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July 28, 2009

SENSITIVE

Mary Dove
Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

re: MUR 5625

Dear Ms. Dove,

Please find enclosed ten copies of Aristotle International, Inc.'s brief in response to the General Counsel's Brief in MUR 5625 for the Commission and three for the General Counsel.

Pursuant to the Procedural Rules for Probable Cause Hearings, 72 Fed. Reg. 64919 (Nov. 19, 2007, Respondent Aristotle International, Inc. requests an oral hearing for counsel before the Commission. Respondent believes a hearing will help resolve significant and novel legal and policy issues present in this matter.

As described in more detail in the Respondent's Brief, this matter raises questions about ambiguities and conflicting decisions in Commission advisory opinions, enforcement decisions and judicial decisions interpreting 2 U.S.C. § 438(a)(4) – the prohibition against selling information copied from reports filed with the Commission for the purpose of soliciting contributions or for commercial purposes. The Commission's advisory opinions (all save one) construed "commercial purpose" to prohibit only the sale or use of contributors' names, while recent Commission enforcement decisions did not prohibit such sale or use. Also, the last Commission Advisory Opinion construing 2 U.S.C. § 438(a)(4) described the provision as a "broad prophylactic measure." However, this description of a provision limiting speech is now inconsistent with a more recent Supreme Court case that held, "we give the benefit of the doubt to speech, not censorship." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 127 S. Ct. 2652, 2674 (2007).

This matter also raises a policy issue of whether the Commission should encourage technological innovations to enhance compliance with the Federal Election Campaign Act's contribution limitations and other requirements established by the Act and the Commission's regulations. The Commission may want to clarify that certain innovations that foster the Act's policies, such as the software feature at issue here, comply and are consistent with prior Commission statements and regulations.

A discussion of how these policy and legal issues are involved in this matter will enhance

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the Commission's deliberations and, therefore, the Respondent requests a hearing prior the Commission's probable cause determination.

Sincerely,

Stephen E. Hershkowitz

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BEFORE THE
FEDERAL ELECTION COMMISSION

In the matter of:	)	
Aristotle International, Inc., Respondent	)	**MUR 5625**

BRIEF OF ARISTOTLE INTERNATIONAL, INC.
IN RESPONSE TO THE
BRIEF OF THE GENERAL COUNSEL

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BEFORE THE
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BRIEF OF ARISTOTLE INTERNATIONAL, INC.
IN RESPONSE TO THE
BRIEF OF THE GENERAL COUNSEL

Respondent Aristotle International, Inc. submits this brief in response to the General Counsel's Brief dated June 10, 2009 ("GC Brief") in the above-captioned MUR.

SUMMARY

The GC Brief recommends that the Commission find probable cause to believe that Aristotle knowingly and willfully violated 2 U.S.C. § 438(a)(4) by selling Aristotle's Campaign Manager software upgrade ("CM5"). One feature of the CM5 program, the compliance/vetting feature, permits a campaign to view the contribution history of a contributor to the campaign using FEC data. The contribution history is intended to be used for compliance, vetting and background information.[1] Although this feature is a small, incidental part of the CM5 program, is rarely used and has never been used for an improper purpose, the General Counsel concluded that the CM5 program constitutes a sale or use of FEC data "for the purpose of soliciting contributions or for commercial purposes" within the meaning of section 438(a)(4). As the

[1]Hereafter, term "FEC data" includes *all* information filed by political committees in their reports to the Commission. The General Counsel's Brief uses the term "FEC data" to refer only to "historical *contribution data* for individual donors obtained from the FEC website." GC Brief at 1 (emphasis added).

courts and the Commission have consistently held, the purpose of this section is to prevent list-brokering, harassment, and invasion of contributors' privacy.

At the outset, it is important to emphasize that the heart of the General Counsel's argument relies solely upon several phrases in isolated advertising flyers used for four months, more than five years ago. Tellingly, she does not rely on actual or even potential uses of CM5 by Aristotle's customers. The phrases in the old advertisements arguably suggested a solicitation-related usage for the limited FEC contribution data made available in single-record, non-downloadable format in CM5. However, that suggestion did not relate to list brokering, prospecting for contributors or targeting solicitations. It related solely to the possibility of informing the campaign of the amount a prior campaign's contributor had contributed to other committees after the campaign had already decided to contact a donor using data that did not come from the FEC. Moreover, before any notice from the Commission, and well before the filing of the complaint in this case, Aristotle had voluntarily ceased using the language in question when it was brought to the attention of company counsel in mid-2004. Therefore, the General Counsel's conclusion is wrong for the following reasons.

First, section 438(a)(4) has been consistently interpreted, by the Courts and the Commission itself, to apply only to the commercial sale of contributor names and contact information obtained from FEC reports necessary to target donors for solicitation. In other words, the prohibition is intended to bar the sale of names of potential contributors gleaned from FEC reports to entities that did not already have the names of those contributors, akin to lists of targets or prospects sold by a commercial list broker. In this case, Aristotle does not sell lists of contributor names or contact information obtained from the Commission. The

compliance/vetting feature of CM5 cannot be used unless the campaign using the program already has the name of the contributor from a source other than FEC data and the campaign already has retrieved the contributor's record from the campaign's database. Not only does the program include clear warnings about the impermissible use of FEC data, but it also includes a series of safeguards designed to make the data useful expressly for lawful compliance purposes, and impossible to use for impermissible purposes such as list-making, list brokering, or solicitation targeting. It allows only single-record look-ups. It allows no targeting, no downloading, and no creation of prospecting lists or any other kind of list using FEC data. And the contribution information from the FEC data is provided with multiple layers of warnings about impermissible uses. Thus, the information provided by CM5 is not the type of information that section 438(a)(4) was intended to restrict, and its presentation creates no risk of harassment or invasion of privacy. In addition, because there is no governmental purpose whatsoever for restricting a committee from viewing contribution history for compliance and other lawful purposes, the First Amendment protects the dissemination of that information.

Second, the compliance/vetting feature is not a "commercial use" because it is not sold – it is provided at no cost. Aristotle does not sell the compliance/vetting feature separately. It is a small part of CM5, one of approximately 400 features. It was introduced at no cost when Campaign Manager 4 was upgraded to CM5 in 2004. It continues to be included at no cost, and the Commission has previously held that there is no "commercial use" when data is made available at no charge.

Third, despite having combed through Aristotle's records and client list of over 700 CM5 users, in an investigation that has gone on for years, the General Counsel's office has not

uncovered a single impermissible use of the data by any Aristotle client. Aristotle is not aware of a single previous case in which an FEC enforcement action or successful court case was commenced unless at least one impermissible use had been uncovered.

Fourth, in one recent MUR, the Commission found no violation by an Internet company that sold FEC data in downloadable form that could be sorted and organized to target solicitations. In other recent MURs, the Commission has allowed FEC data to be downloaded from an Internet site for commercial purposes. The entities in these MURs facilitated the downloading of names of contributors obtained from FEC data. They also included downloaded contact information -- information that is not available from the contribution data that CM5 makes available in limited, highly restricted, single search, non-downloadable form. Thus, the First Amendment not only protects the dissemination of limited contribution information accomplished through CM5, but a finding by the Commission that such limited dissemination is prohibited would also violate Aristotle's rights under the Equal Protection Clause.

In a case that clearly implicates First Amendment rights, the Commission must demand far more from the General Counsel than a speculative, theoretical case that is not based on a single example of misuse of FEC data akin to list brokering or solicitation targeting that the Commission has previously concluded violated section 438(a)(4).

REQUEST FOR HEARING

Pursuant to the Commission's Policy Statement Establishing a Pilot Program for Probable Cause Hearings, Notice 2007-4, Aristotle requests a probable cause hearing to discuss the policy and legal issues raised in this Brief, as more fully described below. Aristotle believes an oral presentation would be useful particularly to discuss why the General Counsel's conclusions are inconsistent with Congress' policy of encouraging the publication of FEC data for purposes of compliance with provisions of the Act.

I. FACTUAL BACKGROUND[2]

A. Aristotle International, Inc.

For over 25 years, Aristotle has been in the business of publishing campaign management software and public record information for lawful uses. Aristotle is nonpartisan, with clients across the ideological spectrum. Aristotle's stated corporate missions include (a) "publishing information used to influence political campaigns, elections, and public policy matters"; and (b) "increasing, in any media, the quality of information reaching the body politic and furthering the goal of the First Amendment to the Constitution of the United States of America of producing an informed public capable of conducting its own affairs."

Aristotle's primary publications include computer software for political committees that enable those committees to maintain accurate records of their contributions and expenditures, and to file

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[2] The facts are supported by the Declaration of Dean A. Phillips, president of Aristotle, (Attachment A) and are supplemented by the Declaration of Bret Garwood, a sales representative, (Attachment B) who has responded to references to his emails in the General Counsel's Brief.

reports with the Commission that accurately reflect those contributions and expenditures. During the last 25 years, Aristotle has continued to improve and upgrade its software to comply with new Commission regulations and to increase the efficiency and ability of its customers to conduct a campaign, maintain accurate records and file reports on paper and electronically. Aristotle's political committee software is nationally recognized as being among the best, if not the best, software because of its accuracy, and assistance that Aristotle staff provides to the political committees to file complete and accurate reports. Aristotle unconditionally guarantees that its political committee software complies with all federal and state disclosure requirements.

The Commission itself on frequent occasions has relied on Aristotle to provide feedback and advice about changes that the Commission makes to its own political committee filing software and has hired Aristotle-trained staff because of their expertise. For example:

1) The Commission staff has sought, on numerous occasions, the input by Aristotle regarding compliance reporting methods. These include credit card fundraising, general reporting, etc.
2) The Commission deemed the inclusion of Aristotle so important to the success of the electronic filing efforts that it paid Aristotle to join in the list of companies that offer electronic filing for campaigns, PACs and other organizations.
3) The Commission staff has repeatedly benefitted from and sought the input of Aristotle regarding releases of upgraded software by the Commission. On many occasions, the Commission staff has delayed or reworked FEC-supplied software to address errors and omissions by the FEC in the delivery of proper reporting.

4) The Commission has hired former Aristotle staff to senior positions within the Commission staff. In discussions with Aristotle regarding an individual, senior Commission staff referred to Aristotle staff as "the most qualified individuals." In one case, the Commission delayed the filling of a position until the Aristotle staff member was able to properly transition from Aristotle to the Commission. The stated goal of that delay was the value of the Aristotle employee to the Commission and the desire not to interrupt filings to the FEC by Aristotle customers.

Aristotle as an institution has always respected, and continues to respect, the Commission's regulations. The Company goes to extraordinary lengths to comply with the Commission's regulations, and it assists its customers with their compliance with the regulations. FEC compliance, in fact, is a central element of the company's business.

B. Campaign Manager 5

Aristotle published its first version of the Campaign Manager software program in 1983. This program, which has been continuously updated, is designed to assist campaigns in such essential campaign management functions as generating FEC and state reports, tracking contributions and expenditures, compliance with federal and state rules, fundraising, and general campaign organization. The program includes more than 400 features, of which only one includes the compliance/vetting capability that is the subject of this MUR.

In the spring of 2004, Aristotle published CM5, which was provided to its current customers as a *free* upgrade from Campaign Manager 4. New customers paid the same price as

existing customers paid for Campaign Manager 4. That is, all 50 new features - including the compliance/vetting feature – were added at no additional cost.

CM5 is a large, sophisticated computer program that allows campaign committees to efficiently and accurately manage contributions and disbursements, file compliant financial disclosure reports, create specialized lists from the committee's database searches (not using FEC data) , conduct an effective e-campaign, process credit card contributions, efficiently organize events, import contributions collected through Aristotle's online campaign contributions network, import voting history and update contact information of registered voters. No contributor names or contact information whatsoever from FEC data are included or provided by any of these features. And only one out of 400 features – the compliance/vetting feature – provides access to any FEC data of any kind and, again, that is solely contribution data, not contributor identification or contact information.

CM5 is used by campaign committees primarily to account for campaign contributions and disbursements, and to prepare and file reports with the Commission. In addition, the program has other ancillary features that may be useful to campaign committees. One of the ancillary features is solicitation management. This feature allows campaigns to track solicitors, track target groups, keep track of pledges and prepare reports for management purposes.

