, that names and addresses of candidates found in FEC records may be used for commercial purposes.") (internal citations omitted). GivingSphere will only use FEC records to obtain data related to political committees and will never use contributor information. Consequently, GivingSphere should be able to provide customers with a search engine and database with which to identify potential federal candidates, national political parties and other federal committees they might contribute to.

**3. If the answer is "yes," can GivingSphere also provide customers with basic factual information about the political committee (e.g., "Barack Obama is President of the United States and running for re-election in 2012 as the Democratic nominee.")**

The general information provided by GivingSphere to its customers will not contain express advocacy, will not support or oppose particular political committees, and will not be influenced or directed by any political committee. GivingSphere intends to provide customers with the tools to gain information about potential recipients from other sources, primarily the entity a customer is considering supporting. The limited directory descriptions, containing basic factual information, will be part of GivingSphere's services offered to its customers to assist them in the making of contributions.

In Advisory Opinion 2006-08 (Braks), the company proposed providing an extensive array of information on political candidates to its subscribers:

The Corporation is considering providing commentary and analysis of various State and Federal officeholders, non-profit organizations, campaigns, and events as an additional service to its individual subscribers. This may include providing biographical information, voting records of a candidate on particular issues, ratings of a candidate given by various organizations, reelection percentages, the candidate's campaign contribution position, the strength of the candidate's party loyalty, and any relevant media articles.

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Subscribers would be asked to identify issues that are of general interest to them. The Corporation would then provide its subscribers with information and analysis relevant to that issue. In some cases, the subscriber may request specific information or analysis from a list of organizations provided by the Corporation. Subscribers may also request specific media articles to be forwarded to them. However, the Corporation may also forward general information, such as biographies of Members of Congress, to all its subscribers, without their making a specific request. Under no circumstances will the Corporation author any of the information or analysis that is forwarded to subscribers.

AO 2006-08, at 3. The Commission approved this proposal:

Yes, the Corporation may forward the proposed commentary and analysis of Federal candidates to subscribers. This service will be provided to subscribers at their request for an additional fee. As such, it is a part of the Corporation's overall business plan to assist subscribers in the making of contributions. Under all of the circumstances present, the proposed activity would be permissible under the Act and Commission regulations.

AO 2006-08, at 4.

The short, non-pejorative descriptions of political committees that GivingSphere intends to provide for its customers fall well within the scope of what was approved in Advisory Opinion 2006-08 (Brooks). In a similar way, GivingSphere is offering its limited directory listings as a service to assist its customer in the making of donations and contributions.

**4. Must GivingSphere file any reports with the Federal Election Commission based on the activities described herein?**

As noted in the discussion of Question 1, GivingSphere's services are provided at the request and for the benefit of its customers. GivingSphere agrees to receive customer funds (either in the form of rebated funds from merchants or direct giving funds from the customer), to hold them, and allocate them as the customer directs. Any funds that a customer decides should be used as a contribution to a federal political committee will be funds belonging to that customer, either in the form of "direct giving funds" or rebated funds the customer has chosen to earn as income and receive an IRS Form 1099. The customers choose when, how much, and to whom to contribute using their own funds. In this way, GivingSphere operates in these transactions much as a bank, credit card company or overnight mail service might, in transmitting funds to the recipient. GivingSphere will include all of the appropriate individual contributor information with its transfers to political committees necessary for the political

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committees to comply with its reporting obligations, and the reports of those committees will provide complete and accurate information as to the identity of the donor.

GivingSphere does not solicit contributions for its own use or on behalf of political committees. In addition, GivingSphere does not engage in express advocacy on its donor - processing platform. Because GivingSphere does not accept contributions or make expenditures under the Act, but merely provides a service for its customers to make contributions, GivingSphere will not be required to file reports to the Commission based on the activities described herein.

**5. May GivingSphere sell advertisements as described herein to federal political committees?**

GivingSphere will sell advertisements at a "usual and normal charge," which will be determined by the market value of comparable online advertisements. For this reason, the transaction will not constitute a contribution to political committees that decides to advertise with GivingSphere. In addition, GivingSphere will endeavor to ensure that political advertisers comply with the applicable FEC disclaimer rules.

Paid internet advertising is a recognized form of "public communication" by a political committee. *See* 11 C.F.R. § 100.26. Furthermore, a company that offers such online advertising space to a political committee at its "usual and normal charge" is not providing "anything of value" to the committee. *See* 11 C.F.R. § 100.52(d)(1). The usual and normal charge for goods and services is determined by the "price of those goods in the market from which they ordinarily would have been purchased" or the "charge for the services at a commercially reasonable rate prevailing at the time the services were rendered." 11 C.F.R. § 100.52(d)(2).

GivingSphere intends to charge political advertisers a fee based on the market rate for similar advertisements. In this way, GivingSphere will not be transferring "anything of value" to the committees under the Act, and thus, not making "contributions." 2 U.S.C. § 441b(b)(2); *see also* AO 2005-18 (Reyes) (no contribution from a radio station where political committee paid the "prevailing commercially reasonable rate" for radio airtime).

**6. May GivingSphere permit political committees to place GivingSphere Badges on their websites?**

GivingSphere's Badges are a promotional tool designed to increase the size of GivingSphere's customer base. They will encourage visitors or non-GivingSphere websites to join GivingSphere as a way to more actively participate in their community through making small contributions. GivingSphere's Badges will not solicit contributions to federal candidates or other federal political committees. If a donor chooses to make such a contribution, based

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upon information they have gained from non-GivingSphere sources, there is no barrier in the campaign finance laws to that donor using GivingSphere as the means by which to deliver their contribution, as opposed to writing and mailing a check to the campaign. For donors, who might view a check for a small contribution to be foolish, the ability to use GivingSphere and contribute through clicks on the internet, at a very small cost to the donor, may be a viable alternative.

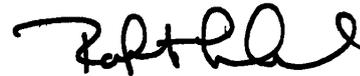
Nor will Giving Sphere make any payments to a federal political committee out of its corporate funds in return for a federal political committee hosting a GivingSphere badge on its website. GivingSphere will neither make any up-front payment for placement nor any fee or payment as a result of a customer engaging in a commercial transaction. Instead, any fees or sums that would normally accrue to a badge host will be allocated to the customer, who will be free to donate or contribute the sums as they see fit.

**CONCLUSION**

For all of the foregoing reasons, GivingSphere therefore request an advisory opinion confirming that it may include federal candidate committees, political party committees and other federal committees among the choices it offers its customers.

Please do not hesitate to contact the undersigned if you have any questions.

Sincerely,



Robert Lenhard  
Andrew Byrnes  
Derek Lawlor