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July 1, 2022

**RE: Advisory Opinion Request (Google LLC)**

Dear Ms. Stevenson and Mr. Stipanovic:

On behalf of our client Google LLC (“Google”), we request an advisory opinion pursuant to 52 U.S.C. § 30108 of the Federal Election Campaign Act of 1971, as amended (the “Act”).

More than 1.5 billion people use Gmail each month to send and receive email, and Gmail’s spam filters are important to its users.<sup>1</sup> Gmail’s filtering capabilities and security protections are built to give users the best overall Gmail experience by delivering the emails they want to see.<sup>2</sup> Prioritizing Gmail’s users is not only integral to Google’s purpose, but is how Google continues to grow.

Google requests the Commission’s opinion on a proposal to launch a pilot program for authorized candidate committees, political party committees, and leadership political action committees that are registered with the Federal Election Commission during the 2022 election cycle (“Eligible Participants”) and that meet objective security criteria, such as implementation of technical authentication standards. Once an Eligible Participant is accepted into the pilot, as long as its emails do not contain content prohibited by Gmail’s terms of service such as phishing, malware, or illegal content and comply with program requirements, those emails will not be affected by forms of spam detection to which they would otherwise be subject. The placement of those emails into users’ inbox folders or spam folders will instead rely on direct feedback from each user. The user may provide this feedback upon receiving the first or a subsequent email from the sender. Additionally, pilot participants will receive information about the rate at which their emails are delivered into Gmail users’ inboxes as opposed to spam folder (“Inboxing Rate”).

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<sup>1</sup> Neil Kumaran, *Spam Does Not Bring Us Joy—Ridding Gmail of 100 Million More Spam Messages with TensorFlow*, GOOGLE WORKSPACE (Feb. 6, 2019), <https://cloud.google.com/blog/products/g-suite/ridding-gmail-of-100-million-more-spam-messages-with-tensorflow/>.

<sup>2</sup> Neil Kumaran, *Understanding Gmail’s Spam Filters*, GOOGLE WORKSPACE (May 27, 2022), <https://cloud.google.com/blog/products/workspace/an-overview-of-gmails-spam-filters>.

Gmail is a commercial product, and its spam filters are one of a number of features that Gmail offers to enable more than 1.5 billion users to be more secure and efficient in their use of the product. Given Google’s focus on protecting the user’s experience, a condition of the program will be that the first email delivered into Gmail users’ inboxes from each qualified participant under this program will contain a prominent notification, such as a banner, asking whether the user wishes to continue receiving messages from the sender. Additionally, all pilot participants will be required to include “one-click unsubscribe” in all messages sent as part of the program, a commonly used market standard. Emails sent by pilot participants will remain subject to all phishing, malware, and illegal content filtering.

Google proposes to offer participation in this pilot program on a non-partisan basis to Eligible Participants. Because the pilot includes only federally-registered political committees, Google will be able to verify their identity using the email address that the committee has included on its FEC Form 1 Statement of Organization. This eligibility criterion—as the threshold component of a comprehensive set of requirements for pilot participation—will minimize the likelihood that any actor falsely purporting to be a committee will join the pilot. The pilot program will be available to all FEC-registered federal candidates and party committees, and is not intended to favor or disfavor any particular candidate, party or speaker, nor intended to influence the outcome of any election.

The pilot will test these new design features to assess whether they enhance the user and bulk sender experience—with a variety of commercial purposes, including determining whether and how to best enhance the product on a broader basis. The pre-election period is an appropriate time to test this program with electorally active bulk senders due to the anticipated increase in the volume of campaign email in the coming months and Google’s ability to more easily verify the identities of these bulk senders.

In light of the focus on this pre-election period, Google respectfully requests that the Commission provide expedited review of this request and issue an opinion within 30 days due to the proximity to upcoming elections.<sup>3</sup>

## BACKGROUND

### 1. Google and Gmail

Alphabet Inc., Google’s parent company, is a publicly traded company, incorporated in Delaware with its principal place of business in Mountain View, California.<sup>4</sup> Google is the largest of the Alphabet businesses.<sup>5</sup> Google has a mission to organize the world’s information and make it universally accessible

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<sup>3</sup> Notice of New Advisory Opinion Procedures and Explanation of Existing Procedures, 74 Fed. Reg. 32160, 32162 (July 7, 2009) (noting that the Commission has an informal policy of “expediting certain highly significant time-sensitive requests,” whereby it “endeavors to issue advisory opinions within 30 days”); *The Advisory Opinion Process*, FEC, <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

<sup>4</sup> Alphabet Inc., SEC Form 10-K (2021) (“Alphabet Form 10-K”) at 1.

