



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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By Office of the Commission Secretary at 10:50 am, May 05, 2021

AGENDA DOCUMENT NO. 21-25-A
AGENDA ITEM
For meeting of May 6, 2021
SUBMITTED LATE

May 5, 2021

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*
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Subject: Draft AO 2021-05 (Tally Up, LLC) – Draft A

Attached is a proposed draft of the subject advisory opinion. We have been asked to place this draft on the Agenda by one or more Commissioners.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 9:00 am (Eastern Time) on May 6, 2021.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2021-05

2

3 Jeremy Holtzman
4 Tally Up, LLC
5 100 Mutton Hill Drive
6 Charlotte, VT 05445

DRAFT A

7

8 Dear Mr. Holtzman:

9 We are responding to your advisory opinion request on behalf of Tally Up, LLC (“Tally
10 Up”), concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45
11 (the “Act”), and Commission regulations to Tally Up’s proposal to use aggregated individual
12 contribution data from Commission reports to score Tally Up’s voter segments. The
13 Commission concludes that Tally Up may not use the data as proposed, because such
14 information would be used to solicit contributions, which is prohibited by the Act and
15 Commission regulations.

16 ***Background***

17 The facts presented in this advisory opinion are based on your letter received on March
18 16, 2021, and your email received on April 30, 2021, on behalf of Tally Up.

19 Tally Up is a Vermont for-profit limited liability company. It describes itself as a “data
20 analytics company”¹ that provides information to political candidates and persons who manage
21 their campaigns. Specifically, Tally Up provides information and analysis on which voters are
22 likely to vote, “messaging trends that will resonate with voters, and social media analytics.”²
23 Tally Up sells its tools and services to its clients at a usual and normal charge. Tally Up’s clients
24 can access its reports through its website or by email.

¹ AOR001.

² *Id.*

1 One feature Tally Up offers its clients is the ability to create customized “segments of
2 voters [the clients] would like to target.”³ A “segment” is a list of voters “defined by specific
3 variables,”⁴ such as age or zip code. For example, a client could generate a segment that
4 identified “registered Democrats age 25-35 who live in New York City.”⁵ A segment would
5 include the voters’ contact information, which Tally Up would obtain from sources other than
6 Commission disclosure reports. Tally Up’s clients would be able to contact the voters in a
7 segment by phone, text message, or mail to “gather support . . . in the form of votes, donations,
8 or volunteer hours.”⁶ Clients can create as many segments as they like, and no minimum number
9 of voters would be needed to create a segment.

10 Tally Up also plans to generate a “Voter Segment Score” (“score”) for each segment. A
11 score, which can range from 0 to 100, would be based on the “aggregated individual
12 contributions of voters within the segment and the aggregated individual contributions of other
13 similar voters”⁷ “to specific categories of committees, such as Democratic candidates or
14 Republican candidates.”⁸ “Similar voters” would be determined at Tally Up’s discretion. Tally
15 Up states that the scores would be intended to reflect the segment’s support for a particular
16 political party and that party’s candidates.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Advisory Opinion Request Supplement (April 30, 2021).

1 Tally Up represents that it would not share the number of voters in a segment that made
2 contributions, the total contribution amount of voters in a segment, or any information about the
3 contributions of any individual voter. Tally Up provides a “simplified example” of how it would
4 score a segment:

5 [L]et’s say a client created two voter segments - Segment A and Segment B.
6 Segment A’s voters and other voters similar to Segment A have contributed \$250
7 per person, while Segment B’s voters and other voters similar to Segment B have
8 contributed \$150 per person. Based on this information, Segment A would receive
9 a score of 62.5, while Segment B would be scored 37.5. These scores clearly do not
10 indicate the contribution amount of any individual donor.⁹

11 Furthermore, Tally Up states that it has “designed two mechanisms to ensure there is no
12 way for candidates to trace donations to individual donors” by using the information provided by
13 Tally Up.¹⁰ First, segments would not receive a score if there are less than 100 individuals in a
14 segment. Second, any two segments of substantially overlapping voters (segments with a
15 difference of fewer than 100 unique voters) would receive the same score, regardless of when the
16 reports are generated.¹¹

17 ***Question Presented***

18 *May Tally Up aggregate individual contributions based on geographic and demographic*
19 *fields such as zip code, city, age, and gender to generate the Voter Segment Scores it will provide*
20 *to candidates?*

⁹ AOR002.

