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June 7, 2019

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BY EMAIL AND HAND DELIVERY

Claudio J. Pavia, Esq.
 Attorney
 Office of General Counsel
 Federal Election Commission
 1050 First Street, N.E.
 Washington, D.C. 20463

Re: MUR 7062

Dear Mr. Pavia:

This response to the Federal Election Commission’s (the “Commission” or “FEC”) reason-to-believe findings, dated April 22, 2019, is submitted by the undersigned counsel on behalf of RevUp Software, Inc. (“RevUp”). The Commission’s Factual and Legal Analysis (“F&LA”) in this matter, which concluded that RevUp violated 52 U.S.C. § 30114(a)(4)’s and 11 C.F.R. § 104.15(a)’s sale-and-use prohibitions, relies on misunderstandings and mischaracterizations of the law and of RevUp’s capabilities. The Commission’s conclusion that RevUp impermissibly uses data disclosed in reports filed with the Commission is flat-out wrong and is in direct conflict with the most recent precedent in this area.

As the Commission *admits* at the outset of the F&LA, but ignores in its analysis, RevUp does not obtain or display any donor names or addresses from FEC reports. It does not generate lists of solicitation prospects from FEC data; it does not display individuals’ addresses from FEC data; it does not offer users the ability to export lists of solicitation prospects containing FEC data (including contribution information); and it does not allow users to append or integrate any FEC data (including contribution information) into their own lists. RevUp is not a list broker, and RevUp’s bipartisan client base uses the software for purposes as varied as opposition research to voter persuasion. RevUp is a tool for users to understand their existing networks and it is *absolutely incapable* of generating new prospects for solicitations. The software literally does not work unless a user uploads his or her own lists of names and addresses onto the platform.

In short, RevUp makes no more use of FEC data – in fact, it makes less use of FEC data – than other products that the Commission has permitted in its advisory opinions and controlling Statements of Reasons (“SORs”) in enforcement actions. The F&LA misapplies Commission precedent both as to the use of aggregated contributor data in algorithms and the display of individuals’ contribution histories, and it holds RevUp liable for activities it has permitted others

to undertake. The F&LA seeks to draw a novel, baseless distinction between how entities can use data for commercial purposes versus solicitation purposes, but the Commission's approach departs from precedent and contradicts the plain language of the Federal Election Campaign Act of 1971, as amended (the "Act").

The Commission's findings against RevUp also highlight deeper constitutional issues in its interpretations of the sale-and-use provision. In recent years, continuing into this action, the Commission has muddled its jurisprudence on sale and use. Instead of providing clarity to the regulated community, the Commission draws arbitrary lines between different types of entities based on their identities. Instead of perpetuating the considerable confusion that campaigns and their vendors currently experience when attempting to interpret the Commission's views in this area, the Commission should take this opportunity to reaffirm previously well-established views on sale and use and bring clarity to this area.

RevUp does not sell or use FEC data for a commercial purpose or for solicitations within the meaning of the Act, and the Commission must dismiss this matter without taking further action.

FACTUAL DISCUSSION

RevUp is not a list broker. RevUp is a tool for organizations to better understand their existing networks through data analytics and research. Nonprofits, academic institutions, and over 300 political committees on both sides of the aisle use RevUp to maximize their efficiency when conducting various forms of outreach to their pre-existing contact lists. This organizational efficiency, in turn, results in supporter interactions that are more respectful of individual supporters' time and in line with their wishes – which is the very purpose that led to RevUp's creation.

An overview of RevUp's services is informative. RevUp's relationships with its clients begins with a software licensing agreement. Even at this initial stage, RevUp is cognizant of donor privacy and requires each user to warrant that it will not upload contact lists with names or addresses pulled from FEC reports. Stated plainly, RevUp requires users to have the right to share every contact they upload to the software. Violation of this rule is grounds for RevUp to prohibit the user's further use of the software.

Once an organization has access to RevUp, it can create a user profile and distribute login credentials to its staff and supporters. These individuals then upload **their own contact lists** from email accounts and/or spreadsheets. RevUp has fields for collecting contacts' names, addresses, phone numbers, email addresses, occupations, employers, and educational backgrounds.

