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**AGENDA DOCUMENT NO. 18-41-A**  
**AGENDA ITEM**  
**For meeting of September 6, 2018**  
**SUBMITTED LATE**

August 31, 2018

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS by NFS*  
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Subject: AO 2018-11 (Microsoft) 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 12:00 pm (Eastern Time) on September 6, 2018.

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 2018-11

2

3 Jan Witold Baran, Esq.

4 Eric Wang, Esq.

5 Wiley Rein LLP

6 1776 K Street NW

7 Washington, D.C. 20006

8

9 Dear Messrs. Baran and Wang:

**DRAFT A**

10 We are responding to your advisory opinion request on behalf of Microsoft Corporation  
11 (“Microsoft”), concerning the application of the Federal Election Campaign Act, 52 U.S.C.  
12 §§ 30101-45 (the “Act”), and Commission regulations to Microsoft’s proposal to offer a package  
13 of enhanced online account security services at no additional charge on a nonpartisan basis to its  
14 election-sensitive customers, including federal candidates and national party committees. The  
15 Commission concludes that the provision of such services is permissible and would not result in  
16 the making of a prohibited in-kind contribution.

17 ***Background***

18 The facts presented in this advisory opinion are based on your letter received on August  
19 21, 2018.

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

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

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

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

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

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

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

14      AOR003-004.

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

1 ***Question Presented***

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

5 ***Legal Analysis and Conclusions***

6 Yes, Microsoft may offer the AccountGuard program at no additional charge on a  
7 nonpartisan basis to election-sensitive customers, including federal candidates and national party  
8 committees, with no prohibited in-kind contribution resulting, because Microsoft would be  
9 providing such services based on commercial and not political considerations, in the ordinary  
10 course of its business, and not merely for promotional consideration or to generate goodwill.

11 The Act and Commission regulations prohibit corporations from making contributions to  
12 federal candidates, political party organizations, and political committees that make contributions  
13 to federal candidates and political party committees. 52 U.S.C. §§ 30118(a), (b)(2); 11 C.F.R.  
14 § 114.2(b).<sup>2</sup> A “contribution” includes any “direct or indirect payment, distribution, loan,  
15 advance, deposit, or gift of money, or any services, or anything of value . . . in connection with  
16 any [federal] election . . .” 52 U.S.C. § 30118(b)(2); *see also* 52 U.S.C. § 30101(8)(A)(i); 11  
17 C.F.R. §§ 114.2(b), 100.52(a). “Anything of value” includes all in-kind contributions, such as  
18 the provision of goods and services without charge or at a charge that is less than the usual and  
19 normal charge. *See* 11 C.F.R. § 100.52(d)(1). The “usual and normal charge” for services is the

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<sup>2</sup> Corporations may, however, make contributions to nonconnected political committees that make only independent expenditures, *see, e.g.*, Advisory Opinion 2011-11 (Colbert); *Citizens United v. FEC*, 558 U.S. 310 (2010); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (*en banc*), and to non-contribution accounts of hybrid political committees, *see* Press Release, FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011), <https://www.fec.gov/updates/fec-statement-on-carey-fec/>.

1 commercially reasonable prevailing rate at the time the services were rendered. *See* 11 C.F.R.  
2 § 100.52(d)(2).

3           A corporation may provide goods and services to political committees without being  
4 considered to have made an in-kind contribution so long as it does so “on the same terms and  
5 conditions available to all similarly situated persons in the general public.” Advisory Opinion  
6 2004-06 (Meetup) at 1 (concluding that corporation may provide federal candidates, political  
7 committees, and supporters both free and fee-based online platform for arranging local  
8 gatherings). Indeed, a corporation “may charge different fees to political committee clients than  
9 it charges to non-political clients,” with no in-kind contribution resulting, as long as “any  
10 variation in fees will be based on business considerations and will not be based on political  
11 considerations.” Advisory Opinion 2018-05 (CaringCent) at 5 (concluding that corporation  
12 would be making no in-kind contribution to political committees in providing online  
13 contribution-processing services partly because any variation in fees with non-political clients  
14 would be based on commercial considerations and not political considerations). Mere  
15 “promotional or good will purposes” will not suffice to show that services are offered for  
16 commercial and not political considerations. Advisory Opinion 1999-17 (Bush Exploratory  
17 Committee) at 8 n.7 (concluding that website owner would be making in-kind contribution to  
18 political committee by charging committee less than similarly situated nonpolitical organization  
19 or entity for posting link to committee’s website); *see also* Advisory Opinion 1996-02  
20 (CompuServe) at 4 (concluding that promotional consideration or goodwill derived by  
21 corporation in return for providing free electronic bulletin board service to political committee  
22 would result in corporation making prohibited in-kind contribution).

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

20           Here, Microsoft plans to offer AccountGuard for no additional cost to protect a group of  
21 its similarly situated customers — election-sensitive users, including not only political  
22 committees but also non-profit organizations and vendors of political committees and non-profit

1 organizations — from security breaches. Microsoft plans to offer this service for a variety of  
2 commercial reasons beyond mere promotion or goodwill, most notably to protect its brand  
3 reputation, which would be at risk of severe and long-term damage if the accounts of its election-  
4 sensitive customers were hacked, and to obtain “highly valuable” data about online security  
5 threats. Importantly, Microsoft would offer this service on a non-partisan basis. The free  
6 offering of AccountGuard also resembles other commercial offerings by Microsoft, including  
7 varying packages and prices to different types of users, and free workshops and trainings tailored  
8 to specific types of customers. Accordingly, because Microsoft would provide the  
9 AccountGuard program to its election-sensitive customers based on commercial and not political  
10 considerations, in the ordinary course of its business and not merely for promotional  
11 consideration or to generate goodwill, the provision of such services would not constitute a  
12 prohibited in-kind contribution. Microsoft therefore may offer such services at no additional cost  
13 to its election-sensitive customers, including federal candidates and national party committees.

14         This response constitutes an advisory opinion concerning the application of the Act and  
15 Commission regulations to the specific transaction or activity set forth in your request.  
16 *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts  
17 or assumptions presented, and such facts or assumptions are material to a conclusion presented in  
18 this advisory opinion, then the requestor may not rely on that conclusion as support for its  
19 proposed activity. Any person involved in any specific transaction or activity which is  
20 indistinguishable in all its material aspects from the transaction or activity with respect to which  
21 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.  
22 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be



1 affected by subsequent developments in the law including, but not limited to, statutes,  
2 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available  
3 on the Commission's website.

4 On behalf of the Commission,

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Caroline C. Hunter  
Chair