CM5 is licensed by well-trained and experienced sales staff in one-on-one meetings with customers. CM5 is not licensed through the mail or over the Internet.[3] When the CM5 program

[3] The GC Brief at 10-11 describes "E-mail Solicitations," "Fliers," and "Power Point Presentations" that advertised the sale of CM5. However, the General Counsel selectively quotes only those few sentences from a handful of obsolete marketing materials that refer to the

was introduced in April 2004, the sales staff was given extensive training, including training about the limitations on the permissible uses of the limited FEC data accessible through the compliance/vetting feature. A few months later, on August 12, 2004, to emphasize the limitations on the use of the limited FEC data, Aristotle's president circulated a company-wide statement "to reaffirm the use and presentation for the limited FEC data that clients may access through CM5." *See infra* at 16-17.

C. Compliance/Vetting Feature

1. Operation of the Feature

A sub-section of the solicitation management feature is the compliance/vetting feature at issue in this case. This sub-feature permits a committee to view a contributor's history of contributing to that committee and others. It is the only portion of CM5 that utilizes any FEC data, and it is limited to contribution data. That same contribution data – along with contributor names and addresses that CM5 does *not* provide – is widely and easily available, and in a far less restricted fashion, from many sources on the Internet.[4]

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compliance/vetting feature and, thereby, may give an inaccurate impression of Aristotle's marketing plan and CM5 itself. *See, e.g.* Declaration of Bret Garwood, Attachment B. Actually, the majority of these marketing tools emphasize the accuracy and ease of operation of the main purpose of the software – accurate accounting and report generation for filing with the Commission. Any interest generated by these marketing tools was relayed to one of sales persons who personally contacted the potential customer before any sale was made. The sales staff did not promote the feature, and if asked about it, they explained its use for compliance and vetting, and emphasized the limitations on the use of FEC data.

[4] "Numerous on-line services, . . ., also allow users to view and obtain complainant's address." MUR 6053 Factual and Legal Analysis HuffingtonPost.com at 5. *Cf.*, "Congressional Quarterly, hyperlinks to the FEC disclosure report page where the contributor's address is found." *Id.* at 5 n.3. Other examples include Tray.com, Fundrace.org, PoliticalMoneyLine.com, HuffingtonPost.com, PoliticalDatabase.com, etc., as well as the FEC.

The manual for CM5 (February 16, 2005 release), which is over 350 pages long, devotes less than one paragraph to a description of this one feature that provides limited access to contribution data. *See* Attachment C. The description of how to use the feature lawfully – after the committee has first identified the donor from its own records and then has accessed or retrieved that contributor's record – reads as follows:

> **COMPLIANCE/VETTING**
>
> The **Compliance/Vetting** tab shows you other Committees to which the donor has given. It does not require data entry on your part. Simply click on the Compliance/Vetting tab and CM5 will search Aristotle's databases of federal and State data, returning the contributions it can match to the donor. Donors are matched by their name and address, and all past history is displayed.

The manual then goes on to provide proper disclaimers and warnings. Note that the warnings are both in the text of the manual and in the screens. Indeed, the space devoted to the warnings is five times the size of the space provided for a description of how to use the feature.

> The **Report** tab is where you view all of your information on fundraising easily. You can run reports for certain date ranges and organize them in almost any manner. The selection of reports will increase in the future, and Aristotle appreciates your comments and suggestions.
>
> **FEC Compliance Note:** Campaign Manager 5 makes a very limited subset of FEC information available for compliance purposes only, such as insuring against accepting excessive or illegal contributions. The data may also be used to refuse or reject contributions from donors who give to those with whom you may not wish to be associated. This information is not made available here in an interactive format or one where the information may be manipulated, and our software does not allow for the downloading or importing of any FEC contributor information into the client's database. Full searchable and downloadable databases of FEC data are available from www.fec.gov. By law, information copied from FEC reports "may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes...." (The names and

addresses of political committees, however, may be used for solicitation purposes.)

2. Purposes and Usage of the Feature

In early 2004, Dean Phillips, Aristotle's president and chief software architect at the time, designed this feature to serve basic informational purposes. It is well-known that campaigns frequently access FEC donor information for a variety of lawful purposes, such as compliance. The inclusion of FEC contribution data in the feature was designed by Mr. Phillips to allow campaigns to access such data more efficiently for such lawful purposes.[5] At the same time, he specifically designed the feature to exclude names and contact information from FEC data so that they could not be used for prospecting purposes, targeting solicitations, or list-making.

As noted above, certain phrases in some very early marketing suggested one possible solicitation-related use that could arise (in the unusual case that a solicitor intended to ask for

[5] For instance, information about a particular, existing donor's aggregate contributions to all federal political committees is extremely useful in avoiding receipt of illegal or excessive contributions from donors who have reached their aggregate election cycle contribution limits under 2 U.S.C. § 441a(a). This is precisely to sort of compliance usage envisioned by Congress when FECA was enacted. *See Buckley v. Valeo*, 424 U.S. 1, 66 (1974). Second, campaigns can use the information about an existing donor's contributions to other campaigns and committees in order to refuse or reject contributions from donors who have given to other committees with which the campaign does not want to be associated.

In fact, the DC Circuit has stated that a campaign may use FEC data - including names and addresses – even to contact donors for other purposes as well. *See FEC v. International Funding Institute, Inc.*, 969 F. 2d 1110 (D.C. Cir. 1992) (*en banc*) ("*IFI*") *infra* at 24. For example, "[u]nder § 438(a)(4), the defendants may use another committee's list to seek popular support for a particular policy, or to solicit signatures on a petition, or to urge recipients not to contribute to a rival cause, but they may not use the list to solicit contributions." *Id.* at 1115. Although aware of this decision since 2004, Aristotle does not promote such other uses of FEC data and expressly limits intended lawful use of contribution data solely to compliance and vetting.

less than the maximum allowable contribution from someone on the campaign's donor list). However, those phrases concerning this unlikely event were removed when brought to the attention of company counsel shortly after introduction of the feature. Their inclusion in several isolated ads simply reflects lack of coordination between Aristotle marketing and legal counsel for a very brief time five years ago.

The General Counsel cites no evidence of use by Aristotle clients for any improper purpose. And, in spite of senior management's expectations that the compliance/vetting feature might give new customers an additional reason to purchase CM5, the sales staff explained during their interviews by staff in the course of the investigation that virtually no prospective customer for CM5 was interested in the compliance/vetting feature. Since the introduction of the feature, there has been *no* reported instance - not a single one - of its use for impermissible purposes. In addition, there is no evidence that the compliance/vetting feature was even an incidental factor in anyone's decision to acquire CM5, much less a primary reason for acquiring the software. In fact, there is evidence to the contrary, as the statements in the staff's interviews of the sales staff are that the compliance/vetting feature was *not* a factor at all in anyone's decision to acquire CM5.

For example, based on a sample tracking by Aristotle of the feature's usage between November 8, 2007 and October 22, 2008, Aristotle recorded the number of times its CM5 customers used the compliance/vetting feature to retrieve FEC data. Based on that record, of hundreds of committees and even more individuals authorized to use CM5, only three committees retrieved information on five or more contributors and none retrieved information on more than 70. Moreover, the feature was actually disabled from October 22, 2008 until July

2009. During that time, Aristotle received no inquiries as to why it was not functioning. Clearly, the contribution/vetting feature is an incidental, ancillary feature, and the inclusion of limited access to FEC contribution data is obviously not a principal purpose for publishing the software. It is not a reason why campaigns buy the program; and it has been used little by any campaign, for *any* purpose, let alone an improper one.

3. Safeguards Against Impermissible Use

In any event, the contribution vetting/compliance feature is specifically designed to prevent its use as a prospecting or list-making tool. In particular:

- Federal contribution information obtained from the FEC may be accessed through the software only after a three-step process:
    1) The campaign must first have already identified the individual for solicitation, based on information already in the campaign's possession from a source *other* than FEC records.
    2) The campaign must physically, manually retrieve the specific individual's pre-existing record *from within its own database*, either by typing in the name, or locating it within one of the campaign's database lists (again, from a source *other* than FEC records.)
    3) Once the individual record searched has been retrieved in CM5, the campaign may click on the "Compliance/Vetting" tab option for that record. Only at that point will that contributor's contribution data – and only that contributor's contribution data – appear for compliance and vetting. At the same time, the campaign is presented with an on-

screen-warning about the legal restrictions on the use of the data. That onscreen warning incorporates the language of the statutory prohibition concerning misuse of FEC data as follows:

> FEC data warning!!! Any information copied, or otherwise obtained, from any FEC report or statement, or any copy, reproduction, or publication thereof, filed under the Act, should not be sold or used by any person for the purpose of soliciting contributions or for any commercial purpose, except that the name and address of any political committee may be used to solicit contributions from such committees.

As noted above, the user manual contains a more extensive warning. The three-step process set forth above must be performed separately for each individual whose contribution record the campaign wishes to view.

- CM5 only provides access to FEC contribution information for individuals whose names and addresses the customer already has in the campaign committee's database. Names and addresses of contributors from FEC records are not provided through CM5. A campaign therefore cannot obtain a contributor name or address through CM5's FEC data feature.
- The contribution information is only made available in a drop-down format on a single record-by-record basis.
- The contribution information is not made available in an interactive format or one where the information may be manipulated.
- The contribution information is not made available in list form. This means that only if an individual has been identified by the campaign for solicitation

based on information not obtained from FEC records, will the campaign be able to access the drop-down information for that particular prospect.

- Because the FEC data is not integrated or matched into the client's database, the software does not allow for the downloading or importing of any FEC contribution information into the campaign's database.
- Because the FEC data is not integrated or matched into the campaign's database, the software also does not have the capacity to search FEC records based on criteria other than the name of the individual that the campaign already possesses. Thus, for example, in this software environment the campaign cannot search for large donors and cannot ask the system who gives to what kind of candidates. It cannot ask for a list of contributors by city, zip code, or any geographic region whatsoever. It cannot search for those who have not given the maximum contribution to any candidate or who have not reached their aggregate maximum for the entire election cycle. Nor can the campaign utilize the FEC contribution data for any other type of automated data sorting.
- During approximately four months in 2004, the feature could be accessed through a tab on the computer screen titled "Donations" and no warning appeared on the screen itself. However, the training manual that accompanied CM5 included, on the same page as the instructions for the donations tab the following warning: "By downloading this data, you agree to follow all state and federal laws concerning its use." Thereafter, during the first week of

August 2004, the computer screen was modified to include the warning set forth above. Further, even prior to the addition of this explicit warning on the computer screen – approximately four months following introduction of the feature in CM5 – the sales staff provided an equivalent oral warning whenever they discussed the compliance/vetting feature.

- Aristotle's contracts prohibit Aristotle's customers from using its software in any manner that violates the campaign finance laws and regulations.[6]

On August 12, 2004, Dean Phillips, Aristotle's president, issued a comprehensive company-wide statement emphasizing the limitations on the use of FEC data that its customers may access through CM5, and notifying staff that Aristotle had filed a comment asking the FEC to deny a competitor's advisory opinion request to fully integrate FEC data into client databases illegally. That statement reads:

> **Reminder and Update re: Developments Concerning FEC Individual Contributor Information**
>
> I want to take this opportunity to reaffirm the use and presentation for the limited FEC data that clients may access through CM5.
>
> To maintain continued compliance with legal standards for the use of FEC

[6] "WARNING: FEC Compliance. By law, the FEC's public record contribution information may not be sold or used by any person for the purpose of soliciting contributions or for any commercial purpose. Campaign Manager 5 provides access to this information in a drop-down format for individuals whose names and addresses you have in your database, and whom you have already identified for solicitation. The Federal contribution information will appear only after you have accessed the individual's record from within your own database, and it may be used solely for the purpose of insuring that the contributor does not exceed his or her contribution limits or otherwise make an unlawful contribution. Campaign Manager 5 makes the information available for compliance purposes only, and does not allow for the downloading or importing of FEC contributor information."

data, we want to insure that FEC individual contributor information is "not sold or used by any person for the purpose of soliciting contributions or for any commercial purpose".