With this information in place, users can deploy RevUp's algorithm, which is RevUp's key feature. RevUp incorporates data from 50,000 publicly-available databases to learn about the

individuals on the users' lists. The only information RevUp draws from FEC reports is the contact's federal campaign contribution history. **The FEC represents one out of literally tens of thousands sets of data that RevUp accesses to help users evaluate the individuals on their contact list.**

The purpose of the algorithm is to create a ranked list of the client's pre-existing contacts, ordered from the most likely to least likely to identify with or support that organization. It short, the software matches like-minded causes and supporters. The algorithm gives each contact a score from 0 to 100, which corresponds with his or her predicted affinity for the client. By isolating those individuals who are most likely to vote for the client, volunteer for the client, or donate to the client, RevUp allows users to approach only those persons most likely to be responsive to the client's requests or programs. RevUp prevents campaigns from harassing individuals who are likely uninterested in their organizations.

As an ancillary capability, RevUp also offers its users the ability to view their contacts' federal contribution histories. Viewing contribution history is not a "default" option; in other words, users must take action to view this information. Specifically, users view contribution history only by hovering the cursor over a contact's name on the ranked list, or by clicking the name. Even then, the system only displays one individual's contribution information at a time, which puts the onus on the user to seek out contribution histories one-by-one.

It is also instructive to understand what RevUp does not allow users to do: While users may click on a name to view the individual's contribution history, RevUp does not offer a way to export the data display, manipulate the data, or append the data to the user's contact list that was originally uploaded into the software. And there is no way to search and sort individuals within the FEC data set or append the contributions histories of multiple donors at once to the user's list. To further eliminate doubt, RevUp also displays a warning that says: "Federal law prohibits using contributor contact information that is obtained from FEC reports for the purpose of soliciting contributions or for any commercial purpose."

Thus, RevUp does not obtain names or addresses from FEC reports. It is completely incapable of generating new solicitation targets and functions only when users upload their existing contacts into the software. While clients certainly use RevUp to prioritize which of their contacts are most likely to support their cause, RevUp serves many other purposes. Clients use the software for accounting, reporting, compliance (including tracking whether contributors have exceeded their limits to the campaign and/or any joint fundraising committee the campaign participates in), general data management, voter persuasion efforts, and generating candidate briefings. RevUp is even aware that its clients have found ways to use the software for purposes it did not predict, like for vetting supporters who want to host campaign events and conducting opposition research. Identifying which of a campaign's or user's existing contacts are most likely to support the client financially is only one of RevUp's purposes, and RevUp's limited use of FEC data does not allow organizations to solicit anyone outside of its existing network.

From its start, RevUp's goal was to help organizations be courteous and respectful of their donors and to avoid wasting anyone's – both the organization's staff and the organization's supporters – time or energy. RevUp has grown substantially since the time of its original response, while staying true to its mission. It has more than doubled its number of employees since 2016 and its clients base has grown ten-fold. RevUp continues to draw more investors and increase its revenues, and its main target for future growth is the nonprofit sector. RevUp predicts that, by the end of 2020, more than 80% of its clients will be nonprofit organizations such as 501(c)(3) charities and 501(c)(4) social welfare organizations, with political committees accounting for a smaller portion of its revenues. RevUp's rapid growth is attributable to its proven success in separating excited and enthusiastic supporters, who are already connected to a client organization, from those who are not.

As discussed below, RevUp's aims and abilities are entirely consistent with the purpose of the Act and the Commission's precedent on the sale and use of FEC data.

LEGAL ANALYSIS

The Act requires the FEC to make political committees' reports available for public inspection and copying. 52 U.S.C. § 30111(a)(4); *see also id.* § 30112 (requiring the Commission to make reports publicly available online). Because the Act requires committees to report the name, mailing address, occupation, and name of employer of all individuals who contribute more than \$200 in a calendar year, Congress sought to protect donors from “harassment” by adding a provision stating that “any information copied from [FEC] reports or statements may not be sold or used by any person for the purpose of soliciting contributions or for any commercial purpose.” *Id.* § 30111(a)(4); 11 C.F.R. § 104.15(a); *see* 117 Cong. Rec. 30,057 (daily ed. Aug. 5, 1971) (Sen. Bellmon).

