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AGENDA ITEM

MEMORANDUM

For Meeting of 11-17-11

SUBMITTED LATE

TO: The Commission

FROM: Christopher Hughey
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Subject: Draft AO 2011-19 (GivingSphere)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the Open Session agenda for November 17, 2011.

Attachment

1 ADVISORY OPINION 2011-19

2 Robert Lenhard, Esquire
3 Andrew Byrnes, Esquire
4 Derek Lawlor, Esquire
5 Covington & Burling, LLP
6 1201 Pennsylvania Avenue, NW
7 Washington, DC 20004

DRAFT

8

9 Dear Messrs. Lenhard, Byrnes, and Lawlor:

10 We are responding to your advisory opinion request on behalf of Social Financial,
11 Inc., d/b/a GivingSphere (“GivingSphere”), concerning the application of the Federal
12 Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to
13 GivingSphere’s proposals. GivingSphere asks whether it (1) may transmit its customers’
14 rebates to political committees; (2) may provide its customers with a searchable database
15 of political committees; (3) may provide its customers with additional information on
16 political committees; (4) must file reports with the Commission; (5) may sell advertising
17 space to political committees on its website; and (6) may permit political committees to
18 post a GivingSphere “badge” on their websites.

19 The Commission concludes that the Act and Commission regulations permit
20 GivingSphere to conduct each of the five activities it describes and do not subject
21 GivingSphere to the reporting requirements in the Act and Commission regulations.

22 ***Background***

23 The facts presented in this advisory opinion are based on your letter received
24 October 7, 2011.

25 GivingSphere is a California for-profit corporation. GivingSphere

1 was founded as an Internet and mobile-based processing platform to help individuals
2 make donations to charitable, civic, faith-based and educational organizations (“groups
3 other than political committees”). GivingSphere would like to include Federal political
4 committees, including candidates’ authorized committees, political party committees,
5 nonconnected committees, and leadership PACs, among the choices its customers have
6 when choosing organizations to support financially.

7 GivingSphere’s customers may accumulate funds to use as donations and
8 contributions in two ways: (1) by making purchases from affiliated merchants who agree
9 to rebate a portion of the purchase price; and (2) by transferring the customer’s own
10 funds to the customer’s GivingSphere account. Customers accumulate rebates by
11 purchasing goods from merchants who participate in the GivingSphere affiliates program.
12 If a customer wants to accumulate rebates, the customer would shop directly at a
13 participating merchant’s website or through the GivingSphere e-Retail Virtual Shopping
14 Mall. After a customer makes a purchase from a participating merchant, the merchant
15 will transfer a portion of the customer’s payment back to GivingSphere. GivingSphere
16 will place all of these rebated funds at the customer’s control. GivingSphere does not
17 plan to give customers the option of receiving a payment or cash-back for the value of the
18 rebates they earn through GivingSphere.

19 GivingSphere will segregate funds under its control from the funds that its
20 customers control. In addition to its corporate account, GivingSphere will maintain a
21 separate bank account, the “customer-owned” account, from which a customer may make
22 contributions to political committees or donations to groups other than political
23 committees. The customer-owned account will contain (a) rebated funds, but only after

1 the customer has agreed to treat the rebate as income and receive an IRS Form 1099 from
2 GivingSphere; and (b) personal funds that the customer has transferred to GivingSphere
3 for the purpose of making contributions or donations.

4 In addition, GivingSphere will maintain a third account, the “customer-controlled
5 account,” for customer rebates that customers have not agreed to treat as income. A
6 customer may direct GivingSphere to make donations from the customer-controlled
7 account to groups other than political committees selected by the customer, but funds in
8 this account may not be used to make contributions to political committees.

9 GivingSphere’s customers may use the GivingSphere search capabilities to find
10 groups other than political committees or political committees to which they might wish
11 to donate or contribute. GivingSphere will include in its database all active political
12 committees registered with the Commission. When customers join GivingSphere, they
13 will provide information about themselves and the causes to which the customers would
14 like to give. Upon selecting a category, a customer will be taken to a search page to find
15 a group to which the customer would like to donate or contribute. The customer will
16 select the search terms to use in the GivingSphere search tool, which will allow for
17 specific searches, such as a search for an organization’s name, and general searches, such
18 as a search for all charities in the customer’s ZIP code or searches by subject matter, such
19 as religious denomination or political party.