In order to better clarify and underscore the appropriate uses (as specified in the manuals and FEC guidelines) as they relate to our screens, we have decided to rename one of the tabs from "'Donation" to "Compliance/Vetting". This is in keeping with the appropriate use of the information. Please remember that the limited individual contributor data we present is provided in what we have determined is an appropriate format under the law (which format is actually far more restricted than what is found on the FEC's website and elsewhere). The information is in a drop-down format for an individual whose name and address is already contained in the user's compliance database, and whose record the user has already been identified and called up from its own database for solicitation. We provide no access to address/telephone information from the FEC and we do not store or integrate the data into the client's database. The Federal contribution information will appear only after the user has accessed the individual's record from within the user's own database, and it may be used solely for the purpose of insuring that the contributor does not exceed his or her contribution limits or otherwise make an unlawful contribution. Campaign Manager 5 and PAC Manager 5 make this limited subset of FEC information available for compliance purposes only. This information is not made available in an interactive format or one where the information may be manipulated, and our software does not allow for the downloading or importing of any FEC contributor information into the client's database. The clients are further admonished to comply with the FEC guidelines, which are clearly stated in their contract as well as in the manuals, screens, and company newsletter.

While not difficult to comply responsibly with these standards, other vendors have requested permission from the FEC to make the FEC individual contributor information available to their clients in a manner and for purposes that we believe are clearly not allowed by law.

As part of our ongoing commitment to compliance, we have recently requested that the FEC reaffirm the appropriate standards by denying a request by one of our competitors to fully integrate FEC contributor data into their software application for solicitation purposes. We have made it clear to the FEC, as we have done and will continue to do with our clients, that we regard any FEC-supplied contributor information to be for non-solicitation purposes. Should a client seek more guidance on this subject, we recommend that they review the

> simple language of the FEC restrictions that we have provided to them, and with which they agree to comply, as a condition of utilizing this valuable compliance feature of our software.

(bold added).

In short, the president of Aristotle, who designed the compliance/vetting feature, reminded all of its employees that its customers cannot create any kind of lists of solicitation targets, or even target individuals one at a time, based on searches of FEC contribution history. The information available within CM5 is simply *not* useable in any way for prospecting. Nor would a customer want to use it that way when actual lists of names and addresses have been so readily available from so many other sources, including the FEC. Specifically, the sales staff was again reminded about the limitations of the FEC data provided in the compliance/vetting feature. Moreover, these technological limitations occur in CM5's software environment where extensive warnings are prevalent, and have been so for the last 5 years.

II. LEGAL BACKGROUND

A. Background and Purpose of Section 438(a)(4)

A major purpose of the Federal Election Campaign Act of 1971 as amended, 2 U.S.C. § 431 *et seq.* (the "Act") was to provide public disclosure of campaign contributions and contributors to inform the electorate and enforce the Act's contribution requirements. *E.g.*, *Buckley v. Valeo*, 424 U.S. 1, 66 (1974). As noted by the Second Circuit: "Congress passed the Federal Election Campaign Act of 1971 ("FECA" or "the Act") in order to, *inter alia,* require disclosure of campaign contributions and contributors 'in order to inform the electorate where campaign money comes from, to deter corruption, and to enforce the act's contribution

requirements,' *See generally Buckley v. Valeo*, 424 US 1, 66-68, 46 L.Ed. 659, 96 S. Ct. 612 (1974)". *FEC v. Political Contributions Data, Inc.*, 943 F.2d 190, 191 (2d Cir. 1991) ("*PCD*").

Congress was concerned, however, that list brokers could misuse the information in the reports to the Commission, and consequently that public spirited citizens who contributed to political campaigns would be harassed for solicitations by entities to which they had not contributed. For that reason, Congress included in the Act a prohibition on the use of FEC data for commercial purposes. 117 Cong. Rec. 30057(daily ed., Aug. 5, 1971) *reprinted in* Legislative History of the Federal Election Campaign Act of 1971, at 581 (1981). The prohibition, codified at 2 U.S.C. § 438(a)(4), states, in pertinent part: "any information copied from such reports or statements [filed with the Commission] may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes."

Courts interpreting the provision as it applied to the publication of FEC data by various entities have found its scope to be "ambiguous," because the term "commercial purposes" is not defined. *See infra* pp. 21-26. The courts, accordingly, have looked outside the letter of the statute for guidance, beginning with the legislative history.[7]

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[7]In part to fill the gap left by the ambiguity in the language of the "commercial purposes" provision, the Commission promulgated a rule known as the "media exemption." *See* 11 CFR § 104.15(c); *see also* 11 CFR §§ 100.72, 100.132. The media exemption follows the suggestion in the legislative history that 2 U.S.C. § 438(a)(4) was not intended to bar the use or publication of FEC data for *bona fide* news reporting purposes. It creates an exemption when use of FEC data is "incidental" to the journalistic purpose, and is not the "primary purpose" of the publication. The media exemption, therefore, exempts only incidental "use" of the data, and does not authorize the "sale" of FEC data lists under any circumstances by any organization--media or otherwise. As written, it is therefore a very narrow exemption. As the D.C. district court held: "What matters is not who owns [the list seller] or the nature of that owner's businesses, but the principal purpose and type of communication in which the campaign

The entire legislative history of 2 U.S.C. § 438(a)(4) consists of a brief colloquy on the Senate floor. On August 5, 1971, Senator Bellmon introduced an amendment to "protect the privacy of public spirited citizens who may make contributions to a political campaign." 117 Cong. Rec. 30057(daily ed., Aug. 5, 1971) *reprinted in* Legislative History of the Federal Election Campaign Act of 1971, at 581(1981). He stated his belief that, "these *names* would certainly be prime prospects for all kinds of solicitations." *Id.* (emphasis added). Accordingly, the purpose of the amendment was to prevent "all kinds of harassment" that could arise because the Act required federal committees to make public the names and contact information of its contributors. He gave an example of his state's tax division that "sells the *names* of new car buyers to list brokers." *Id.* at 30058 (emphasis added). He explained that "list brokers, under this amendment, would be prohibited from selling the list or using it for commercial solicitation." *Id.*

The amendment passed and was codified at 2 U.S.C. § 438(a)(4). Thus, Sen. Bellmon intended the term "for commercial purposes" to apply to the sale of lists of *names* by list brokers for purposes of prospecting and targeting solicitations. Indeed, there is no commercial value in the sale of a prospect list that does not contain the names and contact information of people who can be solicited.

B. Section 438(a)(4) Has Consistently Been Interpreted to Be Limited to Sale or Use of Contributor Names and Contact Information for Prospecting Purposes

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contribution information is used. Even a corporation that is 'an organ of the press,' *Legi-Tech, Inc. v. Keiper*, 766 F.2d 728, 730 (2nd Cir. 1985), or otherwise in the newspaper or multi-media business, is not entitled to compile FEC campaign contribution lists for the primary purpose of a commercial sale of that information." *FEC v. Legi-Tech,* 967 F. Supp. 523, 532 (D.D.C. 1997).

Section 438(a)(4) has consistently been interpreted to ban only the sale of FEC data that is akin to list-making and list-brokering—sale of names of prospective donors, taken from FEC reports. As stated in the legislative history, the purpose is to protect contributors from solicitation targeting and harassment based on the appearance of the donor's name in such reports. The section does not create a blanket prohibition on use or sale of FEC data for purposes that do not implicate that concern. The courts have been clear that application of the statute depends on balancing the goal of disclosure with the goal of protecting contributor privacy. Further, these courts have also been clear that application of 2 U.S.C. § 438(a)(4) requires a full contextual analysis of the purpose for which the data is made available, the type of FEC data published, the design of the media through which the FEC data is made available, and whether the data has been used for impermissible solicitations.

1. The Second Circuit's Decisions

In *FEC v. Political Contributions Data, Inc.*, 943 F.2d 190 (2d Cir. 1991) ("*PCD*"), the Commission sued PCD for violating 438(a)(4) by selling reports containing FEC data. "The FEC contend[ed] that PCD's activities [fell] squarely within the sweep of the 'commercial purposes' prohibition, since PCD sold information compiled from FEC reports for a profit." *PCD*, 943 F.2d at 194. The Court of Appeals disagreed, calling the FEC's position "a 'we know it when we see it' interpretation of § 438(a)(4)." *Id.* at 196. The Court examined both the purpose and design of the publication, and held that the absence of contact information making the data useable for solicitation, plus the inclusion of appropriate warnings, put the sale of the data outside the scope of section 438(a)(4):

> '*Purpose*' permeates the very text of § 438(a)(4). There is little, if any, risk that PCD's lists will result in solicitation or harassment of contributors. The absence from PCD's reports of mailing addresses and phone numbers, as well as the caveat on each page against solicitation and commercial use, make it virtually certain that these reports will be used for informative purposes (similar to newspapers, magazines, and books, which are 'commercial purveyors of news', . . . not for commercial purposes (similar to soliciting contributions or selling cars).

Id. at 197 (emphasis added). The Court further noted the complete absence of any evidence that the data had been misused by PCD's clients: "The undisputed facts confirm this analysis. Of over 100 PCD customers, only two said that they had purchased the reports for solicitation purposes; neither one actually solicited using PCD's lists; and one of them specifically noted the disclaimer and the lack of addresses as factors which led him to abandon that idea." *Id.* The court next observed that the design of the publication was not one that placed the "privacy interests of contributors" at risk: "The §438(a)(4) prohibition is violated by a use of FEC data which could subject the 'public-spirited' citizens who contribute to political campaigns to 'all kinds of solicitations'. PCD's publications plainly are not designed in that manner." *Id.*

In a later proceeding, the Second Circuit upheld the award of attorney's fees on the grounds that the FEC's position was "not substantially justified." The Court noted that the FEC's position defied Congressional intent to make FEC data available "in order to inform the electorate where campaign money comes from, to deter corruption, and to enforce the act's contribution requirements:"

> The [*PCD*] panel ruled that an analysis of legislative history established that the Commission had adopted an unreasonably restrictive interpretation of the provision in question and of its own corresponding regulation, 11 C.F.R. § 104.15(c) (1991). It further ruled that such interpretation, by prohibiting the distribution of appellant's contributor lists, had defied the congressional intent behind the Act, namely to require disclosure of campaign contributions and contributors 'in order to

> inform the electorate where campaign money comes from, to deter corruption, and to enforce the act's contribution requirements,' 943 F.2d at 191. It observed that the government's reading of its regulation 'would very likely run afoul of the First Amendment,' *id.* at 197.

FEC v. Political Contributions Data, Inc., 995 F.2d 383 at 384-385 (2d Cir. 1993) ("*PCD II*") (footnote omitted) (summarizing the holding in *PCD*). The *PCD* decision therefore makes clear that the FEC must examine (a) the purpose, design and type of FEC data published, (b) must analyze whether such publication is consistent with Congressional intent under the Act, (c) must determine whether, on balance, the publication is the sort that is likely to subject the "public-spirited" citizens who contribute to political campaigns to "all kinds of solicitations" and (d) analyze whether, in fact, there is any evidence that the data had been misused by the publisher's clients.

2. The D.C. Circuit's Decisions

In *National Republican Congressional Committee v. Legi-Tech*, 795 F.2d 190 (D.C. Cir. 1986) ("*NRCC*"), the D.C. Circuit, like the Second Circuit, noted that the plain language of section 438(a)(4) was ambiguous as to the meaning of "commercial purpose." *Id.* at 192. The Court further held that, in interpreting the scope of that section, the congressional purpose of promoting disclosure of contributor information must be considered; and that the "brief history of the 'commercial purposes' floor amendment reveals that it was intended to protect campaign contributors from the barrage of solicitations they would receive if 'list brokers' were allowed to sell donor lists on file at the FEC." *Id.* at 192. The court also quoted AO 1980-78, which stated that the "prevention of list brokering, not the suppression of financial information, is the purpose of 2 USC §438(a)(4) and the implementing regulation of the Commission." *Id.* at 192-93. The D.C. Circuit's analysis thus makes clear that the amendment seeks to prevent list-brokering that

would lead to a barrage of solicitations. And it refutes the notion that the amendment was even arguably intended to curtail the free inclusion of FEC contribution data in non-list form for compliance purposes, in the manner that the data is offered in CM5.