For decades, the FEC has understood the sale-and-use prohibition to prevent two narrowly-defined activities: selling names and addresses obtained from FEC reports and soliciting names and addresses obtained from FEC reports. The Commission has time and again allowed a multitude of uses of FEC data as long as people are not obtaining new names and addresses from FEC reports. *See* Advisory Op. 1980-101 (Weinberger) at 2 (“[E]xcept for information identifying individual contributors, any of the information found in FEC documents or documents filed with the Commission may be used”); Advisory Op. 1981-38 (CAMPAC Publications) at 2 (“[A] commercial vendor may compile information from FEC reports for the purpose of selling that information” except for the “names and addresses of *individual contributors*.”); Advisory Op. 1983-44 (Cass Communications) at 2 (stating that the prohibition is on the “copying and use of names and addresses of individual contributors”); Advisory Op. 1986-25 (Public Data Access) at 4 (“The ‘commercial purpose’ provision has been held to prohibit the copying and selling of contributor information when such lists incorporate *nearly all of the identification* of individual contributors contained in the reports filed with the Commission” (emphasis added)); Advisory Op. 1989-19 (Johnson) at 2 (“[T]he Commission has

permitted a publisher to use names and addresses from reports filed with the Commission to provide leads for news articles and other information for use in a newsletter and to solicit subscriptions, so long as the names of individual contributors were not used.”); Advisory Op. 1991-16 (Feigenbaum) at 3 (stating that what the provision prohibits is using “any list to solicit contributions which is copied or otherwise *obtained* from disclosure reports filed under the Act” (emphasis added)); Advisory Op. 1995-05 (14th District TRIM Committee) at 2 (“[T]he principal purpose of restricting the sale or use of information copied from reports is to protect individual contributors from having their *names* sold or used for commercial purposes.” (emphasis added)); Advisory Op. 1995-09 (NewtWatch PAC) at 6-7 (stating that the purpose of the sale-and-use provision is protecting “individual contributors from having their names sold” and approving the posting of FEC data on a website because the lists did not “contain sufficient information to generate solicitations”); *see also* Advisory Op. 2009-19 (Club for Growth PAC) at 4 (characterizing a binding court opinion to stand for the proposition that “lists, compiled without addresses or phone numbers . . . pose[] no danger to the privacy interests which § 438(a)(4) was designed to protect”). The Commission has even recently proclaimed – by unanimous vote – that there is “a long line of advisory opinions in which [it] has approved proposals to sell or use information from reports filed with the Commission where that information did not include the names and addresses of individual contributors.” Advisory Opinion 2014-07 (Crowdpac) at 10.

RevUp’s limited use of FEC data breaks no new ground. RevUp uses information from FEC reports in two ways: (1) in an algorithm, and (2) to display a single individual’s contribution histories in a format devoid of FEC-sourced contact information and with multiple safeguards. The FEC has approved of both of these uses of contributor data many times and in settings that provide far fewer protections than RevUp provides, which, again, relies on users to upload their own lists and does not pull new names or contact information from FEC reports. RevUp’s use of FEC data is entirely consistent with precedent, and the FEC cannot change course now and prohibit RevUp’s features.

A. The FEC Has Consistently Approved the Use of Contributor Information in Algorithms

Over the past five years, the FEC has permitted multiple for-profit companies to use FEC-source contributor information in algorithms for plainly commercial purposes. To start, in Advisory Opinion 2014-07, Crowdpac, a for-profit corporation that matched individuals to candidates they may wish to support and earned revenue by keeping a portion of the contributions made on its platform, asked whether it could use “contributor information contained in reports filed with the Commission” in its proprietary algorithm. Advisory Op. 2014-07 (Crowdpac) at 1-4. The algorithm made inferences about contributors’ and candidates’ issue positions “by analyzing the patterns of which contributors support which candidates.” *Id.* at 2. To do so, the algorithm examined the “contribution histories of individuals who have contributed to particular candidates” and then looked at the “other candidates to whom those contributors have given.”

Id. at 9. With advanced knowledge of both candidates' and users' positions on certain issues, Crowdpac could effectively drive users to the candidates they may wish to support. *See id.* at 2. The more successful the algorithm was at this matching, the more revenue Crowdpac stood to earn through user contributions made through the platform.