<sup>5</sup> *Id.* at 4.

and useful.<sup>6</sup> More than 1.5 billion users across the world trust Google’s products to deliver the most helpful and reliable information available on the web.<sup>7</sup>

Google is committed to building helpful products that can improve the lives of its billions of users. Google’s product innovations have made its services widely used, and its brand is one of the most recognized in the world. Google’s core products and platforms include Android, Chrome, hardware, Gmail, Google Drive, Google Maps, Google Photos, Google Play, Search, and YouTube, each with broad and growing adoption by users around the world.<sup>8</sup> Gmail is the world’s largest email platform because it puts users first,<sup>9</sup> including by using spam filters to reduce unwanted email from senders (who have free access to Gmail recipients).

In its public securities filings, Google has identified that a significant asset to its business is its “strong brands, and failing to maintain and enhance our brands would hurt our ability to expand our base of users, advertisers, customers, content providers, and other partners.”<sup>10</sup> The filings emphasize that Google’s brands may be “negatively affected” by such factors as “third-party content shared on our platforms, data privacy and security issues and developments.”<sup>11</sup> In sum, ensuring that Gmail meets user expectations, including filtering out unwanted emails, is essential to maintaining the Gmail brand and business.

Paid advertising and other sponsored content on certain Google platforms help Google provide many products for anyone to use for free, including its Gmail service. While Google does not scan or process email content for advertising purposes, users may see ads in their free Gmail accounts. 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.<sup>12</sup> More than five million paying businesses use Gmail in the workplace.<sup>13</sup>

## 2. Spam Filtering

More than 1.5 billion people use Gmail each month to send and receive email, and Gmail’s spam filters are important to its users.<sup>14</sup> Roughly half of all email traffic across the Internet consists of unwanted

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 5.

<sup>9</sup> *Ten Things We Know to be True*, GOOGLE, <https://about.google/philosophy/> (Since its founding, Google has been and remains focused on providing the best experience possible for its users).

<sup>10</sup> Alphabet Form 10-K, *supra* note 4 at 12.

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

<sup>12</sup> *How Teams of All Sizes Connect, Create, and Collaborate*, GOOGLE WORKSPACE, <https://workspace.google.com/>.

<sup>13</sup> Kumaran, *supra* note 1.

<sup>14</sup> *Id.*

spam.<sup>15</sup> Without such filtering, the volume of spam reaching inboxes would be overwhelming. All major email services use spam filtering to provide a better experience for their users.

Just as Gmail’s terms of service and policies apply to every user and advertiser, Gmail’s spam filter policies apply to emails from all senders—including Google—whether they are politically affiliated or not. Google’s spam filters detect and filter over 99.9% of spam, phishing, and malware from ever reaching users’ inboxes.<sup>16</sup> Gmail’s spam filters block nearly 10 million spam emails *every minute*.<sup>17</sup> Gmail’s filtering capabilities and security protections are built to give users the best overall Gmail experience by delivering the emails they want to see.<sup>18</sup> Prioritizing Gmail’s users is not only integral to Google’s purpose, but is how Google continues to grow.

From its inception, Gmail sought to assist users with reporting suspected spam and then filtering it.<sup>19</sup> Gmail did so in recognition of the fact that, each day, every Gmail user receives myriad types of emails—messages from friends, social notifications, deals and offers, confirmations and receipts, and large amounts of unwanted and unsolicited messages—all of which compete for the user’s attention and can make it harder for the user to use their inboxes efficiently.

Gmail employs a number of filters that determine whether an email is classified as spam. Gmail describes these signals in its May 27, 2022 blog post, “Understanding Gmail’s Spam Filters,” as follows: “These filters look at a variety of signals, including characteristics of the IP address, domains/subdomains, whether bulk senders are authenticated, and user input. User feedback, such as when a user marks a certain email as spam or signals they want a sender’s emails in their inbox, is key to this filtering process, and our filters learn from user actions.”<sup>20</sup>

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<sup>15</sup> See Tatyana Kulikova & Tatyana Shcherbakova, *Spam and Phishing in 2021*, SECURELIST BY KASPERSKY (Feb. 9, 2022), <https://securelist.com/spam-and-phishing-in-2021/105713/> (“On average, 45.56% of global mail traffic was spam in 2021.”); Tatyana Kulikova, Tatyana Shcherbakova, & Tatyana Sidorina, *Spam and Phishing in 2020*, SECURELIST BY KASPERSKY (Feb. 15, 2021), <https://securelist.com/spam-and-phishing-in-2020/100512/> (“The share of spam in global email traffic in 2020 . . . averag[ed] 50.37%.”); Maria Vergelis, Tatyana Shcherbakova, Tatyana Sidorina, & Tatyana Kulikova, *Spam and Phishing in 2019*, SECURELIST BY KASPERSKY (Apr. 8, 2020), <https://securelist.com/spam-report-2019/96527/> (“The share of spam in mail traffic in 2019 increased . . . to 56.51%.”).