Again, in *FEC v. International Funding Institute, Inc.*, 969 F. 2d 1110 (D.C. Cir. 1992) (*en banc*) ("*IFI*"), the D.C. Circuit ruled that the term "commercial use" in 2 U.S.C. § 438(a)(4) applies only to the names of contributors because that is the source of the commercial value of the FEC data: section 438(a)(4) " does not prevent one from soliciting a person who is on a committee's contributor list, *so long as one does not obtain that person's name* (directly or indirectly) *from a list filed with the FEC.*" *Id.* at 1118 (emphasis added).

The Court also made clear that section 438(a)(4) does not bar uses of FEC data for purposes other than creating a list of names for potential solicitation. For example, "[u]nder § 438(a)(4), the defendants may use another committee's list to seek popular support for a particular policy, or to solicit signatures on a petition, or to urge recipients not to contribute to a rival cause, but they may not use the list to solicit contributions." *Id.* at 1115.

3. The U.S. District Court for the District of Columbia

FEC v. Legi-Tech, 967 F. Supp. 523 (D.D.C. 1997) ("*Legi-Tech*") involved an egregious and flagrant violation of section 438(a)(4)'s prohibition against list-brokering and use of FEC data for prospecting and targeting solicitations. "Legi-Tech provided subscribers with information regarding contributors and their contributions, including the contributors' telephone numbers and street addresses." *Legi-Tech*, 967 F. Supp. at 525. Legi-Tech expressly sold the

lists for purposes of finding prospects for solicitation.[8] *Id.* at 527. For example, one of Legi-Tech's expressly stated purposes was for the Democratic Congressional Campaign Committee ("DCCC") to search Legi-Tech's database of FEC data to create a prospect list of those contributors who had not exhausted their contribution limit, so that they could be targeted for a further contribution to other candidates. "A major use for the DCCC will be to look up contributors for a particular election cycle and see if they have exhaused (sic) their limit amount to any candidate so that if not, they can be approached for a further contribution pledge to one of their affiliated members." *Id.* at n. 5. In addition, "Legi-Tech planned to 'challenge the various federal laws against commercial use of this information' as a central part of its marketing strategy, hoping that 'the ensuing controversy regarding the campaign contribution laws and our open disregard for them will provide for an extremely quick market identification.' Simply put, Legi-Tech invited this suit as a central component of its marketing strategy." *Id.* at 525 (citation omitted).

The Court, understandably, found that these uses of the FEC data fell squarely within the proscription of section 438(a)(4) and the Commission's implementing regulation, which prohibit "list-making: the copying and selling of campaign contributor and contribution information

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[8] At least one fundraiser used Legi-Tech's lists to create and market a solicitation list: "One of Legi-Tech's CCTS [FEC database] customers, the International Funding Institute, Inc. ('IFI'), used the CCTS information to create and market a solicitation list. IFI, a political and managerial consulting firm that engaged in fundraising, advertising, public relations, marketing and other commercial activities, subscribed to the CCTS in May of 1986. One mailing list, entitled 'Active Republican Donors,' was compiled exclusively from information provided to IFI through its subscription to the CCTS database. During September of 1986, IFI marketed the 'Active Republican Donors' list to at least five different organizations, at least four of which used the information to solicit contributions." *Id.* at 527 (footnote omitted).

where the principal purpose is the sale of that information, *a transaction akin to list-making and brokering*." *Id.* at 531 (emphasis added).

The judge also suggested that the use of the names and addresses from disclosure reports filed with the FEC is permissible so long as that use is incidental to the sale of a larger publication. *Id.* at 529. But the Court rejected Legi-Tech's claim that the "media exemption" allowed an "organ of the press" to sell lists for profit:

> What matters is not who owns Legi-Tech or the nature of that owner's businesses, but the principal purpose and type of communication in which the campaign contribution information is used. Even a corporation that is 'an organ of the press,' *Legi-Tech, Inc. v. Keiper*, 766 F.2d 728, 730 (2nd Cir. 1985), or otherwise in the newspaper or multi-media business, is not entitled to compile FEC campaign contribution lists for the primary purpose of a commercial sale of that information.

Legi-Tech at 532 (emphasis added). Thus, when the sale of contributor information is, in fact, the "principal purpose and primary focus" of the publication, or when the type of communication is the sale of lists of names of contributors who will be solicited, a violation of §438(a)(4) occurs. *Id.*

Legi-Tech is entirely consistent with the line of cases holding that the scope of section 438(a)(4) is limited to sale of lists of contributor names and information from FEC reports, to entities that do not already have that information, for the purpose of enabling those entities to target those donors for solicitation.

4. Commission Advisory Opinions

The Commission itself has adopted that limiting construction. In situations in which the seller of data was excluding the names and addresses of contributors, the Commission has found no violation of 2 U.S.C. § 438(a)(4). Thus, in AO 1980-78, the Commission held that the

purpose of 2 U.S.C. § 438(a)(4) is the "prevention of list brokering" and, therefore, does not prohibit a committee from soliciting contributors whose names appear in its own reports. *E.g.* AO 1980-78, *citing* AO 1977-66. Similarly, in AO 1980-101, the Commission made clear the difference between selling impermissible contributor information and permissible contribution information. The requester intended to publish a directory to "help candidates better target their funding requests." AO 1980-101. Relying on "the intent behind 2 U.S.C. 438(a)(4) and the language of 11 CFR 104.15 the Commission conclude[d] that, except for information *identifying individual contributors*, any of the information found in FEC documents or documents filed with the Commission may be used in the subject publication." *Id.* (emphasis added).

In AO 1989-19, the Commission stated affirmatively that the requester could sell FEC data that does not include the identity of contributors, without violating 2 U.S.C. § 438(a)(4). "You have stated you will only market copies of report pages that do not contain the *names of individual contributors*. The Commission concludes that nothing in the Act or Commission regulations prohibits your proposed activity." AO 1989-19 (emphasis added); AO 1991-16 (same). Again, in AO 1995-9, the Commission ruled that, "Based on the legislative history of the Act, the Commission has previously stated that the 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." AO 1995-9 (citations omitted, emphasis added). The Commission concluded that lists containing the contributors' name and contributors' cities and states, but did not include their street addresses or telephone numbers, "do not appear to contain sufficient information to generate solicitations to [] contributors. Moreover, the public posting of contributor information on the World Wide Web site appears similar to the situation in

FEC v. PCD." *Id.* Thus, the FEC has traditionally looked at the type of data, purpose, and design of the publication. *Cf.*, *Legi-Tech*, 967 F. Supp. at 532 (what matters is...the principal purpose and type of communication in which the campaign contribution information is used").

The most recent advisory opinion on this subject, and the one upon which the General Counsel principally relies, is AO 2004-24, which involved downloadable contribution data that NGP sought to integrate into client databases for unlimited purposes, including prospecting and solicitation.[9] NGP, the requestor and the complainant here, described its software product as "an integrated financial system with fundraising, prospecting, and Federal and State campaign finance reporting features." AO 2004-24. NGP asked the Commission if it would be permissible to "integrate [FEC contribution data] into a client's personalized NGP Campaign Office system database." The request sought approval to "sort and organize" the data, and to match that data into the client's database "based on the clients' needs," and "regardless of intended use." It made no mention of any technological limitations on downloading or list-making with the data; and it made no mention of making the data available for lawful uses such as compliance. To the contrary, a principal purpose stated by NGP was giving its clients the ability to target those "existing donors who may have given more to other committees." On the face of the request, the purpose, intent and design of such unlimited integration clearly was to allow export and import of the FEC data, and creation of lists for targeting solicitations. *Id.* NGP's request also displays on its face that it was intended to go beyond what was permissible,

[9] AO 2004-24 was requested by NGP Software, Inc., a competitor of Aristotle and the complainant in this matter. The request was made after Aristotle introduced the compliance/vetting feature.

by acknowledging that the FEC could have to "reinterpret the scope of the law and prior Advisory Opinions" to allow the expansive uses in the proposal.

NGP's request for a "reinterpretation" of the law that would allow NGP to sort and organize contributor data and integrate them into the clients' databases for unlimited uses "based on the client's needs" – including making lists of prospects to target for solicitations – clearly violated 2 U.S.C. § 438(a)(4) in two ways. *First*, NGP's proposal violated the prohibitions described by the courts and in the statute and the legislative history on use of the data to make lists for "soliciting contributions," and on selling the data "regardless of intended use," so that it could be used for any purposes without regard to contributor privacy. NGP provided no other limitations on proposed usage. *Second*, NGP gave no indication that it would even advise its customers of the Act's restrictions on the use of the FEC data. To the contrary, as noted above, NGP intended that the data be integrated into searchable client databases and used for creating prospect lists and targeting solicitations. NGP's request, therefore, was designed to challenge, change or "reinterpret" the law, rather than comply with the parameters set in previous precedent. In that respect, NGP's proposed scheme and request for "reinterpretation" of the prevailing standards was akin to Legi-Tech's knowingly illegal use of FEC data, and its intention to challenge the law.

The General Counsel issued Draft AO 2004-24, which not only declared NGP's proposed scheme to be illegal, but also stated that the mere inclusion of any individual contributor FEC data in campaign software was necessarily unlawful use "*for a commercial purpose because NGP is a for-profit company that sells and services NGP Campaign Office for a profit.*" Aristotle filed a comment urging the Commission to reject NGP's request to reinterpret the law

to allow use of FEC data for, *inter alia*, creating prospecting lists for targeting solicitations. At the same time, however, Aristotle expressed concern that the quoted phrase in the General Counsel's draft was overbroad. Specifically, Aristotle argued that because such language focused solely on the "for-profit" status of the publisher and the fact that the data appeared in campaign software sold "for profit," the draft language improperly suggested that the context, design and purpose of the actual use of the data in campaign software were irrelevant.

Accordingly, Aristotle's comment supported the result of the Draft Advisory Opinion to ban NGP's obviously illegal proposed uses, but also specifically urged the Commission to remove the statement that the proposal was necessarily unlawful use "*for a commercial purpose because NGP is a for-profit company that sells and services NGP Campaign Office for a profit.*" The Commission apparently concurred with Aristotle's concern about creating what might have appeared to be a "*per se*" rule with respect to any publication whatsoever of any FEC contribution data in campaign software sold for profit.. Thus, by unanimous vote, the Commission's final opinion declared NGP's proposed scheme to be illegal. At the same time, it removed the language stating that the basis for its ruling was that any publication of FEC data by a for-profit publisher of campaign software sold for profit would necessarily be illegal.

The removal of the language that appeared to create a rule of *per se* illegality for publishing any FEC data in for-profit campaign software under any circumstances was extremely significant. It underscored the continued commitment of the courts and the Commission to an analysis based not on the for-profit status of the publisher or the publication, but on what the *Legi-Tech* court called "the principal purpose and type of communication in which the campaign contribution information is used." *See Legi-Tech*, 967 F. Supp. at 532. *See also* PCD, 943 F.2d

at 197 (focusing on purpose, type of data published, and usefulness of publication for creating prospect lists).

This same commitment, in fact, is reflected in all of the Advisory Opinions cited in AO 2004-24. *See e.g.* AO 1984-2 ("The prohibition is intended to prevent the use of contribution information taken from disclosure documents filed under the Act to make solicitations. It is not intended to foreclose the use of this information for other, albeit political, purposes, such as correcting contributor misperceptions."). In deciding that NGP's request involved an impermissible use of FEC data, AO 2004-24 described the purpose of 2 U.S.C. § 438(a)(4) as follows: "As the Commission has explained in previous advisory opinions, the purpose of restricting the sale or use of information obtained from FEC reports is to *protect contributors from having their names sold or used* for commercial purposes. *See* Advisory Opinions 1998-4, 1995-5, 1991-16, 1989-19, 1986-25, 1981-38, and 1980-101." AO 2004-24 (emphasis added).

Without further analysis of context, design or purpose, the Commission's rejection of NGP's request for reinterpretation of the law was stated in a conclusory manner. That is, the Commission announced that NGP's proposal would be illegal use for a commercial purpose, but did not specify the reason why. It simply stated its conclusion. It did not refer to *PCD* or any other judicial decision, and did not discuss the effect of the omission of the names of contributors from the information obtained from the FEC data. It also did not address the prior advisory opinions that permitted the use of FEC data that did not include the names of contributors.