The Commission concluded that there was no sale-and-use violation. *See id.* at 10. It reasoned that, where a use of FEC data does not entail disclosure of "individual contributors' contact information," there is no threat to any contributor's privacy interest. *See id.* It also observed that "[m]ere aggregations of data regarding contributions to candidates, without identifiable contributor information," does not implicate the concerns at the core of 52 U.S.C. § 30111(a)(4). Accordingly, the FEC approved of a corporation using contributor data in an algorithm geared toward generating contributions and for the commercial benefit of the corporation.

The Commission reached the same result based on the same reasoning in Advisory Opinion 2015-12 (Ethiq). There, Ethiq, another for-profit organization, developed an algorithm for use as part of a mobile "app" that matches users to candidates and corporations that align with their political views. Advisory Op. 2015-12 (Ethiq) at 1. The algorithm used contributor information from FEC reports to connect users to candidates, and tracked contributions made by top executives of corporations to determine whether a user aligned with a corporation's political leanings. *Id.* at 1-2. Ethiq planned to generate revenues by selling advertising space on the app and by licensing its algorithms and – importantly – its FEC data-informed datasets to other companies. *Id.* at 2.

The FEC again approved of this use. *Id.* at 4. The Commission stated emphatically: "data that does not contain individual contributors' contact information does not implicate the privacy concerns at the heart of section 30111(a)(4) Thus, the Commission has repeatedly approved the use of non-individualized contribution data obtained from reports filed with the Commission, both for display to users and for internal analysis" *Id.* The Commission stressed that Ethiq was not providing its users with any contact information of individual contributors and was not providing information capable of generating solicitations, even though Ethiq admitted that it had a plainly commercial purpose in selling its datasets that incorporated data analysis based on FEC reports. *Id.* Therefore, Ethiq, a commercial entity generating revenue from its use of FEC contributor and contribution information, was not violating the sale-and-use provision. *See id.* at 4-5.

Most recently, the Commission approved of Point Bridge Capital, LLC, a for-profit investment advisory firm, incorporating FEC data into an algorithm used to rank publicly traded companies based on whether the companies' employees and connected PACs supported a particular political party and its candidates. Advisory Op. 2017-08 (Point Bridge Capital, LLC) at 1-2. Point Bridge used its rankings to develop an electronically traded fund of companies that shared the same political inclinations and charged people fees to invest in the fund. *Id.* at 2. It also planned to license its index to other entities. *Id.* The FEC approved Point Bridge's plans, relying on the

now-familiar observation that Point Bridge was not displaying individual contributors' contact information. *Id.* at 3-4.

In each of these opinions, the FEC approved of a for-profit entity using information about individual contributors in an algorithm because algorithms do not display any contributor's contact information obtained from FEC reports. Point Bridge, Ethiq, and Crowdpac were also using their algorithms for a commercial purpose – to offer users a service from which the companies could generate a profit. Crowdpac's business model even depended on users making contributions to candidates.

RevUp and its algorithm are no different from any of these companies. RevUp's algorithm aggregates data and does not display any individual's contact information taken from FEC reports. Thus, RevUp does nothing to generate new solicitations – the only names that can be contacted are those for which the client already has the individual's name and contact information. Furthermore, unlike Point Bridge and Ethiq, RevUp uses its algorithm to analyze only those persons who are already part of a user's network. It does not allow its algorithm to sort through FEC data at-large. And whereas Point Bridge, Ethiq, and Crowdpac each identified a handful of inputs in their algorithms, RevUp's algorithm uses over 150 data points of which contributor history is only one.

RevUp relied on the Commission's advisory opinions in developing its algorithm, understanding the use of FEC data in aggregated form to be permissible under section 30111(a)(4). Consistent with the purpose of the Act, RevUp designed its algorithm to respect the privacy of donors and to minimize unwanted solicitations and harassment. RevUp's use of FEC data for entities to conduct internal analytics of their own networks does not violate the sale-and-use provision.