¹⁰ *Id.*

¹¹ AOR Supp.

1 ***Legal Analysis and Conclusions***

2 No, Tally Up may not aggregate individual contributions to generate the Voter Segment
3 Scores that it proposes to provide to candidates, because such information would be used to
4 solicit contributions, which is prohibited under the Act and Commission regulations.

5 The Act requires each political committee to report the name, mailing address,
6 occupation, and employer of any individual who contributes more than \$200 to the committee in
7 a calendar year, along with the amount and date of the individual's contributions.¹² The Act also
8 requires the Commission to make these reports available for public inspection and copying.¹³

9 In enacting these requirements, Congress was concerned about "protect[ing] the privacy
10 of the generally very public-spirited citizens who may make a contribution to a political
11 campaign or a political party."¹⁴ Accordingly, the Act prohibits any information copied from
12 Commission reports from being "sold or used by any person for the purpose of soliciting
13 contributions or for commercial purposes, other than using the name and address of any political
14 committee to solicit contributions from such committee."¹⁵

¹² See 52 U.S.C. §§ 30101(13)(A), 30104(b)(3)(A); see also 11 C.F.R. §§ 100.12, 104.8(a). Moreover, conduits and intermediaries of earmarked contributions are required to report "[t]he name and mailing address of each contributor" and the amount of each earmarked contribution. See 11 C.F.R. § 110.6(c)(1)(iv).

¹³ See 52 U.S.C. § 30111(a)(4); see also 52 U.S.C. § 30112 (requiring Commission to make all reports publicly available online).

¹⁴ 117 Cong. Rec. S30057 (daily ed. Aug. 5, 1971) (statement of Sen. Bellmon).

¹⁵ 52 U.S.C. § 30111(a)(4); see also 11 C.F.R. § 104.15(a) (prohibiting, in pertinent part, "information copied, or otherwise obtained, from any report or statement, or any copy, reproduction, or publication thereof, filed under the Act," from being "sold or used by any person for the purpose of soliciting contributions or for any commercial purpose"); 11 C.F.R. § 104.15(b) (providing that "soliciting contributions" includes soliciting any type of contribution or donation, including political or charitable contributions).

1 In determining whether a proposed sale or use of contributor data is prohibited, the
2 Commission has focused on whether the sale or use of the data “implicate[s] the privacy
3 concerns at the heart of section 30111(a)(4).”¹⁶ The Commission has concluded that “a vendor
4 does not violate section [30111(a)(4)] where its use of Commission data is not of the type that
5 could infringe on the contributors’ privacy interests.”¹⁷ Consistent with this reasoning, the
6 Commission has approved the sale or use of contributor data when it would not disclose
7 sufficient information to generate solicitations.¹⁸ By contrast, the Commission has determined
8 that the Act would prohibit the sale or use of contributor data when it would generate
9 solicitations.¹⁹

¹⁶ Advisory Opinion 2017-08 (Point Bridge Capital) at 3. Moreover, the Commission has indicated that the sale or use of contributor data in a commercial product does not violate the sale-or-use provision unless the privacy concerns behind the provision are implicated. *See* Certification of Commission Vote in Advisory Opinion 2004-24 (NGP), Aug. 17, 2004, available at: <https://www.fec.gov/files/legal/aos/2004-24/411388.pdf> (voting 5-0 to delete requestor’s status as for-profit company as reason why its proposed use of contributor data would be “for a commercial purpose” (quoting Advisory Opinion 2004-24 (NGP) at 3)).

¹⁷ Advisory Opinion 2014-07 (Crowdpac) at 10 (internal quotation marks omitted).

¹⁸ *See, e.g.*, Advisory Opinion 2017-08 (Point Bridge Capital) at 3-4 (approving investment firm’s proposal to use aggregated contributor data from Commission reports to create index of companies); Advisory Opinion 2015-12 (Ethiq) (approving use of aggregated contributor data to match users to candidates and corporations with similar values); Advisory Opinion 2014-07 (Crowdpac) (approving display of total number of contributors and total amount of contributions); Advisory Opinion 2013-16 (PoliticalRefund.org) (approving display of aggregate number of donors requesting refunds); Advisory Opinion 2009-19 (Club for Growth PAC) (approving use of contributor data to inform contributors of their right to request refunds).