However, the Commission's final version of AO 2004-24 does clearly state that it only "concerned the application of the Act and Commission regulations to the specific transaction or

activity set forth in [NGP's] request." *Id.* Thus, by its own terms, the advisory opinion expressly prohibits: a) the creation of a database for fundraising purposes by integrating contributor names from a private database with matching contribution information from the FEC database; b) based on the client's needs; c) regardless of intended use; d) in a form expressly intended to facilitate creation of lists of solicitation targets; and e) without inclusion of FEC warnings or any other technological limits.

AO 2004-24 is therefore extremely limited, addressing only NGP's request that the FEC "reinterpret" the law to permit the blatantly illegal uses that NGP proposed. As discussed further below, AO 2004-24 therefore does not present or address a situation even remotely analogous to the highly limited presentation of non-downloadable FEC contributor data in CM5, published solely and expressly for lawful purposes. Other than the fact that both involve campaign software, there is no similarity.

5. Recent Commission Enforcement Decisions Permit For-Profit List Sales and Other Publication of FEC Data for Commercial Purposes

Commission decisions in recent enforcement matters further confirm the limited scope of the restrictions in section 438(a)(4). These recent actions allow for-profit list sales, as well as use of FEC data for other commercial uses when the publication is deemed to be for "informational" purposes.

In MUR 5155, the Commission permitted sales of FEC data lists, without relying upon the media exemption or its primary/incidental purpose distinction. This MUR also dispels any possibility that AO 2004-24 was intended to create a *per se* illegality rule with respect to sale of FEC data by a for-profit company.

MUR 5155 considered the allegation that TRKC, Inc., the operator of the PoliticalMoneyLine web site, violated 2 U.S.C. § 438(a)(4) by offering both a free and a more sophisticated paid subscription service that provided access to the FEC data. PoliticalMoneyLine's free service included a searchable, downloadable database that finds contributors based on user-specified selection criteria and provides names, addresses, and contribution information based on the criteria. MUR 5155, General Counsel's Report #3, dated May 3, 2006, at 10. The subscription service "allows users to organize and sort large amounts of data more efficiently." *Id.* For example, a user can obtain a spreadsheet suitable for list-making of all of the donors to all federal political committees in a specified city.[10] In other words, the service sells searchable, downloadable electronic lists, in a form that facilitates the creation of prospect lists. During part of the period included by the Commission investigation, TRKC also did not provide any warnings on the impermissible uses of FEC data, and the Commission

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[10] PoliticalMoneyLine, now called "CQ MoneyLine makes it easy to:

> Track contributions from PACs, individual donors and politicians to elected officials, candidates and party committees.
>
> Find out which industry sectors raise and distribute the most, and where the dollars are going.
>
> Follow the flow of soft money through 527 groups, such as MoveOn.org and Swift Boat Veterans for Truth.
>
> Retrieve information on thousands of lobbyists, indexed by client and issue.

Plus, **you can search for individual donor information by name, city, zip code and more**, and download the results to a spreadsheet format." (bold added). http://moneyline.cq.com/pml/search.do?pacRecipName_0=2000&matchType_0_pacRecipName=c&electionCycleId=16&LTN=campaignFinance, visited on June 24, 2009 (emphasis added).

apparently discovered at least one actual illegal use of the FEC data to target solicitations from donors whose names were obtained from the PoliticalMoneyLine web site. *Id.* at 11.

Nevertheless, after analyzing the applicable law, including the court decisions discussed above, the General Counsel recommended, and the Commission agreed, to dismiss the MUR as to the free searchable database because the FEC data was provided at no cost and, therefore, by definition, was not a "sale of FEC data for a commercial purpose." *Id.* at 12.

As to the subscription services by which TRKC sold searchable, downloadable lists of contributor names and other FEC data for profit, the Commission found no violation on the ground that the data was the same as that being given away free on the website. The Commission distinguished *Legi-Tech,* saying that Legi-Tech sold computerized donor lists for the express purpose of allowing customers to solicit those donors, thus "violat[ing] both the intent and text of the Act." *Id.* at 9. Significantly, despite the *per se* analysis used by the General Counsel here that would expressly bar such for-profit list sales by TRKC, the Commission analyzed the context of the facts and circumstances in the MUR, and did so without employing the principal/incidental purpose analysis upon which the media exemption depends.[11]

[11] The General Counsel's memorandum also stated that "TRKC; Inc. is more of an information-gathering service and, therefore, more akin to Political Contributions Data, Inc. with respect to the information it provides and maintains. Similarly, TRKC, Inc. is an Internet news and tracking service that assists media organizations, corporations, trade associations, individuals and non-profit groups with data collection, storing, transmission, linking, analysis and display of complex financial and political information." *Id.* However, the General Counsel did not refer to the media exemption or its primary/incidental purpose standard as the rationale he provided to the Commission for dismissing the matter. *Id.* ("it does not appear that TRKC engaged in the sale or use for a commercial purpose of information filed with the Commission. Therefore, this Office recommends the Commission take no further action as to TRKC, Inc.").

The Commission also specifically distinguished the facts in AO 2004-24 from the facts in MUR 5155. *Id.* at 9-12. "[T]he Commission's final language in AO 2004-24 found that an entity, for-profit or otherwise, that sold FEC data in a software upgrade or as a separate service would be in violation of the Act." *Id.* at 12. However, "upon review of the evidence in [MUR 5155] and interviews with the founders of TRKC, Inc.," the Commission concluded that "it does not appear that TRKC engaged in the sale or use for a commercial purpose of information filed with the Commission." *Id.* It appears that the Commission's rationale was that TRKC "does not create mailing lists. Further, TRKC, Inc. does not sell a product or service that aggregates an individual donor's contributions." *Id.* at 10. The Commission also concluded that the subscription service does allow "users to organize and sort large amounts of data more efficiently," *i.e.* create sorted lists of contributors' identifying information and contributions useful for list brokering and prospecting. However, the Commission found that the subscription service did not violate section 438(a)(4) because the same information could be obtained free from the non-subscription service. *Id.*

In other words, MUR 5155 conclusively establishes that AO 2004-24 does not create a *per se* rule. Moreover, it establishes that even for-profit services outside of the media exemption, that permit a customer to create computer lists containing names and contact information from the FEC data usable for solicitation purposes, are not necessarily violating section 438(a)(4), depending on the context. This MUR obviously allows the for-profit sale of far more data that

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In contrast, in MURs 6053 and 6065, the FEC data was provided at no cost, but the Commission's decision to dismiss the matter relied only on the media exemption in 11 CFR § 104.15(c). MUR 6053 Factual and Legal Analysis for Huffingtonpost.com at 6, MUR 6065 Factual and Legal Analysis for PoliticalBase.com at 5-6.

can be sorted, searched, organized and downloaded for uses that threaten contributor privacy, than CM5 offers in non-downloadable, single record format solely for lawful uses.[12]

In apparently consolidated MURs 6053 and 6065, HuffingtonPost.com and PoliticalBase.com, respectively, are news and opinion websites that did "not charge a fee or require users to subscribe to see the [FEC data] contributor information." *Id.* HuffingtonPost.com accepted advertisements and PoliticalBase.com intended to sell advertising space. "HuffingtonPost.com obtains its data from the Commission's disclosure database and manipulates it to offer more ways to search it than available on the Commission website. For example, HuffingtonPost.com offered users the ability to search federal political contributions by occupation, address, employer, and name. In addition, the website provides a mapping feature, which pinpoints and displays a contributor's address and location on a map." MURs 6053 and 6065 Factual and Legal Analysis: HuffingtonPost.com, at 2-3. The complainant alleged that the posting of her address makes her a prime prospect for various solicitations such as cars, credit cards, magazine subscriptions and vacation trips." *Id.* at 5.

Nevertheless, the Commission determined that despite using access to the data to sell advertising, and the FEC data was offered independent of any news story, HuffingtonPost.com and PoliticalBase.com are "similar to a newspaper or magazine and its principal purpose in displaying the contributor information appears to be informational." *Id.* at 6. Accordingly, the

[12] Clearly, the TRKC's subscription sales of lists of FEC data for-profit could not be deemed "incidental" to news stories. Indeed, the non-subscription service can be and was used independently from any news story, editorial or any other content published by TRKC. These are pure stand-alone list sales for profit, plain and simple.

Commission dismissed these MURs because the respondents' activities were protected by the media exception to 2 U.S.C. § 438(a)(4).

In the context of the media exemption,[13] however, "informational" should mean that FEC data is provided as an "incidental" part of the news story or editorial, e.g. contributor A made a contribution to candidate X, campaign B has more contributions than campaign Y, etc. However, it is not clear what the General Counsel meant by "informational" in these MURs because the FEC data could be searched independent of any story or analysis; indeed, the General Counsel did not describe a news story or analysis that relied upon or described FEC data.

It therefore appears that the reasoning in MURs 6053 and 6065 is based on interpretation of the extra-statutory term "informational," which apparently has no defined objective meaning other than that anyone can legally provide an "informational" service permitting the ability to download lists of FEC data, regardless of whether the downloading of the list is the primary purpose of the transaction or is incidental to a news story. That is, MURs 6053 and 6065 suggest that it is only illegal to sell the list itself obtained from the FEC data – although even that limitation is called into question by MUR 5155 . Alternatively, the conclusion could be reached that MURs 6053 and 6065 appear to be based on the very defense that the court rejected in *Legi-*

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[13] *See* 11 CFR 104.15(c). "The use of information, which is copied or otherwise obtained from reports filed under 11 CFR part 104, in newspapers, magazines, books or other similar communications is permissible as long as the principal purpose of such communications is not to communicate any contributor information listed on such reports for the purpose of soliciting contributions or for other commercial purposes." *See also supra* p. 19 n.7.

Tech—namely, that the nature of the publisher is determinative of whether or not the sale or commercial use of the data is permissible.

These three recent MURs muddle the analysis provided by the Commission's advisory opinions that it is illegal to sell lists of contributor names and contact information, but other information can be legally sold.

III. DISCUSSION

A. Aristotle Has Not Violated 2 U.S.C. § 438(a)(4)

1. The Compliance/Vetting Feature Is Not Within the Scope of Section 438(a)(4).

The courts and the Commission itself have limited the scope of section 438(a)(4) to the sale of contributor information that the recipient does not already have, in a way and in a form that can be used to create prospecting lists to target new potential contributors. The recent Commission enforcement decisions, MURs 5155, 6053 and 6065, have approved of the sale and uses of FEC data that includes contributor information organized in downloadable list form in certain circumstances. Consistent with every single one of these precedents, the compliance/vetting feature of Aristotle's CM5 software program does *not* and cannot be used for the impermissible purposes of prospecting and list brokering. It does not produce a list of contributors – it only produces the contributions of one contributor at a time. Even it did produce a list, the lack of names or other identifying information obtainable from the compliance/vetting feature would make the list worthless for solicitations.[14] The FEC

[14] The General Counsel may argue that the contributor information from the compliance/vetting feature could be combined with the contributor names in the campaign committee's records to

contribution data revealed by the feature can be used only for the permissible purposes of compliance and vetting, after the committee had identified the donor for contact, using non-FEC information in the committee's database.

Indeed, even before the FEC's recent MURs describing new permissible sales and commercial uses of contributor information obtained from FEC data, the compliance/vetting feature already satisfied all of the criteria described in *PCD*, *NRCC* and *IFI* for permissible uses of FEC data. First, "the purpose of the commercial exception [to the disclosure provisions of the Act] contained in § 438(a)(4) was to protect political contributors from unwanted entreaties from vendors of merchandise such as 'cars, credit cards, magazine subscriptions and cheap vacations," *PCD* at 197. The compliance vetting/feature cannot be used to identify contributors for solicitations. Like "the reports sold by appellant [in *PCD*], which omitted the mailing addresses and phone numbers of the contributors and included a disclaimer against their use for soliciting contributions or any commercial purposes, [and] 'posed little, if any, risk' of unwanted harassment," *PCD II*, 995 F.2d at 385, the compliance/vetting feature poses no risk of harassment because it omits names, address and phone numbers. Indeed, the compliance/vetting feature cannot cause or increase solicitations. A CM5 user can only use the compliance/vetting feature after it has decided to contact contributors whose record the user has already retrieved from its own database.

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create a commercially viable list. However, a committee may use or sell the names of its own contributors without violating 2 U.S.C. § 438(a)(4). And there is no evidence whatsoever that such use has ever been suggested, discussed, or even considered, much less that it has occurred.