20 GivingSphere does not support any particular candidate, political party, or
21 political cause, and its search algorithm will contain no predetermined preference for any
22 particular candidate or political viewpoint. GivingSphere states that it will provide

1 customers with access only to “charities” registered with the IRS, political committees
2 registered with the Commission, and other similarly legally registered groups.

3 GivingSphere search results will be limited to basic factual information about
4 each candidate or group, including political committees, such as name, address, party
5 affiliation (if any), FEC identification number, and a link, if available, to the committee’s
6 website. GivingSphere would also like to provide its customers with additional “basic
7 factual information” about the entities, including candidates and political committees, to
8 which a customer may contribute or donate. This would include, for candidates,
9 information such as the office for which a candidate is running, the election cycle in
10 which a candidate is competing, the candidate’s age, occupation, and whether the
11 candidate is an incumbent or challenger. GivingSphere would also provide the website
12 link to the entity the customer is considering supporting. GivingSphere does not intend
13 to create content that advocates for the election or defeat of any candidate for public
14 office, or content that promotes, attacks, supports, or opposes any candidate, political
15 party or other political committee.

16 Once a customer selects causes to support, GivingSphere will allocate the
17 customer’s rebates among those causes, as directed by the customer.¹ Before
18 GivingSphere processes a customer’s contribution to a political committee, the customer
19 will be required to provide his or her name, address, occupation, and the name of the
20 customer’s employer. Each customer will also be required to certify that (1) the customer

¹ If a customer fails to transfer funds within a certain period of time, GivingSphere will automatically donate the funds to a pre-selected default organization. If a customer has not selected a default organization, GivingSphere will select one from the bookmarked list of the customer’s favorite organizations. In no event, however, would GivingSphere select a Federal political committee as a default organization.

1 is an individual who is a United States citizen or a foreign national who is qualified as a
2 permanent resident; (2) the customer is not a government contractor; and (3) any money
3 (including any sums from a rebate) used to make a contribution has been earned from
4 payments made from the customer's own personal funds, and not from either the funds of
5 a corporation or labor organization or from funds provided to the customer by any other
6 person.

7 GivingSphere will transfer customer-designated contributions to political
8 committees within ten days of GivingSphere's receipt of the customer's funds and the
9 customer's designation. GivingSphere will forward with each contribution all
10 information the political committee would need to report the identification of the
11 contributor, as well as an acknowledgement that the customer has made the certifications
12 described above. GivingSphere will not transfer to political committees contributions
13 that exceed the permissible contribution limits.

14 GivingSphere will generate revenue in four ways. First, as an online retailer,
15 GivingSphere will receive transaction fees from merchants when its customers engage in
16 commercial transactions. Second, GivingSphere will receive a processing fee from
17 customers when customers use GivingSphere to make contributions and donations.
18 Third, GivingSphere will receive rebates from affiliated merchants. Fourth,
19 GivingSphere will sell advertising space. GivingSphere will set these fees, rebates, and
20 advertising rates at market rates for similar commercial transactions.

21 GivingSphere plans to sell advertising space similar to that appearing on existing
22 social media sites to merchants, groups eligible to receive donations, and other entities,
23 including political committees. GivingSphere has not yet determined the precise

1 advertising formats that it will use. GivingSphere represents that it will seek to ensure
2 that any political advertisers comply with the applicable disclaimer requirements in
3 Commission regulations.