B. The FEC Has Consistently Allowed the Display of Individual Contributor Histories When the Displays Cannot Generate a New Solicitation

RevUp's display of a single individual's contribution history, likewise, does not violate the Act. As noted at the outset of this section, there is a long line of FEC advisory opinions stating that the sale-and-use provision prohibits only the display of *names* and *addresses* obtained from FEC reports, as the goal of section 3011(a)(4) is to stop persons and entities from contacting new potential contributors solely because their names were publicly accessible on Commission reports.¹ The FEC has never suppressed the display of individual contribution histories where a

¹ The Commission has strayed from this position only in rare cases, with circumstances that do not apply here. The outliers cited in the F&LA are easily distinguishable from RevUp. For example, the F&LA cites to Advisory Opinion 1985-16 (Weiss), but that opinion involved a list broker, which RevUp is not. *See* F&LA at 6. The Commission also discusses Advisory Opinion 2004-24 (NGP), *id.* at 6-7, but that opinion carries virtually no weight, as a controlling bloc of FEC Commissioners have explained that the advisory opinion request lacked sufficient factual detail and that NGP "did not provide any limitations on its proposed use of the data," SOR of

vendor has ensured that the histories are not paired with FEC-sourced contact information that would a way to contact new individuals.

Two recent enforcement matters, involving features virtually indistinguishable from RevUp's use of contribution histories, firmly establish the Commission's position here. In MUR 5625, a software company, Aristotle International, Inc., allowed users to access the contribution histories of persons whose names and addresses they already had in their databases. *See SOR of Comm'r's Petersen, Hunter & McGahn at 3, MUR 5625 (Aristotle International, Inc.).* A controlling bloc of Commissioners voted to dismiss the case, citing a variety of safeguards that brought Aristotle's software within the Act's allowance for limited uses of contributor information: (1) users could not obtain new names or addresses through the software; (2) users could only access one individual's contribution history at a time; (3) the contribution histories could not be manipulated or searched; (4) the contribution histories could not be downloaded or appended to a pre-existing list; (5) FEC data was only one feature of a larger software package; (6) inclusion of the data served a compliance function; (7) there were warnings about the sale and use of FEC data embedded within the program; and (8) and there was no evidence that any person or entity misused the FEC data. *Id.* at 3-6, 11. *Every single one of those factors is also true for RevUp.*

Just last month, the Commission released a second case involving Aristotle, which rested on similar grounds. There, Aristotle made an update to its software that allowed users to discover relationships between people already in their databases based on multiple factors, including overlap or similarities between their contribution histories. *SOR of Comm'r's Petersen & Hunter at 2, MUR 6334 (Aristotle International, Inc.).* The "Relationship Viewer" also let users access the individuals' contribution histories. *Id.* Again, a controlling bloc of Commissioners found this use of FEC data to be permissible because: (1) users can access information about only those people whose names and addresses are already in their databases; (2) users cannot access an individual's contribution history unless they click or hover over the person's name, and even then, they can only look at one individual at a time; (3) users cannot search, "sort, save, download, export, or otherwise integrate the information into their own databases;" (4) users cannot generate lists or append Commission data onto their existing lists; (5) there is a written warning concerning sale and use; (6) the "Relationship Viewer" has many legitimate non-solicitation uses, like tracking contribution limits, understanding donor behavior, preparing briefings, voter persuasion, and generally better understanding an organization's audience; and (7) groups outside of candidates and committees, such as trade associations, corporations, and entities involved in grassroots lobbying use the software. *Id.* at 3-4. *As with the first Aristotle case, RevUp breaks no new ground: the platform contains each of these limitations on use of FEC data.*

Comm'r's Petersen, Hunter & McGahn at 5, MUR 5265 (Aristotle International, Inc.). As discussed throughout this response, RevUp has implemented all of the safeguards approved in recent sale-and-use SORs.

RevUp uses contribution histories in a nearly identical fashion to software that the FEC has declined to find in violation in these previous matters. It has deployed all the same safeguards the Commissioners found sufficient in those matters to protect against a sale-and-use violation. Additionally, RevUp has a broad user base outside of political committees; its software has purposes outside of solicitations; and its display of contribution histories derived from FEC reports is only one of many features and is ancillary to its primary purpose of processing data through an algorithm. RevUp has acted consistently with FEC precedent and cannot be penalized for following the Commissioners' guidance concerning display of contribution histories.²

C. The Commission's F&LA Relies on Faulty Legal Premises

Despite the fact that each of RevUp's uses of FEC data are plainly lawful, the FEC still found reason to believe it violated the Act, relying on two novel and patently incorrect premises. First, the Commission claims that RevUp's use of the algorithm and contribution history display, together, create an "amplified" privacy concern. F&LA at 7-8. But it cannot be the case that two features, that the Commission has repeatedly approved in isolation, constitute a violation when offered separate pieces of a single software platform. This is particularly true when RevUp does not import new names from FEC reports and does not display individuals' FEC-sourced contact information. In other words, it is impossible for a client to use RevUp to make contact with a person it was not already capable of contacting at the outset. RevUp does not open contributors "to all kinds of harassment;" rather, it protects citizens who do not wish to engage with a particular political or social organization from contact, and connects those "generous and public spirited" citizens who want to be involved with opportunities to get involved. *See* 117 Cong. Rec. 30,057.