Second, like the lists in *PCD*, which were "designed in a manner that will further First Amendment values and not infringe contributor privacy by abetting solicitors," *PCD*, 943 F.2d at 196, the compliance/vetting feature was designed to prevent violations of the Act's contribution limits and provide information to campaigns so that they could exclude contributions from potential contributors with whom they did to want to associate.[15] If anything, this reduces donor contacts. Just as the data provided in *PCD* was for a permissible purpose – providing information – the compliance/vetting feature provides information for a permissible purpose – compliance and vetting.[16]

Third, the CM5 compliance/vetting feature, like the data in *PCD*, includes express warnings against use of the data in violation of section 438(a)(4). In fact, the CM5 feature includes safeguards that go well beyond those in *PCD*, as explained above: In addition to the explicit warnings at every step of the process, it is literally, physically impossible for a user of the feature to use the FEC data to find prospects or develop a list of potential donors for solicitation purposes.[17]

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[15] *Cf.*, *IFI*, 969 F.2d at 1116-1118 (2 U.S.C. § 438(a)(4) allows use of FEC data "to seek popular support for a particular policy, or to solicit signatures on a petition, or to urge recipients not to contribute to a rival cause... .").

[16] Apparently, the Commission's argument that the *PCD* information could also be used for impermissible purposes was irrelevant to the Second Circuit's decision.

[17] In fact, the lists in *PCD* had a greater potential to be used by a list broker because the purchaser of the lists described in *PCD* could have easily found the missing addresses for the identified contributors. In contrast, a list of contribution information cannot be used to discover the identities of the contributors.

The General Counsel's argument here is essentially the same *per se* violation argument that was rejected in *PCD*: "Aristotle was selling, and continues to sell, FEC data for commercial purposes by downloading the individual contributor histories from the FEC Web site and then selling this information to its customers through the CM5 software product." GC Brief at 14. She fails to acknowledge the holding in *PCD, NRCC, IFI* and the Commission's own rulings that a contextual analysis is necessary to determine, *inter alia*, (a) whether contributor names and contact information are being "sold;" (b) if they are being published in a design that facilitates or even permits prospecting and targeting solicitations; (c) whether the stated purpose for publishing the data is list brokering; (d) whether the type of information published is akin to what a list broker sells; (e) whether warnings are included; (f) whether inclusion of the data is the principal purpose of the publication in which it is made available, or is incidental to a news story; (g) whether there is evidence that any clients have misused the data, and (h) perhaps most important, whether the use of the data fits within Congressional intent in making the data available, balanced against possible intrusion on contributors' privacy. The General Counsel's argument that the contributor lists in *PCD* (which did not provide mailing address or phone numbers) and the compliance/vetting contributor information are different because Aristotle's customers already have the names and addresses of contributors highlights the error in her legal reasoning. CM5 users cannot obtain contributor names or contact information from the FEC data. Thus, under *PCD* and the other legal precedents, there is no violation of 2 U.S.C. § 438(a)(4).

The General Counsel relies heavily on the district court decision in *Legi-Tech*. GC Brief at 3-5 and 12. The *Legi-Tech* judge held that the Commission's regulation proscribes "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." *Id.* at 530 (emphasis added). Thus she followed the D.C. Circuit's holding in *IFI* that 2 U.S.C. § 438(a)(4) "does not prevent one from soliciting a person who is on a committee's contributor list, so long as one does not obtain that *person's name (directly or indirectly)* from a list filed with the FEC." *IFI*, 969 F.2d at 1118 (emphasis added).

The General Counsel argues that: "Similar to Legi-Tech, Aristotle was selling, and continues to sell, FEC data." [18] GC Brief at 4. But if this overly simplistic analysis were correct (assuming *arguendo* that Aristotle "sells" the data), then TRKC could not legally have been permitted to sell the data in MUR 5155. GC Brief at 4. More important, however, the facts underlying the *Legi-Tech* decision have absolutely nothing in common with the facts in this case. "Legi-Tech provided subscribers with information regarding contributors and their contributions, including the contributors' telephone numbers and street addresses." *Legi-Tech* at 525. "Legi-Tech planned to 'challenge the various federal laws against commercial use of this information' as a central part of its marketing strategy, hoping that 'the ensuing controversy regarding the campaign contribution laws and our open disregard for them will provide for an extremely quick market identification.'" *Id.* (citation omitted).

In addition, the General Counsel's attempts to equate Aristotle's conduct with that of Legi-Tech depend on an omitted key phrase from the critical quote. In an effort to create the appearance of an equivalent fact pattern that does not in fact exist, the General Counsel partially

[18] Here, the General Counsel is specifically referring to her self-defined historical *contribution information*, in contrast to Legi-Tech, which was selling *contributor* information.

quotes the *Legi-Tech* Court's observation of how Legi-Tech intended for the DCCC to use the list to identified targets to solicit contributions to other affiliated committees. The *Legi-Tech* court stated: "A major use for the DCCC will be to look up contributors for a particular election cycle and see if they have exhaused (sic) their limit amount to any candidate so that if not, they can be approached for a further contribution pledge **to one of their affiliated members."** *Legi-Tech*, 967 F.Supp. at 527 n. 5 (bold added). However, the General Counsel's brief omits from the quote the bolded language stating that the targeted donors will become prospects for solicitation of contributions to *other* committees (see GC Brief at 4) – precisely the kind of harassment that the list-brokering prohibition was intended to prevent.

Therefore, the General Counsel's argument is based on the false premise that Legi-Tech and Aristotle are engaged in the same type of activity. She ignores the fact that the list of names in *Legi-Tech* was to be used by the DCCC specifically to create a prospecting list of those to "approach" (*i.e.*, target for solicitation) for contributions to other committees. And, as discussed earlier, Aristotle makes no such targeting function possible, because it is not a searchable database of FEC information and contains no names of contributors. Moreover, Legi-Tech's list was specifically intended to be used by the DCCC to approach those located as a result of a search of Legi-Tech's list of names and addresses obtained from FEC data, and to ask those named to contribute to other committees. As explained above, the compliance/vetting feature can only be engaged after the person has already been targeted for solicitation using non-FEC records and cannot be used to create lists of targets to solicit for other committees – unlike the plan for the DCCC to use Legi-Tech's list specifically to identify prospects to solicit for contributions to *other committees*.

The contrast to the facts in *Legi-Tech* are overwhelming and obvious: no contributor information is made available for targeting or any other purpose, and the compliance/vetting feature is an incidental, minuscule part of the CM5 software program. Moreover, unlike Legi-Tech, there is no evidence of misuse by Aristotle's customers, and it is beyond doubt that Aristotle did not invite the Commission's inquiry for marketing or any other purpose.

2. Warnings Were Not Necessary for the First Four Months CM5 Was Offered.

The General Counsel also asserts that a separate violation occurred during the short period of time in which the software did not display on screen warnings. GC Brief at 1. There is no requirement in the Act or the Commission's regulations, however, that a warning, written or otherwise, be provided about permissible or impermissible uses of FEC data, and the General Counsel cites none. Indeed, in MUR 5155, the General Counsel expressly acknowledged that there is no requirement to provide a warning. MUR 5155 General Counsel's Report #3 at 11; *see also* AO 1988-2 ("Moreover, the Commission concludes that although the Act and regulations do not require CBOE to attach a notice to the posted reports warning that information in the reports cannot be used for commercial purposes, such a warning is suggested because it informs readers of the restrictions on the use of certain information contained in FEC reports."). But, even during this short period, oral warnings were provided by Aristotle's sales staff; the contract prohibits impermissible uses of the data; there is no evidence that the compliance/vetting feature had an impact on the reason a customer upgraded the software or purchased new software; and the compliance/vetting feature was provided at no cost. Accordingly, there is no legal or factual support for General Counsel's theory of a violation predicated on the absence of a specific

written warning on the compliance/vetting computer screen for the first few months the feature was offered 5 years ago.

3. The Compliance/Vetting Feature Is Not Itself Sold to Anyone.

Aristotle publishes a large sophisticated campaign management software program for campaign committees. The compliance/vetting feature constitutes an incidental, tiny fraction of the program, and is offered at no additional cost. There is no *per* record access charge for FEC contribution data. A list of that data cannot be downloaded, and the cost for CM5 is the same whether or not the FEC contribution data is ever accessed or not. The price of CM5 remained the same when the feature was introduced. The FEC has not offered any evidence whatsoever that Aristotle's single-record lookup feature increases the cost to Aristotle's campaign customers by even a penny. Moreover, all of Aristotle's sales staff told the enforcement staff that Aristotle's customers acquired CM5 for reasons that had nothing to do with the compliance/vetting feature – the compliance/vetting feature was not involved in any sales. Under the theory of MUR 5155 that a "sale" of the data is necessary for a "commercial use," then when there is no charge for data, it cannot be deemed to have been "a commercial use."

The GC Brief relies primarily on a few phrases lifted from advertising literature used for several months in 2004 designed to pique a potential customer's interest, and ignores all other evidence that the feature was marketed little, if at all – and always for lawful purposes -- when a full description of the software was provided to clients by sales staff . *E.g.* GC Brief at 7-9, 10, 11, etc. She simply ignores the evidence that, the compliance/vetting feature was provided at no charge, and it was not the reason that campaigns acquired CM5.

4. The General Counsel's Reliance on AO 2004-24 is Misplaced.

The General Counsel's argument relies on a misinterpretation of AO 2004-24. NGP Software, Inc., one of Aristotle's principal competitors and the complainant here, submitted AO Request 2004-24 soon after Campaign Manager 4 was upgraded to CM5. NGP's submission described a blatantly illegal proposal, apparently to provide a predicate for filing the complaint in this matter on the pretext that NGP's proposal described what Aristotle was doing. NGP described its software product, NGP Campaign Office, as "an integrated financial system with fundraising, prospecting, and Federal and State campaign finance reporting features." AO 2004-24. NGP asked the Commission if it would be permissible to "integrate [FEC data] into a client's personalized NGP Campaign Office system database." *Id.*

NGP proposed several obviously illegal uses of FEC data that have nothing to do with CM5. In plain contravention of all relevant legal authority, NGP asked whether it could "sort and organize" FEC data and provide the FEC data to its customers "regardless of intended use." *Id. See* discussion of AO 2004-24 *supra* p. 28-31.

In describing the holding of AO 2004 -24, the General Counsel inexplicably omits almost every detail of the blatantly illegal data integration scheme proposed in NGP's advisory opinion request, yet she then claims that what Aristotle is doing is "identical" to NGP's proposal. GC Brief at 4. This assertion is belied by the facts, as the only aspect that is "identical" is that both generally involve uses relating to campaign software. Beyond that, there is no similarity whatsoever.

In contrast to NGP's proposal, CM5 does not integrate FEC data into its clients' databases. The data is "integrated" only into *one screen* -- the compliance/vetting screen – *not*

the client's database. Thus, unlike NGP's proposal, CM5 does not "sort or organize" the FEC data. CM5 does not permit mass downloading of FEC data as NGP's proposal would have done. In fact, CM5 does not permit downloading of even *one* contributor's information from the FEC data into a campaign committee's database. Unlike NGP's proposal, CM5 does not provide FEC data "based on the client's needs" and "regardless of intended use." In short, NGP described its product's purpose as primarily "fundraising" and "prospecting" that it wanted to upgrade by downloading and integrating FEC data into a client's fundraising database, *i.e.* creating prospecting lists list for targeting solicitations. In stark contrast, CM5's compliance/vetting feature is a very small part of the program, and CM5 clients cannot create an integrated list by using the compliance/vetting feature.

As discussed above, Aristotle supported the FEC's result in AO 2004-24, and, at Aristotle's recommendation the FEC removed the language that would have made inclusion of any FEC data in campaign software a *per se* violation. That is, the FEC did *not* hold that NGP's request was denied "because NGP is a for-profit company that sells and services NGP Campaign Office for a profit." GC's Draft AO 2004-24.