4 In addition to its proposal to transmit funds to political committees and groups
5 other than political committees, GivingSphere would also like to establish an “affiliates
6 program,” in which third party entities agree to place a GivingSphere “badge” on a
7 relevant portion of their websites. The badge will consist of a small box, icon, or link
8 that encourages viewers to join GivingSphere. Viewers who click on the badge will be
9 directed to the GivingSphere site and encouraged to join GivingSphere. GivingSphere
10 will not offer an up-front payment to those entities that post the badge on their websites.
11 Instead, for those entities that post a badge, other than political committees,
12 GivingSphere will pay, from its corporate account, the entity that posted the badge a
13 small percentage of future transactions that result from the customer joining
14 GivingSphere. GivingSphere proposes to modify its payments under its affiliates
15 program for political committees that post a badge. GivingSphere will not make a
16 payment to a political committee, even if the customer later engages in commercial
17 transactions that would otherwise earn the badge host a fee. Instead, GivingSphere will
18 allocate the sum to and deposit it in the customer’s customer-controlled account.

19 ***Questions Presented***

20 1. *May GivingSphere follow a customer’s instruction to transfer some or all of the*
21 *customer’s rebates to a Federal political committee?*

- 1 2. *May GivingSphere provide its customers with a search engine and database with*
2 *which to identify potential Federal candidates, national political parties and*
3 *other Federal political committees to which they might contribute?*
- 4 3. *If the answer to Question 2 is “yes,” may GivingSphere also provide its*
5 *customers with basic factual information about candidates and political*
6 *committees?*
- 7 4. *Must GivingSphere file any reports with the Commission based on the activities*
8 *described in its advisory opinion request?*
- 9 5. *May GivingSphere sell advertisements as described in its request to Federal*
10 *political committees?*
- 11 6. *May GivingSphere permit political committees to place GivingSphere badges on*
12 *their websites?*

13 ***Legal Analysis and Conclusions***

- 14 1. *May GivingSphere follow a customer's instruction to transfer some or all of the*
15 *customer's rebates to a Federal political committee?*

16 Yes, GivingSphere may follow its customers' instructions to transfer some or all
17 of the customers' rebates to Federal political committees because the rebates are the
18 property of GivingSphere's customers, rather than Giving Sphere, and GivingSphere will
19 not provide a service to the recipient political committees by transferring contributions to
20 them.

21 The Act and Commission regulations prohibit corporations from making a
22 contribution in connection with a Federal election. *See* 2 U.S.C. 441b(a); 11 CFR
23 114.2(b)(1). A “contribution” includes “any direct or indirect payment, distribution, loan,

1 advance, deposit, or gift of money, or any services, or anything of value . . . to any
2 candidate, campaign committee, or political party or organization, in connection with any
3 [Federal] election . . .” 2 U.S.C. 441b(b)(2); *see also* 2 U.S.C. 431(8) and 11 CFR
4 100.52(a). “Anything of value” includes all in-kind contributions, including the
5 provision of goods or services without charge or at less than the usual and normal charge.
6 *See* 11 CFR 100.52(d)(1). The term “usual and normal charge” means the price of goods
7 in the market from which they ordinarily would have been purchased at the time of the
8 contribution, or the commercially reasonable rate prevailing at the time that the services
9 were rendered. *See* 11 CFR 100.52(d)(2).

10 *A. Whether the rebates constitute a prohibited corporate contribution.*

11 The Commission has addressed the corporate provision of revenue, rewards, and
12 remittances to political committees in prior advisory opinions addressing affinity and
13 affinity-like programs. *See, e.g.*, Advisory Opinions 2010-21 (ReCellular), 2010-06
14 (Famos), 2008-18 (Mid-Atlantic Benefits), and advisory opinions cited therein.

15 The Commission has considered two questions in determining whether rebates,
16 rewards, and remittances earned by individuals participating in these programs and
17 transferred by the corporate sponsors of the programs to a participating political
18 committee are permissible contributions by the individual participants, or impermissible
19 contributions by the sponsoring corporations.² The first question is whether the revenue,
20 rebate, or reward is offered to individual customers in the ordinary course of business.

² In prior advisory opinions, the Commission has also analyzed whether a corporation and participating political committee enter into a commercially reasonable transaction in which the political committee pays the usual and normal charges for any services provided by the corporation. *See, e.g.*, Advisory Opinions 2010-21 (ReCellular) and 2010-06 (Famos). Given that political committees will not enter into any transactions with GivingSphere under the proposal discussed in Question 1, the Commission does not analyze here whether political committees pay the usual and normal charges.

