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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 19-28-A
AGENDA ITEM
For meeting of July 11, 2019

June 26, 2019

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS*
Acting General Counsel

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Acting Associate General Counsel

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Assistant General Counsel

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Attorney

Subject: AO 2019-12 (Area 1 Security, Inc.) Draft A

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00 pm (Eastern Time) on July 10, 2019.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2019-12

2

3 Daniel A. Petalas, Esq.
4 Garvey Schubert Barer, P.C.
5 Flour Mill Office Building
6 1000 Potomac Street, NW #200
7 Washington, DC 20007-3501

DRAFT A

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9 Dear Mr. Petalas:

10 We are responding to your advisory opinion request on behalf of Area 1 Security, Inc.
11 (“Area 1”), concerning the application of the Federal Election Campaign Act, 52 U.S.C.
12 §§ 30101-45 (the “Act”), and Commission regulations to its proposal to offer cybersecurity
13 services to federal candidates and political committees under a “low to no cost” pricing tier that
14 Area 1 offers to all qualified customers. Because Area 1 would offer these services in the
15 ordinary course of business and on the same terms and conditions as offered to similarly situated
16 non-political clients, the Commission concludes that the proposal would not result in prohibited
17 in-kind contributions and thus is permissible.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter on behalf of Area 1,
20 received on June 12, 2019.

21 You state that Area 1 provides computer users with “the most imaginative,
22 comprehensive, and effective solution for eliminating phishing attacks.” Advisory Opinion
23 Request at AOR003. A phishing attack allows the aggressor to entice a victim to download a
24 file, click on a link, visit a website, complete a form, or transfer sensitive data, and to cause harm
25 through such actions by downloading malware or stealing or purging credentials, data,
26 intellectual property, or financial assets. AOR001-002. Area 1 preemptively tracks phishing
27 threats and stops them before they cause damage. AOR003.

1 You explain that Area 1 generally employs a pricing strategy it has named “Pay Per
2 Phish,” under which the client pays \$10 per phish that the company catches, subject to a certain
3 cap or maximum. AOR003. However, Area 1 also offers its clients negotiable fixed-term
4 contracts (“Enterprise License Agreements”) that charge an upfront, fixed fee to use the product.
5 *Id.* The fixed-fee Enterprise License Agreement includes a “little to no cost” pricing tier that
6 offers certain qualified clients a fixed cost “between zero and \$1,337 per year.” AOR004 n.7.
7 To qualify for the “little to no cost” pricing tier, organizations must have fewer than 5,000 full-
8 time employees¹ and must also provide Area 1 with “a significant opportunity to improve its
9 research and development initiatives.” AOR004. Current clients using Area 1’s anti-phishing
10 services under the “little to no cost” pricing tier include non-profits, humanitarian organizations,
11 and startups. *Id.*

12 Area 1 plans “to offer anti-phishing cybersecurity services to federal candidates and
13 political committees on a nonpartisan basis within its established ‘little to no cost’ pricing tier.”
14 AOR004. Qualified federal candidates and political committees — those with fewer than 5,000
15 employees and that provide a significant opportunity for research and development — would be
16 charged a flat fee of \$1,337 per year. AOR004 n.7. You state that Area 1 “expects to gain
17 essential, highly valuable research and development benefits” from servicing federal candidates
18 and political committees because they are uniquely and specifically targeted by foreign cyber
19 actors, and that Area 1’s proposal would enhance federal candidates’ and political committees’
20 security against foreign interference in their elections. AOR003-004.

¹ The request explains that in determining the number of employees an organization has, only full-time employees with email accounts are counted. AOR004 n.5.

1 ***Question Presented***

2 *May Area 1 offer federal candidates and political committees that qualify for its “little to*
3 *no cost” pricing tier with anti-phishing services under that tier at a fixed fee of \$1,337 per year*
4 *without making prohibited, in-kind contributions under the Act?*

5 ***Legal Analysis and Conclusions***

6 Yes, Area 1 may offer qualified federal candidates and political committees its “low or
7 no cost” pricing tier and charge them a fixed fee of \$1,337 per year, because doing so would be
8 in the ordinary course of Area 1’s business and on terms and conditions that apply to similarly
9 situated non-political clients.

10 The Act and Commission regulations prohibit corporations from making contributions to
11 federal candidates and political committees that make contributions to federal candidates. 52
12 U.S.C. §§ 30118(a), (b)(2); 11 C.F.R. § 114.2(b).² A “contribution” includes any “direct or
13 indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or
14 anything of value . . . in connection with any [federal] election.” 52 U.S.C. § 30118(b)(2);
15 *see* 11 C.F.R. § 114.2(b). “Anything of value” includes all in-kind contributions, such as the
16 provision of goods and services to federal candidates and political committees without charge or
17 at less than the “usual and normal charge,” defined in context of services as the commercially
18 reasonable prevailing rate at the time the services are rendered. *See* 11 C.F.R. § 100.52(d).

² 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 The sale of goods or services at a discount does not result in a contribution when the
2 discount is offered in the ordinary course of business and made available on the same terms and
3 conditions as to the vendor’s customers that are not federal candidates or political committees.
4 *See, e.g.*, Advisory Opinion 2018-11 (Microsoft) at 3 (corporation providing enhanced online
5 security services at no additional charge on nonpartisan basis to its election-sensitive customers,
6 including federal candidates and national party committees); Advisory Opinion 2004-06
7 (Meetup) at 1 (corporation providing federal candidates and political committees free and fee-
8 based online platform for arranging local gatherings); Advisory Opinion 2014-06 (Ryan *et al.*)
9 (candidate purchasing books from a publisher at discounted bulk rate). Most relevant to the
10 present circumstances, in Advisory Opinion 2018-11 (Microsoft) the Commission concluded that
11 a corporation may provide cybersecurity services to federal candidates and national party
12 committees that were existing customers of the corporation at no additional cost. Advisory
13 Opinion 2018-11 (Microsoft) at 1. In reaching this conclusion, the Commission noted that the
14 corporation offered its cybersecurity services “in the ordinary course of business” and made the
15 same offer available to its similarly situated non-political customers, including public-sector
16 entities, educational institutions, teachers and students, small and large businesses, start-up
17 companies, and 501(c)(3) non-profit organizations. *Id.* at 3.

18 Area 1 currently offers its “low to no cost” pricing tier — charging between \$0 and
19 \$1,337 per year for anti-phishing services — to organizations that have fewer than 5,000 full-
20 time employees and that provide significant opportunity for research and development.
21 AOR004, AOR004 n.7. Participants in this pricing tier include non-profits, humanitarian
22 organizations, and startups. AOR004. Area 1 now proposes to apply this pricing tier to qualified

1 federal candidates and political committees — those with fewer than 5,000 employees and that
2 provide a significant opportunity for research and development. AOR004. In return for its anti-
3 phishing services, Area 1 plans to charge qualified federal candidates and political committees a
4 flat, fixed fee of \$1,337, which is consistent with how Area 1 charges its existing, non-political
5 clients that qualify for the “low to no cost” pricing tier. AOR004 n.7. Thus, similar to Advisory
6 Opinion 2018-11 (Microsoft), because Area 1 is proposing to charge qualified federal candidates
7 and political committees the same as it charges its qualified non-political clients, the
8 Commission concludes that its proposal is consistent with Area 1’s ordinary business practices
9 and therefore would not result in Area 1 making prohibited in-kind contributions to such federal
10 candidates and political committees.

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

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

3 On behalf of the Commission,

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Ellen L. Weintraub
Chair