At its core, however, the General Counsel's argument with respect to CM5 is based upon the same rationale that the Commission rejected and removed from the draft advisory opinion. Essentially, she is arguing that the sale of an Aristotle computer program that includes any FEC data is a *per se* unlawful use "for a commercial purpose because [Aristotle] is a for-profit company that sells and services [Aristotle's CM5] for a profit." *See* Draft Advisory Opinion 2004-24. This is troubling, for one, because she is attempting to hold Aristotle to a legal standard that not only is absent from AO 2004-24, but was in fact specifically excluded from the

final version following Aristotle's recommendation to remove it. The General Counsel's failure to explain, address, or even acknowledge the significance of the removal of the very language upon which she still appears to rely, reveals a fatally flawed interpretation of AO 2004-24. Her analysis also is flawed because, like the Draft Advisory Opinion, she fails to take into account the entire context and history of the use of the information and the type of information.

The fact is that the FEC's final version of AO 2004-24 prohibited NGP's proposal in a conclusory manner, and stated that it was addressed "to the specific transaction or activity set forth in [NGP's] request." *Id.* Thus, the advisory opinion prohibits the creation of a single database for fundraising purposes by integrating contributor names from a private database with matching contribution information from the FEC data database. In contrast, CM5 provides only contribution data for one contributor at a time for compliance and vetting purposes and includes multiple layers of warnings about impermissible uses of the data. CM5's inability to create a prospecting database akin to a list broker, does not remotely resemble the facts underlying NGP's advisory opinion request for permission create a database akin to a list broker by organizing and "match[ing] [FEC data] into a client database" for "soliciting contributions," "regardless of intended use." *Id.* Contrary to the General Counsel's suggestion, AO 2004-24 simply does not create a *per se* rule of illegality for any inclusion of any FEC data in campaign software, regardless of context, type of data, design, and stated purpose.

Aristotle expressly makes campaigns aware of the FEC restrictions at every stage of the process from pre-sale discussions to contracts to computer screens. CM5 itself precludes the downloading of FEC data and the creation of lists including the FEC data. Furthermore, campaign committees are repeatedly and expressly made aware that the data may only be used

for lawful compliance or vetting purposes as in *PCD*. Aristotle does not even go so far as to suggest that the campaign may use the data for the additional purposes set out in the *IFI* decision, or sell lists like PCD and TRKC did, or provide FEC data in a form useable by list brokers as TRKC, HuffingtonPost and PoliticalBase did – all of which were found to be permissible uses of FEC data.

Unlike NGP's proposed integration of FEC data into client databases for virtually unlimited uses, CM5 is structured so that compliance/vetting feature generated data may only be viewed on a single, record-by-record basis for individuals whose name the campaign has already manually accessed and targeted for solicitation based on information previously in the campaign's database. Aristotle only provides this limited data in a non-interactive, non-integrated format that does not allow for searching on FEC data or list creation based on user supplied criteria. Under these circumstances, it is difficult to see how a campaign contributor's "privacy" is violated in any way; particularly when balanced with the fact that the software's lawful compliance purposes are expressly emphasized and furthered.

Moreover, Aristotle has clarified and removed any possible ambiguity that may have been created in the early isolated marketing statements submitted by NGP with the complaint in this matter about the different uses for FEC data. Those statements in fact, were discontinued in August 2004, almost 5 years ago, and many months before NGP's complaint in this case was even filed.

In sum, the FEC data reference provided by CM5 does not resemble the NGP fact pattern. In fact, the idea that the blatantly illegal list-making and solicitation-prospecting scheme

proposed by NGP in 2004-24 remotely resembles the carefully designed, severely limited offering of data for compliance in CM5 defies common sense.

5. Aristotle's Inclusion of FEC Contribution Data in CM5 Is Protected By the First Amendment and the Equal Protection Clause.

The Commission should exercise its discretion and dismiss this matter, even if, *arguendo*, Aristotle violated 2 U.S.C. § 438(a)(4) by publishing information about campaign contributions through its compliance/vetting feature, because such dissemination of contribution information only – but not contributor information – - is protected by the First Amendment's guarantee of free speech.

There should be no question that, as the General Counsel seeks to apply 2 U.S.C. § 438(a)(4) here, she would infringe the First Amendment by prohibiting the limited publication of contribution information.[19] This infringement can be constitutional only if her application furthers "an important or substantial government interest" and is "no greater than necessary or essential to the protection of the particular government interest involved." *IFI*, 969 F.2d at 1114. As described above, the purpose of 2 U.S.C. § 438(a)(4) is to protect contributors from harassment and invasion of privacy, and the means chosen by Congress is the prohibition of the sale or use of contributor information for such purposes.

The compliance/vetting feature does not have the potential to cause the harassment of any contributor or the invasion of a contributor's privacy. The information disseminated by the compliance/vetting feature does not include contributor information and the user cannot derive

[19] The campaign's freedom of association under the First Amendment is also impacted if they are not allowed to use the contribution information for vetting to determine whether to associate with a particular contributor.

contributor information from the information disseminated. In short, the information disseminated by the compliance/vetting feature is useless to a list broker because the information cannot be associated with contributor information for list creation or prospecting, cannot be sorted or otherwise organized, and cannot be download into a larger list or database. Because the compliance/vetting feature does not disseminate contributor information that could be used to harass contributors, there is no governmental interest in applying the 2 U.S.C. § 438(a)(4) restrictions to CM5. Thus, the General Counsel conclusion of a violation would be unconstitutional as applied to CM5.

Furthermore, the compliance/vetting feature affirmatively furthers the governmental interests identified in *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976) that justified the compelled disclosure of the contribution information disseminated by the compliance/vetting feature. It allows a candidate to determine if the contributor has associated with another committee by contributing to that committee. If that candidate desires to avoid associating with that contributor, the candidate can reject or return a contribution, which "allows the voters to place each candidate in the political spectrum more precisely." *Id.* at 67. The information in the compliance/vetting feature "deters actual corruption" by limiting the possibility of an excessive contribution by a contributor and "the appearance of corruption" by the candidate for accepting an excessive contribution. *Id.* 67. Accordingly, applying the prohibition of 2 U.S.C. § 438(a)(4) to Aristotle's dissemination of contribution information by the compliance/vetting feature contravenes Congress' stated purposes for making the information available and is therefore unconstitutional.

In short, the compliance/vetting feature provides contribution information for permissible uses of such information. As the Supreme Court has instructed, when enforcing an ambiguous provision of the Act that infringes on the First Amendment, the Commission should weigh any balancing on the side that "give[s] the benefit of doubt to speech, not censorship." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 127 S. Ct. 2652, 2674 (2007).

Further, the Equal Protection Clause prevents the Commission from discriminating between different users of the same medium for expression." *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972), as well as regulatory distinctions among different kinds of speech," *City of Ladue v. Gilleo*, 512 U.S. 43, 51 n.9 (1994). "As in all equal protection cases ... the critical question is whether there is an appropriate government interest suitably furthered by the differential treatment." *Mosley*, 408 U.S. at 95, *Cal. Med. Ass'n v. FEC,* 453 U.S. 182, 200 (1981).

As described above, the Commission found that TRKC, Inc., d/b/a PoliticalMoneyLine in MUR 5155, PoliticalBase.com in MUR 6065, and Huffington Post in MUR 6053 did not violate 2 U.S.C. § 438(a)(4) – despite providing lists, with names and addresses, for commercial gain. These organizations provide the same service to their customers as CM5 - the ability to recall FEC data over the Internet. TRKC and Huffington Post earn revenue from advertisements on their internet sites, and Politicalbase intends to do so in the future. TRKC also earns revenue from a subscription service for the FEC data – a permissible for-profit list sale far beyond anything argued by the General Counsel about CM5. TRKC's look-up service provides FEC data for a fee, and (unlike the compliance/vetting feature) TRKC's look-up feature includes contributor data that can be searched using many different criteria and lists can be downloaded

for an impermissible purpose. As noted above, TRKC's list sales were permitted without invoking the "media exemption."

TRKC, Huffington Post and PoliticalBase services are also more akin to a list broker because they market the FEC data as a standalone feature to enhance one or both of their primary purposes – the sale of the data for substantial profit, or the sale of advertising for profit. They do this by offering viewers access to their look-up features, which are prominently displayed on their web sites, frequently without any connection to their news stories or editorials.

The most significant difference between CM5 and these web sites is that the FEC data provided in the compliance/vetting feature has not, and cannot be, used independently of information in the campaign's records, and cannot be used for impermissible targeting or list-making purposes. PoliticalMoneyLine, Huffington Post and Politicalbase provide FEC data that has been or could easily be used for such impermissible purposes. *See* General Counsel Reports in MURs 5155, 6065 and 6053. As the General Counsel noted in the reports to the Commission in these MURS, *see e.g.* General Counsel's Report #3 in MUR 5155 at 8, the most significant fact that the Second Circuit in *PCD* relied upon was "finding little risk that the contributor lists will result in solicitation or harassment of contributors because of the absence of mailing addresses, as well as the caveat on each page against solicitation and commercial use." *PCD*, 943 F. 2d at 197.[20] This is an apt description of the compliance/vetting feature.

There are differences between the compliance/vetting feature and the MURs, but they are not significant because they do not go to the fundamental purpose of 2 U.S.C. § 438(a)(4), which

[20] PoliticalMoneyLine did not display warnings at the time investigated. MUR 5155, General Counsel's Report #3 at 7.

is to prevent harassment of contributors. For example, the primary business of these other organizations is political reporting and blogging. But unlike news stories that report political contributions, these web sites offer customers the ability to search the FEC data for information for uses that may have absolutely nothing to do with their new stories—and in some cases these uses have been for the unlawful purpose of targeting solicitations. "[M]erely reproducing the campaign contribution information provided to the FEC is, as the FEC recognizes, more akin to that of a list broker" even if the vendor is a purveyor of news. *Legi-Tech*, 967 F.2d at 530. These are organizations that earn their income from advertising, but that is irrelevant to the purpose of 2 U.S.C. § 438(a)(4).[21]

The General Counsel found significant that these organizations make their information available without charge (TRKC also has a subscription service). Of course, these organizations are not philanthropic enterprises. They are commercial ventures that survive on advertising that requires attracting customers to their web sites by, among other things, offering access to FEC data. Accordingly, if attracting customers by providing access to FEC data is an incidental feature to these organizations' primary business of selling advertising, then the compliance/vetting feature, which assists committees from accepting an illegal contributions, is surely incidental to CM5's business.

The General Counsel's reports in these MURs noted another difference between the respondents in these MURs and Aristotle. The respondents' look-up feature offered free access

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[21] PoliticalBase intends to sell advertising, but until it does, apparently it is supported by its parent company's commercial enterprises. TRKC sold subscription services to its look-up feature.

to FEC data, albeit in a form that can lead, and has led, to the misuse of the contributor information. The General Counsel and the Commission deemed it insignificant that TRKC subscription customers paid for the ability to obtain and organize and download FEC data. The General Counsel and the Commission also deemed it insignificant that the look-up features are supported by advertising revenue on their web sites. *It would be perverse if the Commission found that Aristotle could have avoided a violation in the past – or could do so in the future – by providing the compliance/vetting feature free on its web site without third party advertisements where more people could use it for purposes the General Counsel deems improper.* Accordingly, the so-called free look-up features approved by the Commission in these MURs seem to be features that permit precisely the type of harassment and invasion of privacy that 2 U.S.C. § 438(a)(4) is intended to prevent.

B. The Commission's Advice To The Regulated Community Is Ambiguous.

Even if, *arguendo*, the General Counsel's interpretation of 2 U.S.C. § 438(a)(4) is correct, the Commission should exercise its discretion and dismiss this MUR and clarify its advice to the regulated community because its precedents have not been consistent. 2 U.S.C. § 438(a)(8) states that FEC data may not be "sold" or "used" (a) for the purpose of soliciting contributions" or (b) for "commercial purposes." It does not say that FEC data may never be sold. It simply may not be sold for the purpose of soliciting contributions or for any commercial purpose. The courts have already agreed that the statute is ambiguous.

AO 2004-24 is itself internally inconsistent. It cites Advisory Opinions 1998-4, 1995-5, 1991-16, 1989-19, 1986-25, 1981-38, and 1980-101 to support its construction that "the purpose of restricting the sale or use of information obtained from FEC reports is to protect contributors

from having their names sold or used for commercial purposes." But AO 2004-24 did not involve inclusion of the names of contributors. It restricted the unlimited downloading and importing only of contribution information into a database that was intended to be used for prospecting and targeting solicitations.