<sup>16</sup> *Choose Your Google Workspace Pricing Plan*, GOOGLE WORKSPACE, <https://workspace.google.com/pricing.html>; Kumaran, *supra* note 2.

<sup>17</sup> *Email That Keeps Your Private Information Safe*, GOOGLE SAFETY CTR., <https://safety.google/gmail/#:~:text=Email%20that,million%20spam%20emails%20every%20minute> (emphasis added).

<sup>18</sup> Kumaran, *supra* note 2.

<sup>19</sup> Tom Holman, *Hitting send on the next 15 years of Gmail*, GOOGLE THE KEYWORD (Apr. 1, 2019), <https://blog.google/products/gmail/hitting-send-on-the-next-15-years-of-gmail/>.

<sup>20</sup> Kumaran, *supra* note 2.

One of the most important factors in the operation of spam filtering is user preference. Users' actions teach Gmail how best to sort the received email based on user preferences. Users flag emails as spam for a variety of reasons, which may include not knowing they subscribed to a mailing list, the amount and frequency of emails, or simply cleaning up a cluttered inbox. For example, if a user moves one message to the spam folder, future emails from that sender generally are filtered to that user's spam folder. And if a user adds a sender to their contact list, future messages from that email address generally will be placed in the user's inbox, with rare exceptions, such as email containing malware.

### 3. Tools to Aid Bulk Senders

Google works hard to help bulk senders understand how to maximize deliverability without providing a roadmap for spammers and other bad faith actors. Key components of this effort include the publicly available Bulk Sender Guidelines,<sup>21</sup> Postmaster Tools,<sup>22</sup> and a best practices learning module.<sup>23</sup> Google provides these resources to educate the public—including bulk senders—on steps bulk senders can take to maximize the Inboxing Rate, the rate at which a sender's emails are delivered into the inboxes of Gmail users (as opposed to spam folder).

Any bulk sender may create a free Postmaster Tools account associated with their domain, which can be used to access data and diagnostics regarding their own email campaigns.<sup>24</sup> For example, Postmaster Tools provides visibility to bulk senders regarding the reputation of their domain and IP address, which affect the Inboxing Rate, as described in greater detail below. This data transparency allows bulk senders to better understand topics like delivery errors and spam reports. A sender's domain and IP reputation reflect, *inter alia*, the sending practices of those using a given domain and IP address and user interactions with those emails.

In addition to domain and IP reputation, Postmaster Tools currently provides information on the sender's authentication status, expressed as the approximate percentage of emails on a daily basis that passed the following common email authentication standards, which are used to determine that an incoming email is from whom it claims to be (to avoid spammers or other bad actors mimicking another domain):

1. SPF—an email standard that specifies the servers and domains authorized to send email on behalf of the sender's organization;

<sup>21</sup> *Prevent Mail to Gmail Users from Being Blocked or Sent to Spam*, GMAIL HELP, <https://support.google.com/mail/answer/81126?hl=en> (“Bulk Sender Guidelines”).

<sup>22</sup> *Postmaster Tools*, GMAIL, <https://gmail.com/postmaster/>.

<sup>23</sup> *Best Practices: Send Emails to Gmail Users*, GOOGLE TRAINING CTR., [https://civicsresources.withgoogle.com/training-center/amplify/lesson-7/?\\_sm\\_au\\_=isVknNWP9V1nRWNB2RNkKQT82pFc](https://civicsresources.withgoogle.com/training-center/amplify/lesson-7/?_sm_au_=isVknNWP9V1nRWNB2RNkKQT82pFc).

<sup>24</sup> *See Get Started with Postmaster Tools*, GMAIL, [https://support.google.com/mail/answer/9981691?hl=en&ref\\_topic=6259779&authuser=0#zippy=%2Cip-reputation%2Cspam-rate%2Cfeedback-loop%2Cdomain-reputation](https://support.google.com/mail/answer/9981691?hl=en&ref_topic=6259779&authuser=0#zippy=%2Cip-reputation%2Cspam-rate%2Cfeedback-loop%2Cdomain-reputation).