1 *Id.* The second question is whether the revenue, rebate, or reward is the property of the
2 individual customer who controls the disposition of the revenue, rather than the property
3 of the corporation that transfers the funds to a political committee. *Id.*

4 The answers to these two questions lead to the conclusion that the funds that will
5 be contributed to political committees under GivingSphere's proposal will be permissible
6 contributions made by GivingSphere's customers, and not impermissible contributions
7 made by GivingSphere. First, customers will accumulate rebates in the ordinary course
8 of business. Merchants participating in GivingSphere's affiliate program will rebate the
9 same amounts to all GivingSphere customers, regardless of whether particular customers
10 use the rebates as political contributions. In this respect, it is similar to the proposal
11 approved by the Commission in Advisory Opinion 2010-06 (Famos). Further,
12 GivingSphere intends to charge a commercially reasonable fee when its customers make
13 purchases from affiliated merchants, again regardless of how the customers ultimately
14 dispose of their rebates. Therefore, the Commission concludes that the rebates will be
15 offered to customers in the ordinary course of GivingSphere's business.

16 Second, the Commission concludes that the rebates that GivingSphere will
17 transmit to political committees will be the property of GivingSphere's customers, rather
18 than GivingSphere. GivingSphere will transfer to political committees only those funds
19 that an individual customer has agreed to treat as personal income for IRS purposes, and
20 which GivingSphere has placed in a customer-owned account. In addition, GivingSphere
21 will transfer funds to political committees only when directed to do so by GivingSphere's
22 customers. Moreover, GivingSphere's customers will have the ability to direct these

1 funds to any political committee and any group other than a political committee included
2 in GivingSphere's database.

3 The fact that GivingSphere will not give its customers the option of receiving a
4 payment for the value of the rebates they earn through the program does not change the
5 Commission's conclusion. The Commission has approved affinity programs that place
6 certain limitations on participating individuals' use of their funds. Under the program
7 considered in Advisory Opinion 2010-06 (Famos), for example, customers could
8 contribute the value of their remittances to political committees or receive a check for the
9 value of the remittances only after the value exceeded ten dollars. The Commission
10 stated that, so long as the company gave all of its customers "access to their [rebates] on
11 the same terms," the customers had control over the disposition of the remittances, and
12 therefore the remittances were the customers' property. Similarly, in Advisory Opinion
13 2009-31 (MAXIMUS), the Commission determined that members of a corporation's
14 restricted class could contribute the value of credits that they earned from the corporation
15 to the corporation's separate segregated fund ("SSF"), even though the corporation
16 restricted the circumstances under which employees could redeem their credits for cash.
17 The Commission so concluded because "neither the earning of the credits nor the ability
18 to redeem them depends on an employee's contributions to the SSF or other political
19 activity."

20 The same is true of the rebates here. Like Advisory Opinions 2010-06 (Famos)
21 and 2009-31 (MAXIMUS), GivingSphere will give all of its customers the ability to earn
22 rebates and to access their rebates subject to certain restrictions on the use of their funds.
23 Moreover, restrictions on the ability of individual customers to take money out of the

1 program in the form of personal payments for the value of their rebates is the same for all
2 customers and is consistent with the stated premise of GivingSphere's program, which is
3 that individuals will join it in order to make contributions and donations. Therefore, the
4 rebates that GivingSphere proposes to transmit to political committees will be the
5 property of its customers, and not of GivingSphere.

6 *B. Whether GivingSphere's transmission of rebates is a prohibited corporate*
7 *contribution.*

8 The next issue is whether GivingSphere's services in transmitting its customers'
9 contributions to political committees would constitute impermissible corporate in-kind
10 contributions by GivingSphere. The Commission concludes that they would not.

