



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Office of the Commission Secretary *LC*

DATE: March 10, 2021

SUBJECT: AO 2021-01 (Aluminate, Inc.) Comment on Draft A

Attached is a comment received from Perkins Coie LLP.
This matter is on the March 11, 2021 Open Meeting Agenda.

Attachment

RECEIVED

By Office of the Commission Secretary at 1:08 pm, Mar 10, 2021

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March 10, 2021

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VIA ELECTRONIC MAIL

The Honorable Shana M. Broussard
Federal Election Commission
1050 First Street, N.E.
Washington, D.C. 20463

Re: Advisory Opinion 2021-01 (Aluminate, Inc.) Draft A

Dear Chair Broussard:

We submit this comment on behalf of the Perkins Coie LLP Political Law Group in response to the Federal Election Commission's (the "FEC's" or the "Commission's") Draft Advisory Opinion in AO 2021-01 (Aluminate, Inc.), known as Draft A ("Draft A"). We submit the comment not on behalf of any client, but instead as practitioners with experience advising clients on the laws, regulations, and precedents that govern the use of information contained on reports filed with the Commission (the "sale-and-use" rule).¹ **In short, we encourage the Commission to reject Draft A. The draft is a dramatic contraction of permissible uses of FEC data; is out of line with the Commission's own precedent; and would considerably increase the significant confusion the regulated community already faces around this rule.**

Until today, entities have reasonably understood the sale-and-use rule to address two narrowly-defined activities: (i) selling the names and addresses of contributors obtained from FEC reports; and (ii) using FEC reports to discover individuals' names and addresses so they might be solicited. The Commission and the courts have permitted a number of other uses of FEC data, including incorporating FEC data into commercial products that do not make new names and addresses available for solicitation. Operating in reliance on this precedent, vendors currently market products that incorporate FEC data, and political committees read FEC reports to help them determine whether existing donors have the capacity to make bigger contributions.²

Draft A reaches far beyond past precedent and scrambles the community's understanding of the sale-and-use rule. For the first time in its history, the Commission purports to prohibit use of FEC data merely to "make inferences about the financial capacity of individuals to make donations," and implies that using "contributor data in a commercially available product" is itself

¹ See 52 U.S.C. § 30111(a)(4); 11 C.F.R. § 104.15.

² Campaigns also use FEC contributor data in ways that have nothing to do with solicitations; they use such data to understand the electorate and its interests, which assists in voter persuasion efforts, preparations for meetings and presentations, and in crafting policy positions.

a violation.³ If the Commission adopts the draft, actors across the political spectrum could be forced to either risk FEC enforcement or else back away from the products and activities on which they have so far reasonably relied because the confusion over the Commission's position on the sale-and-use rule is too tenuous and undefined to tolerate.

Accordingly, we respectfully submit this comment to encourage the Commission to reject or revise Draft A to address its overbreadth and permit the modern data-driven campaign environment to survive - as it has done in its rulings in this area to date while still providing robust protections for individual privacy.

A. The Commission Has Never Concluded that *Any For-Profit Use of FEC Data is Per Se* a Sale-and-Use Violation

Draft A appears to upend the Commission's approach to the sale-and-use provision by newly prohibiting *any* use of "contributor data in commercially available product[s]." ⁴ The Draft overlooks significant precedent where the FEC has approved just that.

- In Advisory Opinion 2017-08, Point Bridge Capital, LLC, a for-profit investment advisory firm, incorporated FEC data into an algorithm it deployed to rank publicly traded companies on political factors.⁵ Point Bridge used its rankings to develop a revenue-generating product.⁶ It also planned to license that product to other entities.⁷ The FEC approved Point Bridge's plans for this commercial use of FEC contributor data.
- In Advisory Opinion 2015-12, the Commission allowed a for-profit entity called Ethiq to use FEC data in an algorithm for its "app" that matched users to candidates and corporations that align with their political views.⁸ Ethiq explicitly asked the Commission whether it could generate revenue by licensing its algorithms and—importantly—its FEC data-informed datasets to other companies.⁹ The FEC approved this purely commercial use.¹⁰
- In Advisory Opinion 2014-07, the FEC permitted Crowdpac (a for-profit corporation that earned revenue by matching individuals to candidates and keeping a percentage of any resulting contributions made through the company's web platform) to use "contributor information contained in reports filed with the Commission" in its proprietary matching

³ Draft A at 7.