2. DKIM—an email standard that adds a digital signature to every outgoing message to allow receiving servers to verify that the message came from the apparent sender; and
3. DMARC—an email standard that allows senders to signal to receiving servers how to handle messages sent by the sender that do not pass SPF or DKIM.<sup>25</sup>

## PROPOSED PILOT PROGRAM

### 1. Overview

Google proposes to create a pilot program for Eligible Participants. The handling of emails from Eligible Participants that meet security and identity verification requirements will rely on direct feedback from the user as long as the email does not contain content prohibited by Gmail’s terms of service such as phishing, malware, or illegal content and is in compliance with program requirements. The user may provide opt-out feedback upon receiving a first or subsequent email from the sender under the program. Emails from entities participating in the pilot will not be subject to regular spam detection algorithms. Additionally, participants will receive information about their Inboxing Rate, which is information that Google collects in the ordinary course of its business. Just as Google does not charge users to set up a Gmail consumer email account and does not charge bulk senders to send mail to Gmail users, Google would not charge for participation in this pilot.

This pilot program achieves a number of commercial goals. It will assist Google with its commercial objective of improving the Gmail user experience, which, in turn, enhances the Google brand. The pilot program will test whether users receive more email they want from bulk senders who participate in the program, which we expect would result in a higher deliverability rate for those senders, possibly without increasing user complaints about unwanted email. Additionally, the pilot will explore one way to address concerns about Google’s approach on Gmail spam filtering. Testing methods to increase deliverability for users who want to receive such communications will help address those concerns and ensure they do not harm Google’s brand.

To test the design features, Google will gather information during the pilot program to assess how the proposed pilot program affects the Gmail user experience and bulk senders’ ability to reach their audience. Google will use the feedback and its own experience in operating the pilot program to determine whether and which aspects of the pilot program to continue or make available to bulk senders in other scenarios, such as for government agencies, entities related to or involved in providing government services, senders of class-action notices, and non-profit organizations. This will depend on

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<sup>25</sup> *Help prevent spoofing and spam with SPF*, GOOGLE WORKSPACE ADMIN HELP, <https://support.google.com/a/answer/33786?hl=en>.

the feasibility from a commercial perspective and user feedback. Importantly, if user feedback indicates that the user experience is degraded by the pilot program, the pilot program may be discontinued.

## 2. Procedures

Participation in the pilot program would only be available to Eligible Participants who meet the objective criteria described below. These objective criteria are formulated to ensure that senders participating in the pilot program are legitimate, securely configured, and authenticated. The criteria are designed to exclude senders who might use the additional capabilities provided under the pilot to reach Gmail users with harmful content. It will also help prevent imposters or fraudsters from posing as a candidate or a political party to solicit fraudulent contributions, which Congress has long recognized as a prohibited practice.<sup>26</sup> Fraudsters often pose as candidates and solicit fraudulent contributions from unsuspecting donors, including through the use of email.<sup>27</sup> And, in recent elections, there have been efforts to undermine the electoral process with misinformation in various forms of communication, including from email accounts affiliated with malign foreign actors.<sup>28</sup>

### A. Identity Verification

An important step in joining the pilot will be for an Eligible Participant to contact Google for identity verification using its FEC-registered email address and providing its FEC ID number. Google will verify that the sender represents the committee it purports to represent by ensuring the request comes from the email listed by the committee on its Statement of Organization, which Google will look up using the FEC ID number. Using this identification process will allow Google to verify participants expediently and accurately and is another reason Google is proposing to focus the pilot program on Eligible Participants. Other industries with high bulk sending rates do not have as clear a process for identity verification of bulk senders.

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<sup>26</sup> 52 U.S.C. § 30124 (prohibiting fraudulent misrepresentation of campaign authority in 1976 and fraudulent solicitation of contributions in 2002).

<sup>27</sup> See, e.g., Judgment, *United States v. Bell*, No. 1:21-cr-00284-JDB (D.D.C. Dec. 9, 2021) (Nevada man sentenced to prison due to fraud schemes that included emailing more than 42,000 unique recipients solicitation materials that imitated official campaign solicitations for President Donald J. Trump); Amended Judgment, *United States v. Taub*, No. 1:19-cr-00015-WES-PAS (D.R.I. Mar. 30, 2021) (Rhode Island man sentenced to prison for using fraudulent and unregistered political action committees to solicit over \$1.5 million in donations, including over email and social media).

<sup>28</sup> See, e.g., Indictment, *United States v. Kazemi*, No. 1:21-cr-00644-VM (S.D.N.Y. Oct. 20, 2021) (charging two Iranian nationals with computer fraud and conspiring to interfere with voting for the 2020 presidential election, with conduct that included sending emails to Republican officials claiming the Democratic Party planned to exploit security vulnerabilities in mail-in ballots); Affidavit in Support of a Criminal Complaint, *United States v. Khusyaynova*, No. 1:18-mj-464 (E.D. Va. Sept. 28, 2018) (charging a Russian national with conspiring to use social media messaging and email accounts that appeared to be operated by U.S. persons to amplify divisive political rhetoric in advance of elections).