¹⁹ *See, e.g.*, Advisory Opinion 2004-24 (NGP) (disapproving vendor’s proposal to enable clients to access information about contributions made by client’s donors to other political committees and party organizations); Advisory Opinion 1995-05 (TRIM) (disapproving proposal to copy contributors’ names from political committee’s reports and send contributors a mailing soliciting donations); Advisory Opinion 1985-16 (Weiss) (disapproving list vendor’s proposal to compare potential contributors on list to actual contributors in Commission reports before selling list for commercial or solicitation purposes).

In Advisory Opinion Request 2021-01 (Aluminate, Inc.), the requestor proposed using individual contributors’ data obtained from Commission reports to provide commercial services to universities, colleges, and not-for-profit organizations to assist with their fundraising activities. The Commission was unable to render an advisory opinion by the required four affirmative votes.

1 The Commission’s focus on whether contributor data would be sold or used to solicit
2 contributors is consistent with the legislative history of the Act’s sale or use prohibition and has
3 been upheld in court. The Senate sponsor of the prohibition explained that its primary aim was
4 to prevent contributors’ data from being used in “selling lists and list brokering” or exposing
5 individual contributors to “harassment.”²⁰ In *FEC v. Legi-Tech, Inc.*, the court approvingly
6 described the Commission’s sale or use regulation as “generally permit[ing] the use and
7 publication of [contribution] information,” except “where the principal purpose of the use of this
8 information is the solicitation of contributions or the commercial sale of the information itself.”²¹

9 Thus, the Commission has previously rejected proposals that would use individuals’
10 contribution histories for solicitation purposes. In Advisory Opinion 1985-16 (Weiss), the
11 Commission concluded that a list vendor could not compare the names of potential contributors
12 on the vendor’s list to the names of contributors in Commission reports before selling the list for
13 commercial or solicitation purposes, because doing so would enable the vendor to purge the
14 names of non-contributors from its list or to identify individuals who had made contributions.
15 Similarly, in Advisory Opinion 2004-24 (NGP), the Commission concluded that the Act would
16 prohibit a commercial software vendor from integrating individuals’ contribution histories from

²⁰ 117 Cong. Rec. S30057 (daily ed. Aug. 5, 1971) (statement of Sen. Bellmon)); *see also FEC v. Legi-Tech, Inc.*, 967 F. Supp. 523, 531 (D.D.C. 1997) (describing sale or use regulation as “proscrib[ing] ... 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”).

²¹ 967 F. Supp. at 530; *see also see also FEC v. Political Contributions Data Inc.*, 943 F.2d 190, 197-98 (2d Cir. 1991) (concluding that corporation may sell compilation of Commission reports for research purposes that did not include individual contributors’ mailing addresses and phone numbers).

1 Commission reports into its clients' donor databases to enable its clients, among other things, to
2 "resolicit existing donors who may have given more to other committees."²²

3 By contrast, the Commission has previously determined that the use of contributor data to
4 derive generalized information for purposes other than solicitation does not implicate the privacy
5 concerns of the Act. In Advisory Opinion 2014-07 (Crowdpac), the Commission concluded that
6 the privacy concerns behind the sale or use prohibition were not implicated by a vendor's use of
7 contributor data in algorithms to make inferences about contributors' positions on issues, and the
8 positions of candidates to whom they contributed, where doing so did not entail disclosing the
9 contributors' contact information.²³ More recently, in Advisory Opinion 2017-08 (Point Bridge
10 Capital), the Commission approved a proposal to score publicly traded companies based on their
11 employees' and separated segregated funds' aggregated contributions to, and expenditures in
12 support of (or opposed to), particular candidates, party committees, and leadership PACs. In that
13 advisory opinion, no individual's contact information would be disclosed nor would any
14 individual's contribution history be used to solicit contributions or other services.²⁴ Under those
15 circumstances, the Commission concluded that the requestor's "use of aggregated, non-
16 personally identifiable contribution data does not violate the sale and use restrictions of the
17 Act."²⁵

²² Advisory Opinion 2004-24 (NGP) at 2 (internal quotation marks omitted).

²³ Advisory Opinion 2014-07 (Crowdpac) at 2, 10; *cf.* 11 C.F.R. § 104.15(c) (providing that information copied from Commission reports could be used in newspapers, magazines, books, or similar communications per "as long as the principle 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").

²⁴ Advisory Opinion 2017-08 (Point Bridge Capital) at 1-2, 4.

²⁵ *Id.* at 4.