The second issue with the Commission's F&LA, which is even more troubling, is that the Commission is creating an imbalance between section 30111(a)(4)'s prohibitions on selling or using Commission data for a "commercial purpose" and selling or using Commission data for "soliciting contributions." The F&LA attempts to distinguish RevUp's use of FEC data from the uses approved in Crowdpac and Ethiq because RevUp is, allegedly, a solicitation tool, whereas Crowdpac and Ethiq are not. *See* F&LA at 7. However, it is unquestionable that Crowdpac, Ethiq, and any number of entities requesting an advisory opinion from the FEC in this area had a "commercial purpose," as they were using FEC data to make a profit. The plain language of the Act draws no distinction between the meaning of "sale and use" as applied to a commercial purpose versus a solicitation purpose. For the Commission's approach in the F&LA to even

² The F&LA accuses RevUp of ignoring "the fact that its software matches the *names* of individuals on the uploaded contact lists to the *names* of contributors in the Commission's database. The relevant contribution histories are then copied and paired with the *names* on the contact lists." F&LA at 7. However, Aristotle was undoubtedly engaging in the same "pairing" (there is no other way its software could have operated), but the controlling bloc of Commissioners did not find this to be a problematic use of FEC data.

remotely fit within the bounds of the agency’s existing precedent requires drawing a novel, baseless distinction that certain commercial uses of FEC data are allowed as long as they are not solicitation purposes. The Commission would, in effect, read the word “commercial” out of the statute as Congress enacted it. To begin applying different standards now, and placing greater restrictions on how data can be used to solicit contributions than how it can be used for commercial purposes, is illogical, finds no support in the law, and must not be allowed to stand.

CONSTITUTIONAL AND PUBLIC POLICY CONCERNS

For decades, the FEC understood the purpose of the sale-and-use provision to be protecting the privacy of people who contribute to political committees by suppressing the sale and use of their names and contact information. The Second Circuit Court of Appeals even ratified this approach in *FEC v. Political Contributions Data, Inc.*, 995 F.2d 383, 386-87 (2d Cir. 1995), stating that the lists at issue, “compiled without addresses or phone numbers and bearing a warning against commercial use, posed no danger to the privacy interests which § 438(a)(4) was designed to protect.” In 2014, the Commission went even further and explicitly acknowledged the “long line” of authority “which has approved proposals to sell or use information from reports filed with the Commission where that information did not include the names and addresses of individual contributors.” Advisory Opinion 2014-07 (Crowdpac) at 10.

Yet here, the Commission appears to be departing from its long-held guidance and creating a new legal theory without an adequate explanation, which it has declined to do in enforcement matters in the past – especially concerning subjects where the law has become as muddled as it has in the sale-and-use context. *See* SOR of Comm’rs Wold, Elliot & Mason at 10, MUR 4520 (Lerner for Congress) (expressing “reservation about adopting a doctrine that has not been relied on before by the Commission or the courts in applying the provisions of FECA for the first time in an enforcement action. That procedure raises significant questions about fair notice to the regulated community and, hence, questions of due process.”); SOR of Sandstrom at 2, MUR 4553/4671/ 4407/4544/4713 (Clinton/Gore Primary Committee, Inc., *et al.*) (“No reading of the law as it existed when these advertisements were aired would have provided the parties with fair notice of the standard that the staff has subsequently suggested should be applied The respondents in this matter simply cannot be held to a standard that was not discernible prior to engaging in otherwise protected speech.”); SOR of Comm’rs Petersen & Hunter at 10, MUR 5724 (Jim Feldkamp for Congress) (stating that the law had become “hopelessly muddled” and that “respect for due process and fundamental fairness demand[ed]” that the Commission not penalize a respondent until it “articulate[d], either by rule or through policy statement, the permissible boundaries” of the law).