## **B. Qualification Requirements**

To participate, the requestor must adopt industry-standard, secure email sending practices that will be clearly communicated by Google to potential participants. These standards will incorporate existing bulk sender best practices and are many of the same factors that go into a sender's authentication status as displayed currently in Postmaster Tools, described above. Broadly, the qualification requirements are designed to ensure the sender is who they claim to be, protect the user from harmful content, and enhance the user's ability to communicate their preferences. And users may opt out of receiving unwanted email from any particular pilot program participant over the course of the pilot program.

The requestor must meet reputational thresholds and ensure that their messages are secure, filterable, and follow best practices for the user experience, including for example: (i) "one-click" unsubscribe, which enables a user to efficiently opt out of future communications; (ii) approving and following unsubscribe requests within 24 hours, which respects the user's choice; and (iii) ensuring that all links in the message can be scanned by Google for phishing and malware detection, which helps to protect the user from harmful content.

Google may add additional objective criteria over the course of the pilot. Participants will be expected to implement and adhere to new guidelines with sufficient notice. Pilot participants will be subject to the program's requirements, including the requirements described above, and will also be made aware that failure to satisfy these obligations for the duration of the pilot may result in a participant being removed from the pilot.

## **3. Potential Impact of the Pilot Program**

The purpose of the pilot is to test whether the features employed in the pilot enable users to receive more wanted email from bulk senders without degrading the user experience. We expect that qualified participants will likely increase deliverability rates, as long as users wish to receive their emails. To keep Gmail users safe, senders verified under the pilot will continue to be subject to Gmail's terms of service prohibiting phishing, malware, and illegal content.

From the perspective of the Gmail user, for the first message the user receives from a pilot participant, Gmail will display a prominent notification asking the user whether they wish to continue receiving messages from the sender. Unless the user opts out in response to the first email, subsequent emails from that sender will land in the inbox for that individual user, unless and until a user later opts out.

While subsequent messages from that sender will not have an explicit notification attached to them, the Gmail user will continue to be able to express their preferences at any time and affect future delivery by marking a sender's message as either spam or not spam. Gmail users can also easily express their preference to no longer receive messages as the pilot will require a "one-click" unsubscribe button on all messages.



**4. Data Provided Under the Pilot Program**

Pilot program participants would receive a generalized indicator (a numerical range) of the Inboxing Rate associated with their emails. This means that a participant could view in Postmaster Tools information about the volume of messages that land in Gmail users' inboxes vs. the spam folder. Various factors inform the Inboxing Rate and the information provided would relate to some of those factors. Inboxing Rate information is currently not included in Postmaster Tools.

**5. Publication of the Pilot Program**

To ensure all potentially eligible senders are made aware of the pilot program, Google intends to announce the availability of the pilot program on its website, include information in Postmaster Tools, and publicize the pilot program through other social media platforms, such as Twitter. Google also intends to conduct direct outreach to multiple party committees, who can disseminate information about the pilot program to their affiliated candidate committees.

**6. Duration of the Pilot Program**

The pilot program will commence only upon the Commission's confirmation that it is permissible. Unless the pilot degrades the user experience, Google intends to continue the pilot through January 2023 to be able to collect a meaningful amount of data to analyze. Again, Google may reconsider this approach if it receives indication that the program is harming the user experience.

**7. Output of the Pilot Program**

As discussed above, Google intends to gather feedback from both users and pilot program participants on the pilot's efficacy and ease of use to consider whether the features tested in the pilot are commercially feasible, either for this group or other groups of bulk senders. This feedback will be used to inform potential enhancements to Gmail and whether to continue, discontinue, or expand the features tested in the pilot.

**QUESTION PRESENTED**

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

## DISCUSSION

### 1. Legal Framework

Corporations are generally prohibited from making contributions in connection with federal elections. 52 U.S.C. § 30118(a). Under the Act, a “contribution” means “anything of value made by any person for the purpose of influencing any election for Federal office.” 52 U.S.C. § 30101(8)(A). The Commission considers activity engaged in for *bona fide* commercial reasons not to be “for the purpose of influencing an election,” and thus, not a contribution or expenditure under Section 30118(a). *See* Advisory Opinion (“AO”) 2018-11 (Microsoft) (finding Microsoft’s efforts to protect its reputation by providing only election-sensitive customers with free account security services did not amount to an in-kind contribution); AO 2012-31 (AT&T) (finding text message contribution processing proposal was not an in-kind contribution because it reflected commercial considerations).

