

FEC Approves Microsoft Proposal to Guard Against Election Interference

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As foreign attempts to interfere with American political campaigns persist into this year's elections, technology companies have taken a number of steps to fend against such threats. One prominent example is Microsoft's program to provide election-sensitive users of its products with enhanced online account protections at no additional cost, which the Federal Election Commission (FEC) recently approved.

Microsoft's request for the FEC advisory opinion (2018-11) sought to confirm that the company's initiative, called AccountGuard, would not violate the federal law's prohibition against corporations making contributions to federal candidates and national political party committees. Under FEC rules, a contribution is defined to include "the provision of any goods or services without charge or at a charge that is less than the usual and normal charge."

Microsoft's AccountGuard program will provide federal, state, and local candidates; national and state political party committees; campaign technology vendors; and think tanks and democracy advocacy nonprofits that are customers of Microsoft's ubiquitous O365 products (as well as certain users of Outlook.com and Hotmail.com affiliated with such entities) with a package of additional account security tools at no extra cost and on a nonpartisan basis. Those tools would include cybersecurity training tailored to campaigns to guard against account breaches, notifications from Microsoft's threat intelligence division of hacking attempts by foreign governmental entities directed against particular election-sensitive users, and technical support for securing users' online accounts and addressing security breaches.

Practice Areas

Election Law & Government Ethics

Under the general prohibition against corporate contributions, the FEC has concluded, for example, that CompuServe, a provider of dial-up Internet service in the 1990s, was prohibited from providing its service for free to federal candidates, even where the company argued that its purpose for doing so was to generate public goodwill. Similarly, the FEC has concluded that an automobile distributor was prohibited from donating a car for a PAC's fundraising raffle, notwithstanding the promotional value the distributor would receive from the donation.

On the other hand, the FEC has concluded that commercial vendors may provide preferential pricing to federal candidates and political committees and national party committees where their reason for doing so is based on "business considerations" and not "political considerations." Moreover, the FEC has permitted vendors to provide goods or services at no extra charge or at a discount to candidates, political committees, and party committees in the context of a preexisting business relationship, and where the offerings are consistent with a vendor's ordinary course of business.

Microsoft's FEC advisory opinion request cited the company's ordinary business practice of tailoring product packages and pricing to particular customer segments and offering free cybersecurity workshops, both of which are similar to elements of Microsoft's AccountGuard program. In addition, Microsoft explained its business considerations for offering the program to election-sensitive customers, such as maintaining its market share among such customers, protecting its brand reputation by preventing its products from being misused in connection with election interference schemes, and obtaining valuable threat intelligence from participating election-sensitive customers that Microsoft could use to bolster the security of its products for all of its customers. Moreover, Microsoft would only be providing the AccountGuard features to election-sensitive customers of its products – i.e., entities with which Microsoft has a preexisting business relationship.

Based on these considerations, the FEC agreed that Microsoft would not be making prohibited in-kind corporate contributions by offering its AccountGuard program available at no additional charge to federal candidates and national party committees. Wiley Rein's Election Law Practice represented Microsoft in seeking the FEC advisory opinion.