As two Commissioners aptly explained just last year:

The Supreme Court has observed that “[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of

conduct that is forbidden or required.” This concern is particularly acute where First Amendment rights are at stake. To decide otherwise would not only create due process concerns but would risk chilling vitally important political speech that is strictly protected by the First Amendment. Indeed, these “vagueness and notice concerns carry special weight” in the Commission’s enforcement decisions. As the Court of Appeals for the District of Columbia has recognized, “[u]nique among federal administrative agencies, the Federal Election Commission has as its sole purpose the regulation of core constitutionally protected activity — ‘the behavior of individuals and groups only insofar as they act, speak and associate for political purposes.’” Thus, the “Commission has [a] ‘unique prerogative to safeguard the First Amendment when implementing its congressional directives,’” particularly in the enforcement process.

SOR of Comm’rs Hunter & Petersen at 6-7, MURs 6969/7031/7034 (MMWP12 LLC, *et al.*) (internal citations omitted).

Even worse than using an enforcement matter to implement a new legal interpretation, the Commission is holding RevUp to a different standard than other entities, including its competitors. The Commission has acknowledged that treating similarly situated respondents differently creates a due process violation. *See* SOR of Comm’r Mason at 2-3, MURs 4568/4633/4634/4736 (Rick Hill for Congress, *et al.*) (“Fundamental fairness is also implicated here by the principle of treating like cases alike. The Commission would be exposed to attack if it went forward as to these particular respondents because our actions are subject to judicial review by the arbitrary and capricious standard under the Administrative Procedure Act. A Commission decision will be considered arbitrary if we ‘treat like cases differently.’”); SOR of Comm’rs Mason, Wold & Smith at 3, MUR 4994 (New York Senate 2000) (“Proceeding in this case at this time would be unfair to the respondents because it would be exceedingly difficult, if not impossible, to explain why the Commission decided to proceed against them but not to proceed in at least some of the cases cited above. The Commission has an obligation to avoid disparate treatment of persons in similar circumstances.”). Indeed, courts have clearly stated that when an agency departs from its prior precedent without explanation, and treats similarly situated parties differently, it violates the Due Process Clause by taking arbitrary and capricious action. *See Bush-Quayle ’92 Primary Committee, Inc. v. FEC*, 104 F.3d 448, 453-54 (D.C. Cir. 1997) (holding that an agency interpretation which might normally be afforded deference is nonetheless prohibited when the agency fails to explain its departure from prior precedent) (citations omitted); *Shays v. FEC*, 337 F. Supp. 2d 28, 87 (D.D.C 2004) (same).

Furthermore, the sale-and-use statute itself, and the FEC’s interpretation of it, are questionable at best under a First Amendment analysis. The Supreme Court has held that “[g]overnment regulation of speech is content based,” and subject to strict scrutiny, “if a law applies to particular speech because of the topic discussed or the idea or message expressed.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). The sale-and-use prohibition regulates only

Page 12

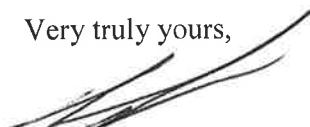
those uses of FEC data that relate to solicitations and commercial activity, thus drawing lines based on the content of speech. But this line is not at all well suited for protecting the privacy interest of citizens, whose names and addresses are already on display on the FEC's website and may be printed and reproduced in any variety of publications that exist for any purpose but those two identified in the statute.

The FEC also draws an impermissible distinction based on the identity of the speaker, as its regulations allow "newspapers, magazines, books or other similar communications" to sell and use FEC data. 11 C.F.R. § 104.15(c). In *Citizens United v. FEC*, 558 U.S. 310, 352 (2010), however, the Supreme Court announced that "[t]here is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not." The Court has "consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers." *Id.* The fact that the FEC would allow a newspaper to use data in the same way as RevUp "cannot be squared with the First Amendment." *Id.* at 352-53.

CONCLUSION

As described in the proceeding pages, RevUp does not use FEC data in a way that conflicts with the Commission's precedent or the purpose of the sale-and-use provision. The F&LA is premised on a mistaken understanding of RevUp's functionality and inconsistent and incorrect interpretations of the law. We respectfully request that the Commission dismiss this matter and take no further action against RevUp.

Very truly yours,



Marc E. Elias
Counsel to RevUp Software, Inc.