Contributions may include in-kind contributions, which encompass “the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services.” 11 C.F.R. § 100.52(d)(1). The “usual and normal charge” for services is defined as the commercially reasonable prevailing rate at the time the services were rendered. 11 C.F.R. § 100.52(d)(2). However, the Commission has recognized that “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.’” AO 2018-11 (Microsoft) at 4 (quoting AO 2018-05 (CaringCent) at 5).

The Commission has repeatedly authorized technology companies to provide limited services for no charge or at a discounted rate to election-sensitive or political speakers as long as the company did so for commercial considerations. *Id.* at 4 (recognizing Microsoft’s motivations for providing cybersecurity services at no cost to election-sensitive customers were valid commercial reasons, which included protecting its brand reputation and obtaining valuable data about online security threats); AO 2018-05 (CaringCent) at 5 (permitting CaringCent to provide online contribution-processing services to political committees at a different fee from that of other clients based on commercial considerations); AO 2012-31 (AT&T) at 4 (permitting AT&T to provide text messaging services to political committees at a discounted rate because the proposed rate structure reflected commercial considerations); AO 2012-28 (CTIA-II) at 8 (finding no in-kind contribution where CTIA provided text message contribution processing at a discount to political committees); AO 2012-26 (m-Qube, *et al.*) at 8-9 (permitting wireless service providers to provide text messaging services to political committees at discounted rates where those discounts “reflect[ed] commercial considerations”); AO 2006-34 (Working Assets) at 7 (permitting Working Assets to participate in a program involving political committees serving as sponsors of wireless telephone service because its participation was based on business reasons).

## 2. Analysis

Here, Google proposes a pilot program that is intended to test Gmail design features. As long as an email sent by a pilot participant does not contain content prohibited by Gmail's terms of service such as phishing, malware, or illegal content and is in compliance with program requirements, the placement of emails will rely predominantly on direct feedback from the user rather than standard spam detection. The user may provide this feedback when the user receives the first email from the sender under the pilot program or at a later time if the user wishes to opt out. Emails from pilot participants will not be subject to spam detection to which they would otherwise be subject. Additionally, pilot participants will receive access to information regarding their Inboxing Rate.

The pilot program will be offered free of charge and on a non-partisan basis. The pilot program will serve commercial purposes of testing whether these features improve the user experience by better facilitating communications between these bulk senders and Gmail users, thereby enhancing the Google brand. Google is proposing to start this pilot with Eligible Participants rather than other industries due to: (1) the ability to verify these FEC-registered entities; (2) the upcoming period of expected increased and sustained engagement by this set of bulk senders; (3) this group of bulk senders' strong incentives to keep users engaged for a sustained period; and (4) the ease of participant feedback for this group of senders due to the concentrated group of email vendors.

Google's proposal is consistent with its normal course of business. Enhancing its products and user experience is the heart of Google's business, and the provision of tools and information at no cost is fully consistent with Google's ordinary business practices.

If the pilot program proves useful to users and pilot participants as informed by the feedback collected, it may be adopted for senders in other scenarios, including potentially expanding to government agencies, entities related to or involved in providing government services, senders of class-action notices, and non-profit organizations. In this way, the pilot program is intended to benefit a broader array of bulk senders, including non-campaign speakers.

Thus, the pilot program is designed for valid business reasons, in the ordinary course of Google's business, on a non-partisan basis, and not "for the purpose of influencing any election for Federal office." *See* 52 U.S.C. § 30101(8)(A)(i).

### **A. Google's Proposed Pilot Program is Motivated by Commercial, Not Electoral, Considerations.**

The pilot program is designed for commercial purposes—to improve the user experience of Gmail users and thus enhance the Google brand. This program will be offered on a non-partisan basis.

1. *The pilot program would help Google to improve the Gmail user experience, enhancing the Google brand.*

First, undertaking the proposed pilot program is intended to evaluate whether relying more heavily on user intent would help Google to better facilitate interactions between its Gmail users and bulk senders, thus improving the user experience. Maximizing the user experience is central to Google's ethos.<sup>29</sup> The pilot program targets an identifiable and verifiable group of election-related speakers who are expected to send a high volume of emails during the months-long election period, enabling Google to obtain a sizable amount of data in a short period of time, which may be used to provide product enhancements on a broader basis. The pilot program thus serves commercial purposes.

Another important aspect of the pilot program is assessing whether adding a notification, such as a banner, to the first email from a sender enhances or degrades the user experience. Google does not currently have access to third-party data as to whether a user directly signed up to receive emails from a bulk sender or if the sender obtained the user's email from another source. Adding a notification to the email therefore enables Google to quickly confirm whether a particular user wants further communications from a particular sender. This may provide users with welcome ease to opt in or out of future emails. Alternatively, users may find it disruptive.