11 The Commission recently reaffirmed the distinction between companies that
12 provide services to political committees and those that provide services to their
13 customers. *See* Advisory Opinion 2011-06 (Democracy Engine); *see also* Advisory
14 Opinions 2007-04 (Atlatl) and 2006-08 (Brooks). Companies that process contributions
15 to political committees as a service to the political committees must be compensated for
16 those services by the political committees to avoid making in-kind contributions.
17 Companies that process contributions as a service to their customers, however, do not
18 need to be compensated for these services by the recipient political committees because
19 the companies are not providing any services or anything of value to the recipient
20 political committees. *See* Advisory Opinions 2011-06 (Democracy Engine) and 2006-08
21 (Brooks).

22 The Commission concludes that, based on the facts presented, GivingSphere will
23 provide a service only to its customers, and not to the recipient political committees.

1 GivingSphere’s customers will identify potential recipient political committees from
2 GivingSphere’s database and will make contributions to those political committees from
3 GivingSphere’s website, rather than from the political committees’ own websites.
4 *Compare* Advisory Opinions 2011-06 (Democracy Engine) *and* 2006-08 (Brooks) *with*
5 Advisory Opinion 2007-04 (Atlatl). Moreover, GivingSphere’s customers will have to
6 agree to GivingSphere’s terms of service before participating in the program, and
7 GivingSphere will not enter into any contractual relationships with the recipient political
8 committees. *See* Advisory Opinion 2011-06 (Democracy Engine). Therefore,
9 GivingSphere may transmit a customer’s rebates to political committees without its
10 services constituting prohibited in-kind contributions to those political committees.

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

14 Yes, GivingSphere may provide its customers with a search engine and database
15 with which to identify potential Federal candidates, national party committees, and other
16 Federal political committees to which they might contribute.

17 GivingSphere proposes to provide its customers with a search engine and
18 database identifying Federal candidates, national political parties, and other Federal
19 political committees using information obtained from reports filed with the Commission.
20 Political committees must file certain statements, notices, and reports with the
21 Commission, which the Commission makes public. 2 U.S.C. 434 and 438(a)(4); *see also*
22 11 CFR Part 104. The Act provides that “any information copied from such reports or
23 statements may not be sold or used by any person for the purpose of soliciting

1 contributions or for commercial purposes, other than using the name and address of any
2 political committee to solicit contributions from such committee.” 2 U.S.C. 438(a)(4);
3 *see also* 11 CFR 104.15(a).

4 The Commission has previously concluded in a number of advisory opinions that
5 the prohibition on the use of information in Commission filings serves to prevent
6 information about individual contributors from being sold or used for commercial
7 purposes.³ *See, e.g.*, Advisory Opinions 2004-24 (NGP Software), 1983-44 (Cass
8 Communications), 1981-38 (Campac Publications), and 1980-101 (Weinberger). The
9 Commission, however, has allowed the sale or use of the name and address of political
10 committees and the sale or use of such information for commercial purposes. *See, e.g.*,
11 Advisory Opinions 2004-24 (NPG Software), 1989-19 (Johnson), and 1980-101
12 (Weinberger). For example, in Advisory Opinion 2004-24 (NGP Software), the
13 Commission determined that the inclusion of information obtained from the
14 Commission’s public records about contributors, other than political committees, in a
15 commercially available software product would be prohibited under the Act and
16 Commission regulations, but that the sale or use of the names and addresses of political
17 committees would not be restricted. In Advisory Opinion 1980-101 (Weinberger), the
18 proposed sale of a directory was determined to be permissible where the directory

³ The legislative history of the 1979 Amendments to the Act indicates that Congress intended the prohibition on the copying and use of names and addresses to protect individual contributors. H.R. Rep. No. 422, 96th Cong., 1st Sess. 23 (1979). Congress was concerned that the Act’s reporting requirements would “open up the citizens who are generous and public spirited enough to support our political activities to all kinds of harassment . . .” 117 Cong. Rec. 30057 (1971) (statement of Senator Bellmon). Senator Bellmon stated that the amendment prohibiting the use of contributor information was intended to “protect the privacy of the generally very public-spirited citizens who may make a contribution to a political campaign or a political party.” *Id.*

1 contained comprehensive information concerning political action committees obtained
2 from documents filed with the Commission.

3 The information that GivingSphere seeks to use concerns political committees,
4 rather than individual contributors. Thus, consistent with prior advisory opinions,
5 GivingSphere may use the information as proposed.

