



FEDERAL ELECTION COMMISSION

Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Office of the Commission Secretary^{VFV}

DATE: July 28, 2022

SUBJECT: AO 2022-10 (Sprinkle) (Draft A) Comments

Attached is 1 comment on AO 2022-10 (Sprinkle).

Attachment

RECEIVED

By Office of the Commission Secretary at 10:35 am, Jul 28, 2022



10 G Street NE, Suite 600 | Washington, DC 20002

July 28, 2022

VIA ELECTRONIC MAIL

The Honorable Allen Dickerson
Federal Election Commission
1050 First Street NE
Washington, DC 20463

Re: Advisory Opinion 2022-10 (Sprinkle) Draft A

Dear Chair Dickerson:

We submit this comment on behalf of Elias Law Group LLP in response to the Federal Election Commission's (the "FEC's or the "Commission's") Draft Advisory Opinion in AO 2022-10 (Sprinkle), 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 **Draft A clearly reaches the right conclusion that the requester's proposed use of data from FEC reports is permissible. However, Draft A's legal analysis is nonetheless unduly restrictive because it applies a test that would prohibit more activity than Congress meant for the sale-and-use rule to cover or that the FEC and courts have traditionally sought to regulate.**

We urge the Commission to take an approach to the sale-and-use rule that is more in line with its own precedent and that of the courts.

Sprinkle asks the Commission whether it may display "aggregated campaign finance data" drawn from campaigns' FEC reports on a web platform designed to "make it easier for people to find and support candidates that align with their interests, policy views, and values."² Specifically, "Sprinkle's website will show "the numbers of contributors that support a particular candidate, the total amount of funds the candidate has raised, the geographic distribution or concentration of contributors, the candidate's average contribution amount, and the relative proportion of individual contributions as a percentage of total contributions received."³ Notably, the website will not display any campaign contributor's contact information, so there is no possibility that any person or group could obtain new solicitation prospects from Sprinkle's website.⁴

Under a long line of FEC precedent, the fact that Sprinkle's website *cannot provide new solicitation prospects to any viewer* is the key safeguard that avoids running afoul of the sale-and-use restriction.

¹ See 52 U.S.C. § 30114(a)(4); 11 C.F.R. § 104.15.

² Draft A at 1-2.

³ *Id.* at 2.

⁴ *Id.* at 2-3.

Rather than recognizing this, Draft A applies a much broader, more nebulous test. It concludes that Sprinkle’s proposal passes muster because it doesn’t use Commission data in a way that could “generate solicitations” or “enable political committees or others to engage in fundraising activity.”⁵ In other words, Draft A asks whether a person’s use of FEC data has any connection to an entity making solicitations, and, if the answer is “yes,” prohibits that activity.

But this view is grossly out of line with prior Commission precedent and court cases on the sale-and-use provision, and it reflects a very recent and mistaken interpretation of the law. While it’s true that Sprinkle’s proposed use will not “generate solicitations,” it’s equally true that Sprinkle’s proposed use does not provide any new solicitation prospects or contact information and is permissible for that reason under the FEC’s longstanding test. Rather than asking the broad, vague question of whether a use could “generate solicitations,” the Commission should more clearly advise requestors that their proposed uses are lawful if they do not display new names and addresses pulled from FEC reports so that people can solicit those new leads.

This tailored analysis would align with a long series of advisory opinions concluding that so long as an entity’s use of FEC data does not result in it sharing or displaying donors’ names and contact information so that a person or group could discover and solicit an individual not already on their contact list, there is no violation of the law. For example:

- 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.”⁶
- 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.”⁷
- 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.”⁸
- 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 enough information to generate new solicitation prospects for any user.⁹
- 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...” was permissible.¹⁰

⁵ *Id.* at 11-12 (internal quotation marks omitted).

⁶ Advisory Op. 1980-101 (Weinberger) at 2.

⁷ Advisory Op. 1983-44 (Cass Communications) at 2.

⁸ Advisory Op. 1995-05 (14th District TRIM Committee) at 2.

⁹ Advisory Op. 1995-09 (NewtWatch PAC) at 6-7.

¹⁰ Advisory Op. 2009-19 (Club for Growth) at 4.

- In Advisory Opinion 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.¹¹
- And most to the point, the Commission acknowledged in Advisory Opinion 2014-07 (Crowdpac) 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.”¹²

The federal courts, who would ultimately arbitrate any dispute about the scope of the sale-and-use rule, concur in this narrower understanding of the prohibition. 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.¹³ The D.C. District Court similarly stated that it understands the sale-and-use rule 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.”¹⁴

As the courts recognize, Congress never intended—and, until very recently, the Commission never understood—the sale-and-use rule to prohibit any and all use of FEC data in connection with commercial or fundraising activities. Congress’s purpose in passing the law was to protect donors from unwanted calls, mailers, and other requests from organizations with which they don’t have a relationship. Congress’s stated goal in enacting the sale-and-use rule was to “protect the privacy of the generally very public-spirited citizens who may make a contribution to a political campaign or a political party.”¹⁵ The approach endorsed by federal courts and previously employed by the FEC is narrowly tailored to achieve that goal. The FEC should take this opportunity to bring its views back in line with this understanding that has served political committees and donors for decades, rather than releasing another overly broad sale-and-use opinion that has restrictive implications on First Amendment associational activities.

Very truly yours,



Tyler J. Hagenbuch
Shanna M. Reulbach

¹¹ Advisory Op. 2015-12 (Ethiq) at 4.

¹² Advisory Op. 2014-07 (Crowdpac) at 10.

¹³ *FEC v. Political Contributions Data, Inc.*, 943 F.2d 190, 193, 197 (2d Cir. 1991).

¹⁴ *FEC v. Legi-Tech, Inc.*, 967 F. Supp. 523, 531 (D.D.C. 1997).

¹⁵ 117 Cong. Rec. 30,057 (daily ed. Aug. 5, 1971) (Sen. Bellmon).