The pilot program may also benefit users due to the security, enhanced authentication, and other objective user-focused program guidelines required for participation to which participants must adhere to be included and remain in the program. Significantly, ensuring that a campaign sender is who they say they are may help to minimize email as a method to defraud prospective voters and donors. In addition, requiring that participants employ practices that give users greater control, such as the "one-click" unsubscribe option and respecting a user's opt-out choice within 24 hours, will enhance Gmail users' experience.

As the user experience and the security of the user are key brand-enhancing commercial drivers for Google, these motivations mirror Microsoft's commercial motivations, as described by the Commission in Advisory Opinion 2018-11, for providing cybersecurity services without charge to election-sensitive customers. These included: (1) increasing Microsoft's market share among such customers; (2) gathering data about online security threats that would be highly valuable to Microsoft's efforts to enhance cybersecurity applicable to all of its products; and (3) protecting its brand reputation by reducing the likelihood that its election-sensitive customers could be compromised by a cyberattack via one of Microsoft's products. AO 2018-11 (Microsoft) at 4–5.

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<sup>29</sup> *Ten Things We Know to be True*, *supra* note 9.

Second, the pilot will test whether providing additional information regarding inbox deliverability to bulk senders will enhance the user and sender experience. The pilot will also test whether these features enable users to receive more wanted emails from bulk senders.

Further, the Commission has recognized that protecting a company’s brand and customer relationships goes beyond mere promotional or good will purposes and is a valid commercial reason for providing free goods or services to political committees. AO 2018-11 (Microsoft) at 4 (affirming that Microsoft’s motivations to protect its brand and obtain data about online security threats were valid commercial reasons inconsistent with making a prohibited contribution); *see also* AO 2012-31 (AT&T) at 4 (recognizing “protection of AT&T’s brand and relationship with its wireless customers” as a valid commercial reason for application of a reduced rate schedule for processing of text message contributions to political committees).

2. *Participation in the pilot program will be offered on a non-partisan basis.*

The Commission has found that a key consideration in determining whether services offered are for an electoral or commercial basis is whether the services are offered on a non-partisan basis. *See, e.g.*, AO 2018-11 (Microsoft) at 1, 4 (finding Microsoft’s provision of free and discounted cybersecurity services to election-sensitive customers did not constitute an in-kind contribution in part because, “[i]mportantly, Microsoft would offer this service on a non-partisan basis”).

Here, all Eligible Participants would be able to submit a request to participate in the pilot program, regardless of party affiliation. This non-partisan approach is consistent with Google’s approach to all of its products.<sup>30</sup> Participation would be subject to bulk senders consistently complying with Google’s requirements for identity verification, authentication, security, and other objective user-focused program guidelines designed to enhance the user experience, as described above. These criteria are intended to enable Google to verify the identity and FEC registration status of requesting senders and ensure that pilot participants are following basic technical and customer experience best practices to enhance the user experience. The Commission has confirmed repeatedly that a business can adopt objective criteria that includes some committees and excludes others without making a prohibited corporate contribution. *See, e.g.*, AO 2012-28 (CTIA II) at 8–9 (finding no contribution where CTIA and wireless service providers would “decide, for commercial reasons, to accept only [text messaging] proposals from some political committees and not others”); AO 2012-26 (m-Qube, *et al.*) at 10 (finding no in-kind contribution where aggregators and wireless service providers made receipt and processing of political contributions

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<sup>30</sup> Sundar Pichai’s testimony before the Senate Commerce Committee, GOOGLE THE KEYWORD (Oct. 28, 2020), <https://blog.google/outreach-initiatives/public-policy/sundar-pichai-testimony-senate-commerce-committee/>; *see also, e.g.*, Shirin Ghaffary & Kurt Wagner, Google CEO Sundar Pichai’s testimony to Congress today, VOX (Dec. 11, 2018), <https://www.vox.com/2018/12/11/18134984/live-googleceo-congress-hearing-china-testimony-house-judiciary-committee-censored-search> (quoting Pichai as saying, “I lead this company without political bias and work to ensure that our products continue to operate that way . . . To do otherwise would be against our core principles and our business interests.”).

by text message available to only committees who satisfied certain eligibility criteria based on objective business standards).

**B. The Proposed Pilot Program is Consistent with Google’s Ordinary Course of Business.**

The pilot program is consistent with Google’s business practices. Google routinely provides products and resources without charge and aims to provide transparency without enabling bad actors to abuse its systems. In addition, the information regarding Inboxing Rate that will be provided in an existing platform, Postmaster Tools, is derived from data that Google already collects as part of its ordinary course of business. The pilot program is consistent with these existing business practices.