6 *3. If the answer to Question 2 is "yes," may GivingSphere also provide customers with*
7 *basic factual information about candidates and political committees?*

8 Yes, GivingSphere may also provide customers with basic factual information
9 about candidates and political committees, for the reasons given below.

10 GivingSphere's business model includes providing its customers with tools that
11 they can use to gain information about potential recipients of funds from sources other
12 than GivingSphere, primarily by providing a link to the website of the entity that a
13 customer is considering supporting. To this end, GivingSphere proposes to supplement
14 the names of candidates and political committees in its database with basic factual
15 information, such as the office that a candidate is running for; the election cycle that a
16 candidate is competing in; a candidate's party affiliation, age, occupation, or incumbency
17 status; and a website link. An example of the type of additional information that
18 GivingSphere plans to provide is: "Barack Obama is President of the United States and
19 running for re-election in 2012 as the Democratic nominee." GivingSphere does not
20 intend to create content that advocates for the election or defeat of any candidate, or that
21 promotes, attacks, supports, or opposes any candidate, political party, or political
22 committee.

1 The Act and Commission regulations do not address whether a commercial entity
2 may provide to its customers in the regular course of business the type of information that
3 GivingSphere proposes to provide to its customers. The Commission has concluded,
4 however, that GivingSphere may forward contributions to candidates and political
5 committees as a service to its customers and provide its customers with a database that
6 identifies the candidates and political committees to which they may choose to make
7 contributions. GivingSphere’s proposal to include in its database basic factual
8 information about these candidates and political committees to help its customers make
9 their contribution decisions appears to be a corollary of this activity.

10 The situation presented here is similar to the one addressed by the Commission in
11 Advisory Opinion 2006-08 (Brooks). In that advisory opinion, the Commission
12 interpreted the Act and Commission regulations as allowing a corporation to provide
13 commentary on and analysis of various State and Federal officeholders to its individual
14 subscribers as part of the corporation’s overall business plan to assist its subscribers in
15 making contributions. Specifically, in that advisory opinion, the corporation proposed
16 providing additional information at the subscriber’s request, including biographical
17 information about candidates and information about the candidates’ voting records,
18 “ratings,” reelection percentages, campaign contribution positions, and “party loyalty.”
19 Advisory Opinion 2006-08; *see also* Advisory Opinion 1999-25 (DNet) (costs of
20 operating a website providing information on candidates were not an “expenditure”).

21 Accordingly, the Commission concludes that GivingSphere may provide its
22 customers with basic factual information about candidates and political committees as
23 described in its request.

1 4. *Must GivingSphere file any reports with the Commission based on the activities*
2 *described in its advisory opinion request?*

3 No, GivingSphere is not required to file any reports with the Commission based
4 on the activities described in its advisory opinion request.

5 The Act and Commission regulations require certain persons to file reports with
6 the Commission. For example, a “treasurer of a political committee shall file reports of
7 receipts and disbursements.” *See* 2 U.S.C. 434(a)(1); 11 CFR 104.1. Persons who make
8 independent expenditures or electioneering communications must also file reports with
9 the Commission. *See* 2 U.S.C. 434(c) and (f); 11 CFR 104.20 and 109.10.

10 GivingSphere is not a political committee, and therefore is not subject to the
11 reporting requirements for political committees. *See* 2 U.S.C. 434(a)(1); 11 CFR 104.1.
12 GivingSphere indicates that it will not make communications that contain express
13 advocacy. Thus, it will not be subject to the reporting requirements for persons making
14 independent expenditures. *See* 2 U.S.C. 431(17) (“The term ‘independent expenditure’
15 means an expenditure by a person (A) expressly advocating the election or defeat of a
16 clearly identified candidate”); *see also* 11 CFR 100.16. Moreover, given that all relevant
17 communications will take place on the Internet, GivingSphere’s proposal will not
18 implicate the reporting requirements for persons making electioneering communications.
19 *See* 2 U.S.C. 434(f)(3)(A)(i) (“The term ‘electioneering communication’ means any
20 broadcast, cable, or satellite communication . . .”); *see also* 11 CFR 100.29. Thus,
21 GivingSphere’s activities as described in the advisory opinion request would not subject
22 it to any reporting requirements under the Act or Commission regulations.