In contrast to the *per se* violation theory argued here by the General Counsel, the Commission and the courts included the context of the use of FEC data in their analysis of 2 U.S.C. § 438(a)(4). In those decisions described above, the Commission and the courts approved of the use in commerce of contributor information in certain circumstances that were not akin to list making. However, the General Counsel here has taken the position that AO 2004-24 prevents a for-profit publisher's use of any kind of FEC contributor or contribution data for any purpose, in any manner, *Under this theory, there is no permissible way, under any circumstances, that Aristotle can include one feature out of 400 in CM5 to allow its customers to refer to FEC contribution data for compliance.* She argues this, despite the fact that, under such *per se* construction of 2 U.S.C. § 438(a)(4), PCD, TRKC's PoliticalMoneyLine, HuffingtonPost and PoliticalBase would have violated 2 U.S.C. § 438(a)(4) because they provided FEC data in commerce and independently from any news story, in order to earn income (i.e., to sell subscriptions to lists for a profit and/or to sell advertising).[22] It is telling that her

[22] As the *Legi-Tech* court stated it is irrelevant whether these organizations' web sites contain news stories and editorials if they also sell FEC data. "What matters is not who owns Legi-Tech or the nature of that owner's businesses, but the principal purpose and type of communication in which the campaign contribution information is used. Even a corporation that is 'an organ of the press,' *Legi-Tech, Inc. v. Keiper*, 766 F.2d 728, 730 (2nd Cir. 1985), or otherwise in the newspaper or multi-media business, is not entitled to compile FEC campaign contribution lists

"*per se*" theory ignores so many of the advisory opinions described above, and the only Commission support she found for her position is the factually inapposite AO 2004-24.[23]

Advisory Opinion 2004-24 also is now inconsistent with new instructions from the Supreme Court. The Commission's reasoning was expressly based in part on the incorrect assumption that "section 438(a)(4) is a 'broad prophylactic measure intended to protect the privacy of the contributors about whom information is disclosed in FEC public records.'" AO 2004-24 (citing AO 2003-24). However, the Supreme Court, construing a different section of the Act, subsequently has held that, when it comes to banning speech as AO 2003-24 and AO 2004-24 do, "we give the benefit of the doubt to speech, not censorship. The First Amendment's command that 'Congress shall make no law . . . abridging the freedom of speech' demands at least that." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 127 S. Ct. 2652, 2674 (2007). Thus, 2 U.S.C. § 438(a)(4) must be applied narrowly rather than as a broad prophylactic measure. Hence, the use of a "broad prophylactic" restriction on speech underlying the reasoning and conclusion of AO 2004-24 is, at the very least, suspect when applied to a statute that the courts have consistently deemed ambiguous..

In consideration of the conflicting guidance from the Commission and the need to reconsider AO's 2003-24 and 2004-24 in light of more recent Supreme Court guidance that the

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for the primary purpose of a commercial sale of that information." *Legi-Tech*, 967 F. Supp. at 532.

[23] Of course, the Commission cannot constitutionally single out one medium of publication – campaign software — as *per se* illegal, regardless of facts and circumstances that establish a reason for such disparate treatment.

Act's infringement on First Amendment rights should be construed narrowly, the Commission should not take any enforcement action at this time.

C. Even if the General Counsel's Construction of 2 U.S.C. § 438(a)(4) is Correct, Aristotle Has Not Committed a Knowing and Willful Violation

Aristotle's integrity and its efforts to comply with all of the Commission's rules are more than rhetoric. Aristotle sells CM5 with an unconditional compliance guarantee. The facts in this matter demonstrate Aristotle's good faith belief that it has not violated 2 U.S.C. § 438(a)(4). Aristotle cooperated with the investigation and voluntarily complied with each of the requests from the Office of the General Counsel. Aristotle voluntarily produced senior management and the entire CM5 sales staff for interviews together with boxes of documents, and gave the Office of General Counsel access to Aristotle's computers to search and read its emails. Thus, even if, *arguendo*, the Commission concludes that Aristotle violated the Act, it should not find that Aristotle acted "knowingly and willfully." 2 U.S.C. § 437g(a)(5)(B).

"Congress expressly stated that the 'knowing and willful' requirement was intended to limit liability to cases in which 'the acts were committed with a knowledge of all the relevant facts and a recognition that the action is prohibited by law.'" *United States v. Trie*, 21 F. Supp. 2d 7, 16 (D.D.C. 1998) *quoting* H.R. Rep. No. 94-917, at 4 (1976) reprinted in Federal Election Campaign Act Amendments of 1976, at 804. ""This provision has only recently been interpreted by the Court of Appeals for this Circuit to require a finding of 'defiance ' or 'knowing, conscious, and deliberate flaunting' [sic] of the Act."" *NRWC Inc. v. FEC*, 501 F. Supp. 422, 435 (D.D.C. 1980) *rev'd on other grounds by NRWC, Inc. v. FEC*, 716 F.2d 1401, 1404 (D.C. Cir. 1983) ("*NRWC*"). Thus, a "serious" violation is insufficient to support a finding of "willful and knowing." *AFL-CIO v. FEC*, 628 F. 2d 97, 100 (D.C. Cir. 1980) ("*AFL-CIO*").

Furthermore, there must be 'clear and convincing' proof that the violations were 'knowing and willful' so as to merit the substantial penalties." *NRWC*, 716 F.2d at 1402-03; *AFL-CIO*, 628 F.2d at 100 (same). Examples of defendant's actions that the courts have considered when deciding whether there has been a "knowing and willful" violation of the Act include: the ambiguity of the law, *NRWC*, 716 F.2d at 1404, the amount of guidance provided by the Commission, *id.*, the defendant's willingness to comply with the law prospectively, *id.*, whether the defendant "considered itself to be in compliance with the Act," *AFL-CIO*, 628 F.2d at 101, whether the defendant routinely complied with the Act, *id.*, whether the defendant's conduct had been tested in a tribunal, *id.*, whether the defendant had been "intransigent after learning of the Commission's position'" *id.* at 102, whether the defendant was willing during the conciliation period to accede to the Commission's position prospectively, *id.*

The General Counsel has not provided any clear and convincing proof that Aristotle acted in "'defiance' or 'knowing, conscious, and deliberate flaunting' [sic] of the Act." *NRWC*, 716 F.2d at 1404. Indeed, the evidence is the opposite. Aristotle has a long history of compliance with the Act, and compliance is one of the selling points it features in its advertisements. Aristotle provides a compliance guaranty to its customers. Aristotle also has a history of voluntarily working with the Commission when it releases new electronic filing guidelines. With respect to CM5, Aristotle instituted many precautions against the improper use of FEC data by its customers such as preventing importing or exporting information from the compliance/vetting feature and preventing inquiries of more than one name at a time. The sales staff received training about the impermissible uses of the FEC data accessible through the compliance/vetting feature. A few months after CM5 was introduced, Aristotle added warnings

to the compliance/vetting feature screen, the CM5 manual, contracts and used cautionary language in its fliers. At the same time, Aristotle discontinued the isolated advertisements (that had been released without vetting by counsel) that contained the language that the General Counsel finds so troubling. To emphasize the limitations on the use of the FEC data, Aristotle's president circulated a statement to the impermissible uses of FEC data. *See* text of statement at *supra* p. 16-17.

For the reasons described above, Aristotle believed that the compliance/vetting feature complied with 2 U.S.C. § 438(a)(4). If Aristotle were interested in deliberately flaunting the Commission's authority (a) it would not have included warnings about the impermissible use of FEC data in its advertisements or in the software , (b) it would have integrated the contribution data into the clients' databases (as NGP proposed) c) it would have permitted CM5 users to search the FEC's database for *all of a committee's contributors* at once, and to compile a list thereof, (d) it would have permitted CM5 users to download all of the contributor information into a spreadsheet, or merge the committee's contributor names and contributions into one database, (e) it would have permitted CM5 users to provide various mechanisms to sort the new database, (f) it would have permitted the new database to be merged with other databases, (g) it would have permitted CM5 users to use the FEC data to create mailings and mailing labels, (h) it would have aggressively promoted additional uses of the data, even to target and contact donors "to seek popular support for a particular policy, or to solicit signatures on a petition, or to urge recipients not to contribute to a rival cause", as expressly authorized by the D.C. Circuit in *IFI*, 969 F.2d at 1115, and (i) it would have permitted CM5 users to use the FEC data to create reports that analyzed the success or failure of subsequent fundraising activities. Instead,

Aristotle restricted access to the data to single-record, non-exportable lookups where the campaign must already have the retrieved individual record of its contributor to solicit before accessing the FEC data.

Rather than flaunting the Commission's authority, Aristotle voluntarily complied with all of the Commission's requests during the investigation, including inviting the staff to Aristotle's office to use its computer to review all of its emails. At the Commission's request, Aristotle wrote and executed a search program of its emails using criteria specified by the Commission. Thereafter, the Commission's staff determined which emails Aristotle would print and deliver to the staff.

In short, the regulatory and judicial support for the legality of the compliance/vetting feature, Aristotle's historic support of the Commission and its regulations, and its voluntary compliance the Commission's investigation demonstrate Aristotle's good faith efforts to comply with the Act and specifically 2 U.S.C. § 438(a)(4).

The General Counsel's only evidence offered to show Aristotle's allegedly deliberate flaunting of 2 U.S.C. § 438(a)(4) is the company's awareness of AO 2004-24, GC Brief at 5. As described above, the General Counsel's construction of 2 U.S.C. § 438(a)(4), primarily supported by reliance on language that was removed from the draft of AO 2004-24, a misreading of AO 2004-24 and *Legi-Tech*, and ignoring the rationale of MUR 5155, is flawed. Moreover, she appears to concede that *PCD* supports Aristotle's position. GC Brief at 13. Finally, the General Counsel argues that the *Legi-Tech* district court and the *PCD* Second Circuit court disagree about the application of 2 U.S.C. § 438(a)(4), which if true demonstrates the sort of ambiguity that *NRWC* and *AFL-CIO* courts found prohibits a finding of a "knowing and willful" violation.

All of the facts, taken together, fail to provide the requisite clear and convincing proof that Aristotle knowingly and willfully violated 2 U.S.C. § 438(a)(4).

D. The Commission Should Encourage Innovations Like The Compliance/Vetting Feature.

Aristotle believes that the software it publishes for federal political committees should do more than create reports that can be filed with the Commission. Innovative computer technology developed by Aristotle provides committees with tools to gain an advantage in campaigns while

making it easier for them to comply with the Commission's regulations. The compliance/vetting feature is one of those innovations.

CM5 makes it easier for campaigns to raise contributions by keeping track of the success of individual fundraisers, fundraising techniques and contribution pledges so that the campaigns can be more efficient and maximize their fundraising. At the same time, Aristotle encourages campaigns to use the compliance/vetting feature to assure compliance with the Act's contribution limits. The only way a committee can accomplish this task is to access FEC data.[25] CM5 merely makes it easier for the campaigns to do so. While the Commission could mandate that every committee must log into the Commission's web site to assure each of its contributors' compliance with the Act's contribution limits, Aristotle believes that it is better to encourage compliance by making it more efficient to verify compliance through the committee's own software.

Computer technology may offer other ways to increase compliance with the Commission's rules. For example, if a contributor has not provided occupation and employment information to one committee but has provided that information to another committee, the first committee could find the missing information in the FEC data. It would certainly be easier for the committee to file a more complete report if it could access the FEC data through its own computer system.[26]

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[25] Presumably, there are many proper uses of FEC data by campaigns and party committees, which is why the Commission permits them to download the FEC database of contributor and contribution information.

[26] This application of computer technology may require a "best efforts" rule change.

The above examples illustrate innovative methods to increase compliance with the Commission's regulations. However, taking advantage of computer technology also requires using FEC data. 2 U.S.C. § 438(a)(4) was never intended to prevent innovative companies like Aristotle from assisting committees to access FEC data to meet their compliance obligations. However, the General Counsel's *per se* construction of 2 U.S.C. § 438(a)(4) not only discourages, but also would prevent any innovative use of FEC data for similar permissible compliance purposes. Accordingly, Aristotle requests that the Commission reject the General Counsel's construction of 2 U.S.C. § 438(a)(4).

CONCLUSION

For the reasons set forth above, the Commission should find no probable cause to believe that Aristotle International, Inc. violated the Act, and should close the file.

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Dated: July 28, 2009