The Commission has recognized that where a corporation provides a service to political committees consistent with its ordinary course of business, no prohibited contribution results. *See* AO 2019-12 (Area-1) at 1 (permitting Area 1 to provide cybersecurity services to federal candidates and party committees at “low to no cost” because doing so was consistent with Area 1’s ordinary course of business); AO 2018-11 (Microsoft) at 4–5 (finding Microsoft’s provision of enhanced online account security services at no additional cost to election-sensitive customers consistent with Microsoft’s ordinary course of business and existing marketing practices and thus not a prohibited contribution).

First, the users of consumer Gmail services do not pay to use Gmail. Any person can create a consumer account for free, and bulk senders do not pay Google to send email to Gmail users or access Google’s Postmaster Tools. Providing access to the pilot program at no charge is consistent with Google’s business practices.

Second, making information available on the operation of its tools and products is an ordinary part of Google’s business practices. Google already provides some email data to all bulk senders and makes an expansive suite of resources and educational guides publicly available at no charge.<sup>31</sup> Most critically, Google already provides a great deal of information to bulk senders—such as domain and IP reputation—as an ordinary part of Google’s business through existing Postmaster Tools.<sup>32</sup> Postmaster Tools makes

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<sup>31</sup> *See generally Reach Your Goals with Powerful Digital Analytics – For Free*, GOOGLE ANALYTICS, <https://analytics.withgoogle.com/> (giving users access, at no cost, to various categories of online data affecting their businesses); *Google Civics Training Center*, GOOGLE TRAINING CTR., [https://civicsresources.withgoogle.com/training-center/?\\_sm\\_au=isVZDD1Z6StV4fPRB2RNkKQT82pFc](https://civicsresources.withgoogle.com/training-center/?_sm_au=isVZDD1Z6StV4fPRB2RNkKQT82pFc) (providing senders with resources across various Google products, including, among other resources, lessons on hosting virtual town halls, verifying election advertisements, and using the Google Trends tool to optimize online messaging for different audiences); *Get Started with Postmaster Tools*, *supra* note 24; *Google Bulk Sender Guidelines*, *supra* note 21; *Best Practices: Send Emails to Gmail Users*, *supra* note 23; *Google Civics Training Center*, GOOGLE TRAINING CTR., [https://civicsresources.withgoogle.com/training-center/?\\_sm\\_au=isVn2DDjktR751QsB2RNkKQT82pFc](https://civicsresources.withgoogle.com/training-center/?_sm_au=isVn2DDjktR751QsB2RNkKQT82pFc).

<sup>32</sup> *See Get Started with Postmaster Tools*, *supra* note 24.

available to all bulk senders certain data regarding their email marketing campaigns.<sup>33</sup> And, even more broadly, Google regularly makes various types of data publicly accessible and easily digestible across a variety of resources. Google was the first major company to publish a publicly available Transparency Report, which provides, at no cost, “data that sheds light on how the policies and actions of governments and corporations affect privacy, security, and access to information.”<sup>34</sup> Google also provides increased transparency over political advertising information<sup>35</sup> and its election advertising verification tools.<sup>36</sup> Google proposes as part of this pilot program to provide participants with information regarding Inboxing Rate, which is information that Google already collects in the ordinary course of its business. *See* AO 2018-11 (Microsoft) at 5 (noting as a factor supporting its approval of Microsoft’s proposal that the proposal “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”).

Thus, because the proposed pilot program would be consistent with Google’s regular business practice of providing similar resources at no cost and working to enhance the experience of its users, the pilot should not be viewed as providing an in-kind contribution.

### CONCLUSION

For the reasons discussed above, the Commission should confirm that Google will not be making prohibited in-kind contributions by launching a free and non-partisan pilot program designed to enhance the Gmail product that will (1) rely predominantly on user intent for emails from verified authorized candidate committees, political party committees, and leadership political action committees; and (2) provide program participants with information about their individual Inboxing Rate.

Thank you for your consideration and please do not hesitate to contact me should you have any questions regarding this request.

Sincerely,

*Claire Rajan*

**Claire Rajan**  
Partner

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<sup>33</sup> *See* discussion of tools to aid bulk senders *supra* Background.

<sup>34</sup> *Transparency Report*, GOOGLE, <https://transparencyreport.google.com/>

<sup>35</sup> *Political Advertising on Google*, GOOGLE, <https://adstransparency.google.com/political?political=&region=US>.

<sup>36</sup> *See generally Transparency Report*, *supra* note 34; *Reach Your Goals with Powerful Digital Analytics – For Free*, *supra* note 31; *Google Civics Training Center*, *supra* note 31.