1 5. *May GivingSphere sell advertising space as described in its advisory opinion request*
2 *to Federal political committees?*

3 Yes, GivingSphere may sell advertising space as described in its advisory opinion
4 request to Federal political committees.

5 The Act and Commission regulations prohibit corporations from making a
6 contribution in connection with a Federal election. *See* 2 U.S.C. 441b(a); 11 CFR
7 114.2(b)(1). A “contribution” includes “any direct or indirect payment, distribution, loan,
8 advance, deposit, or gift of money, or any services, or anything of value . . . to any
9 candidate, campaign committee, or political party or organization, in connection with any
10 [Federal] election . . .” 2 U.S.C. 441b(b)(2); *see also* 2 U.S.C. 431(8) and 11 CFR
11 100.52(a). “Anything of value” includes all in-kind contributions, including the
12 provision of goods or services without charge or at less than the usual and normal charge.
13 *See* 11 CFR 100.52(d)(1). Advertising space provided to candidates and political
14 committees at a discount is nonetheless provided at the “usual and normal charge” if the
15 services are provided on the same terms and conditions to other advertisers. *Advisory*
16 *Opinion 1986-22 (WREX-TV).*

17 GivingSphere plans to charge political committees wishing to advertise on its
18 website the “usual and normal charge,” as determined by the market value of comparable
19 online advertising space. Thus, the Commission concludes that the sale of advertising
20 space would not constitute a contribution to the political committee advertisers, so long

1 as GivingSphere makes advertising space available to political candidates and
2 committees on the same terms and conditions as other advertisers.⁴

3 6. *May GivingSphere permit political committees to place GivingSphere badges on their*
4 *websites?*

5 Yes, GivingSphere may permit political committees to place its badges on their
6 websites because GivingSphere's proposal represents a commercially reasonable
7 transaction made in the ordinary course of business, and because any contributions made
8 from funds rebated by GivingSphere to its customers will be those of GivingSphere's
9 customers.

10 GivingSphere proposes to allow third parties, including political committees, to
11 post its badge on their websites without paying an up-front fee. If users access
12 GivingSphere through a badge on a third party's website and join GivingSphere, then
13 GivingSphere will pay to the third party a small percentage of future transactions
14 resulting from the new customer. If the third party is a political committee, GivingSphere
15 will pay the fees to the new customer, instead of to the badge host.

16 As noted in the answer to Question 1, the Act and Commission regulations permit
17 corporations to offer affinity programs, where (1) the corporations and political
18 committees enter into commercially reasonable transactions in which the political
19 committees pay the usual and normal charge for any services provided by the
20 corporations; and (2) the amounts contributed to the political committees via rebates,

⁴ Communications placed for a fee on another person's website are "public communications" subject to the disclaimer requirements of the Act and Commission regulations. *See* 11 CFR 100.26; *see also* 2 U.S.C. 441d, and 11 CFR 110.11. GivingSphere will endeavor to ensure that its political advertisers comply with all applicable Commission disclaimer rules. The Commission is currently considering whether and how it should revise its rules regarding disclaimers on Internet communications. *See* Advance Notice of Proposed Rulemaking on Internet Communication Disclaimers, 76 FR 63567 (Oct. 13, 2011).

1 rewards, or remittances are from the customers' funds and not from the corporations'
2 funds. *See* Advisory Opinions 2010-21 (ReCellular), 2010-06 (Famos), 2008-18 (Mid-
3 Atlantic Benefits), 2006-34 (Working Assets), and advisory opinions cited therein.

4 *A. Usual and Normal Charge*

5 For its badges program to comply with the Act and Commission regulations,
6 GivingSphere must not provide any goods or services to political committees at no
7 charge, for less than the usual and normal charge, or without bargained for consideration.
8 11 CFR 100.52(d)(1); *see also* Advisory Opinions 2010-21 (ReCellular) and 2010-06
9 (Famos).