⁴ *Id.*

⁵ Advisory Op. 2017-08 (Point Bridge Capital, LLC) at 1-2.

⁶ *Id.* at 2.

⁷ *Id.*

⁸ *See* Advisory Op. 2015-12 (Ethiq).

⁹ *Id.* at 2.

¹⁰ *Id.* at 4.

algorithm.¹¹ The Commission concluded that there was no sale-and-use violation in Crowdpcac’s use of anonymized FEC data, despite the fact that Crowdpcac was profiting from its website.¹²

- In Matter Under Review (“MUR”) 5625, Aristotle International, Inc. sold software that allowed users to access the FEC contribution histories of persons in a user’s pre-existing database.¹³ A controlling bloc of Commissioners voted to dismiss the sale-and-use allegations against the company.¹⁴ In their Statement of Reasons, the controlling Commissioners warned the Office of General Counsel away from making the same assumption it does in Draft A, stating “OGC’s probable cause recommendation was based upon the notion that virtually any sale of any FEC data constitutes a *per se* commercial use, thus violating the Act. But reading the Act this way is at odds with the legislative history, court cases, and prior Commission matters.”¹⁵

In each of these decisions, the Commission blessed the use of contributor data in a commercially available product. While Draft A mentions some of these decisions in passing, it fails to acknowledge their meaning and that the Commission has repeatedly approved of businesses incorporating FEC contributor data into their commercial products. We urge the Commission to fully integrate this precedent into its final opinion.

B. The Commission Has Repeatedly Allowed Uses of FEC Data That Do Not Disclose Contributor Contact Information

The Commission’s current sale-and-use precedent focuses on preventing two narrowly-defined activities: (i) selling or publishing the names and addresses of individual contributors from FEC reports; and (ii) using FEC reports to discover individuals’ names and addresses so they might

¹¹ Advisory Op. 2014-07 (Crowdpcac) at 1-4.

¹² *Id.* at 10.

¹³ Statement of Reasons (“SOR”) of Comm’rs Petersen, Hunter & McGahn at 3, MUR 5625 (Aristotle International, Inc.).

¹⁴ *Id.* SORs give notice to the regulated community about how the Commission will rule in similar future matters. See *Common Cause v. FEC*, 842 F.2d 436, 450 (D.D.C. 1988). They can also represent the “controlling decision” of the Commission. See *FEC v. Nat’l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) (when the Commission dismisses a complaint based on a split vote, the Commissioners who voted to dismiss the complaint “constitute a controlling group” since their “rationale necessarily states the agency’s reasons for acting as it did”).

¹⁵ SOR of Comm’rs Petersen, Hunter & McGahn at 2, MUR 5625 (Aristotle International, Inc.). In MUR 6334, the Commission dismissed a second enforcement action involving Aristotle. There, Aristotle had updated its product to display to customers the relationships between people already in their databases, including overlap or similarities between their contribution histories, and let users access individuals’ contribution histories. The Commission again permitted this use of individual contributor data in a commercially available product. See SOR of Comm’rs Petersen & Hunter at 2, MUR 6334 (Aristotle International, Inc.).

serve as new solicitation prospects. By contrast, the Commission has issued a slew of opinions *permitting* activities stemming from the use of FEC data that avoid these prohibited acts.

Draft A largely ignores these opinions and the guidelines they establish. Instead, the draft creates an uncertain regulatory environment by neglecting to explain why Aluminate’s proposed use is impermissible while the FEC has permitted similar uses or explained the relevant restrictions in narrow terms in opinions including, but not limited to, the following:

- In Advisory Opinion 1980-101 (Weinberger), the Commission stated that “except for information identifying individual contributors, any of the information found in FEC documents or documents filed with the Commission may be used.”¹⁶
- In Advisory Opinion 1983-44 (Cass Communications), the FEC stated that the sale-and-use prohibition specifically applies to the “copying and use of names and addresses of individual contributors.”¹⁷
- In Advisory Opinion 1995-05 (14th District TRIM Committee), the Commission stated that “[t]he principal purpose of restricting the sale or use of information copied from reports is to protect individual contributors from having their names sold or used for commercial purposes.”¹⁸
- In Advisory Opinion 1995-09 (NewtWatch PAC), the Commission stated that the purpose of the sale-and-use provision is protecting “individual contributors from having their names sold,” and it approved a website’s use of contributor information because the site did not “contain sufficient information to generate solicitations.”¹⁹
- In Advisory Opinion 2009-19 (Club for Growth), the Commission characterized a binding court opinion to stand for the proposition that “the sale of contributor lists that did not include addresses or phone numbers and that explicitly stated that the lists could not be used for the purpose of solicitation or any commercial use...” was permissible.²⁰
- In AO 2015-12 (Ethiq), the Commission stated, “[D]ata that does not contain individual contributors’ contact information does not implicate the privacy concerns at the heart of section 30111(a)(4) Thus, the Commission has repeatedly approved” such uses.²¹

¹⁶ Advisory Op. 1980-101 (Weinberger) at 2.

¹⁷ Advisory Op. 1983-44 (Cass Communications) at 2.

¹⁸ Advisory Op. 1995-05 (14th District TRIM Committee) at 2.

¹⁹ Advisory Op. 1995-09 (NewtWatch PAC) at 6-7.

²⁰ Advisory Op. 2009-19 (Club for Growth) at 4.

²¹ Advisory Op. 2015-12 (Ethiq) at 4.

- And most succinctly, the Commission acknowledged in the Crowdpac advisory opinion that there is “a long line of advisory opinions in which the Commission has approved proposals to sell or use information from reports filed with the Commission where that information did not include the names and addresses of individual contributors.”²²

Finally, Draft A would ban far more activity than federal courts have deemed the law prohibits. For example, in *FEC v. Political Contributions Data, Inc.*, the Second Circuit allowed a company to sell contributor data, including names, occupations, and congressional districts, because the lists did not include mailing addresses or phone numbers.²³ The D.C. District Court similarly stated that it understands the sale-and-use statute to “proscribe[] list making: the copying and selling of campaign contributor and contribution information where the principal purpose is the sale of that information, a transaction akin to list-making and brokering.”²⁴ Accordingly, in the view of the courts, it is the provision of individuals’ names and contact information to entities that do not already have that information that triggers a sale-and-use violation.

C. The Commission Should Strive to Avoid Uncertainty

In the highly regulated arena of federal elections, participants need to know what is permissible. If Draft A is adopted, campaigns will be left wondering whether they should look to this opinion or to the contradictory body of FEC precedent and federal case law to determine whether they can turn to FEC reports to better understand and respectfully solicit their existing donors. Companies will wonder if they can use *any* FEC data *at all* in their products. And voters will suffer when these entities abandon innovative supporter engagement practices out of fear of an unpredictable and shifting regulatory framework. We urge the Commission to reject Draft A.

Very truly yours,



Tyler J. Hagenbuch
Shanna M. Reulbach

²² Advisory Op. 2014-07 (Crowdpac) at 10. It also bears noting that, a controlling bloc of the Commission pressed even further in the Aristotle MURs, allowing a company to display individuals’ contribution histories in conjunction with their names and addresses, provided the names and addresses were already in the committee’s possession. *See* SOR of Comm’rs Petersen, Hunter & McGahn, MUR 5625 (Aristotle International, Inc.); *see also* SOR of Comm’rs Petersen & Hunter, MUR 6334 (Aristotle International, Inc.)

²³ *FEC v. Political Contributions Data, Inc.*, 943 F.2d 190, 193, 197 (2d Cir. 1991). The court found that “the overarching goal of the prohibitions was to protect campaign contributors from ‘all kinds’ of unwanted solicitations,” and withholding contact information achieved that goal. *See id.* at 197. The Second Circuit later characterized its findings in that decision to be that “lists, compiled without addresses or phone numbers and bearing a warning against commercial use posed no danger to the privacy interests which § 438(a)(4) was designed to protect.” *FEC v. Political Contributions Data, Inc.*, 995 F.2d 383, 386-87 (2d Cir. 1993).

²⁴ *FEC v. Legi-Tech, Inc.*, 967 F. Supp. 523, 531 (D.D.C. 1997).

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Max Schechter