1 Tally Up's segments would link voters' names and contact information to a score based,
2 in part, on the aggregated contributions of individuals within the segment to specific categories
3 of committees, such as those of Democratic candidates or Republican candidates. Tally Up
4 expects that its clients would contact the individuals identified in the segments, using the contact
5 information provided in the segments, to solicit contributions. As the scores are intended to
6 reflect the segment's support for a particular political party and that party's nominees — with
7 higher scores indicating larger past contribution amounts — Tally Up's clients would be able to
8 use the scores to identify which segments of voters would be the most likely to contribute.
9 Ultimately, therefore, Tally Up proposes to obtain individuals' contribution histories from the
10 Commission's database and incorporate those histories into its scoring methodology in a manner
11 that would enhance its clients' solicitation efforts of those individuals.

12 Tally Up's proposal more closely resembles situations where individuals' contribution
13 histories obtained from reports filed with the Commission are used to generate solicitations,
14 which the Commission concluded would violate the privacy concerns of the Act, rather than
15 situations where data is analyzed to derive generalized information for uses other than
16 solicitation, which the Commission concluded would not implicate the Act's privacy concerns.
17 For example, in Advisory Opinion 2017-08 (Point Bridge Capital), which the Commission
18 approved, the requestor proposed to score companies based, in part, on their employees'
19 aggregated contributions to certain recipients. That requestor did not, however, propose to
20 disclose individual contributors' names and contact information, or make any solicitations, let
21 alone score individual contributors singly or as a group as Tally Up proposes to do.²⁶ Further,

²⁶ *Id.* at 1-2, 4.

1 neither Advisory Opinion 2015-12 (Ethiq) nor Advisory Opinion 2014-07 (Crowdpac) — which
2 approved proposals to use aggregate contributor data — involved the use of Commission data in
3 a manner that could engender solicitations of individual contributors found in disclosure reports
4 filed with the Commission: Neither advisory opinion involved linking and providing to clients
5 the names of individual contributors and their contact information with analysis of their
6 contribution histories from data filed with the Commission.

7 By contrast, in order to generate a segment score, Tally Up proposes to cross-reference
8 individuals' names against names and contribution histories in Commission disclosure reports,
9 like in Advisory Opinions 1985-16 (Weiss) and 2004-24 (NGP), and would provide to its clients
10 at least a partial list of the names and contact information of individuals linked with a segment
11 score derived from the contribution histories of those same individuals. Even though a score
12 does not necessarily reflect the contribution history of any given individual within a segment, a
13 segment's score is partly a function of the contribution histories of individuals in the segment.²⁷
14 A client could focus its solicitation efforts on a high-scoring segment, resulting in at least some
15 individuals in the segment being solicited because their past contributions factored into the
16 segment's overall score. Thus, because Tally Up's proposed analysis of contributor data would
17 be used to solicit previous contributors, Tally Up's proposal "implicate[s] the privacy concerns at

²⁷ The scores would also be based on the aggregated individual contributions of voters *similar* to the specific voters identified in a segment. Because Tally Up does not ask whether it may base a segment score exclusively on the aggregated individual contributions of "similar voters" to those voters in a segment, or otherwise score segments without the aggregated individual contributions of the voters in the segment, the Commission does not address this question.

1 the heart of section 30111(a)(4).”²⁸ Accordingly, Tally Up may not generate the Voter Segment
2 Scores that it proposes to provide to its clients under the Act and Commission regulations.

3 This response constitutes an advisory opinion concerning the application of the Act and
4 Commission regulations to the specific transactions or activities set forth in Tally Up’s request.²⁹
5 The Commission emphasizes that, if there is a change in any of the facts or assumptions
6 presented, and such facts or assumptions are material to a conclusion presented in this advisory
7 opinion, then Tally Up may not rely on that conclusion as support for its proposed transactions or
8 activity. Any person involved in any specific transaction or activity which is indistinguishable in
9 all its material aspects from the transaction or activity with respect to which this advisory
10 opinion is rendered may rely on this advisory opinion.³⁰ Please note that the analysis or
11 conclusions in this advisory opinion may be affected by subsequent developments in the law
12 including, but not limited to, statutes, regulations, advisory opinions, and case law. Any
13 advisory opinions cited herein are available on the Commission’s website.

14 On behalf of the Commission,

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16
17
18 Shana M. Broussard
19 Chair

²⁸ Advisory Opinion 2017-08 (Point Bridge Capital) at 3.

²⁹ See 52 U.S.C. § 30108.

³⁰ See *id.* § 30108(c)(1)(B).