10 The transaction here resembles the transaction in Advisory Opinion 2010-06
11 (Famos). In that advisory opinion, a limited liability company wished to provide its web-
12 based referral platform to political committees without requiring the political committees
13 to pay an up-front fee for the platform's use. Instead, the value of the marketing services
14 to be provided by the political committees that would use Famos's platform could result
15 in additional revenue to Famos. The Commission concluded that the proposed
16 transaction was a commercially reasonable transaction made in the ordinary course of
17 business.

18 Similarly, GivingSphere will allow political committees to use its badge without
19 paying GivingSphere an up-front fee. In return, political committees that post a
20 GivingSphere badge on their website will provide marketing services to GivingSphere,
21 which may increase GivingSphere's revenue. Therefore, as in Advisory Opinion
22 201006 (Famos), GivingSphere's proposal represents a commercially reasonable
23 transaction made in the ordinary course of business.

1 *B. Contributions from Rebates and Rewards*

2 As explained in the answer to Question 1, any contributions to political
3 committees from rebates and rewards must be made by individuals from their own funds
4 and not by the corporate service provider. As a general matter, affinity programs in
5 which a corporation transmits to a political committee a portion of the corporation's
6 revenues will result in prohibited corporate contributions. *See generally* Advisory
7 Opinions 2008-18 (Mid-Atlantic Benefits) and 2003-16 (Providian National Bank).
8 Prohibited corporate contributions will not result, however, from affinity programs that
9 generate revenue in the form of rebates and rewards to individual customers or users, if
10 the individual customers or users then choose to use their earned revenue to make
11 contributions to a political committee affinity partner. *See* Advisory Opinions 2010-21
12 (ReCellular), 2010-06 (Famos), and 2006-34 (Working Assets). In considering the
13 permissibility of these programs under the Act and Commission regulations, the
14 Commission has focused on whether (1) the revenue or rebate was offered to individual
15 customers or users in the ordinary course of business; and (2) the revenue was the
16 property of the individual customer – rather than the corporate affinity partner – who
17 controlled its disposition. *See id.*

18 Based on these considerations, the Commission concludes that any contributions
19 made to political committees from funds paid by GivingSphere to its customers under the
20 proposed badges program will be contributions from GivingSphere's customers. First,
21 GivingSphere will pay fees to its customers in the ordinary course of its business and on
22 the same terms as it will pay fees to third parties who post its badges on their websites,
23 regardless of whether the customer ultimately uses the funds to make contributions to

1 political committees. In this respect, the badge program is similar to the rebates addressed
2 in the answer to Question 1, as well as the proposal approved by the Commission in
3 Advisory Opinion 2010-06 (Famos). Moreover, GivingSphere intends to charge a
4 commercially reasonable fee when its customers make contributions or donate the funds,
5 again regardless of how the customers ultimately dispose of their funds. Therefore, the
6 Commission concludes that the rebates will be offered to customers in the ordinary
7 course of GivingSphere's business.

8 Second, as explained in the answer to Question 1, any revenues from the badges
9 program that GivingSphere will transmit to political committees will be the property of
10 GivingSphere's customers, rather than GivingSphere.

11 This response constitutes an advisory opinion concerning the application of the
12 Act and Commission regulations to the specific transaction or activity set forth in your
13 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
14 of the facts or assumptions presented, and such facts or assumptions are material to a
15 conclusion presented in this advisory opinion, then the requestor may not rely on that
16 conclusion as support for its proposed activity. Any person involved in any specific
17 transaction or activity which is indistinguishable in all its material aspects from the
18 transaction or activity with respect to which this advisory opinion is rendered may rely on
19 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
20 conclusions in this advisory opinion may be affected by subsequent developments in the
21 law, including, but not limited to, statutes, regulations, advisory opinions, and case law.

1 The cited advisory opinions are available on the Commission's website, www.fec.gov, or
2 directly from the Commission's Advisory Opinion searchable database at
3 <http://www.fec.gov/searchao>.

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On behalf of the Commission,

Cynthia L. Bauerly

Chair