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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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

May 5, 2021

**MEMORANDUM**

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*  
Acting General Counsel

Neven F. Stipanovic *NFS*  
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Assistant General Counsel

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Subject: Draft AO 2021-05 (Tally Up, LLC) – Draft B

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 B**

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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 use the data as proposed, because such use is not  
14 prohibited under the Act or Commission regulations.

15 ***Background***

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

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

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<sup>1</sup> AOR001.

<sup>2</sup> *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.”<sup>3</sup> A “segment” is a list of voters “defined by specific  
3 variables,”<sup>4</sup> 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.”<sup>5</sup> 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.”<sup>6</sup> 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.”<sup>7</sup> “Similar voters” would be determined at Tally Up’s discretion. Tally Up states  
14 that the scores would be intended to reflect the segment’s support for a particular political party  
15 and that party’s candidates.

16           Tally Up represents that it would not share the number of voters in a segment that made  
17 contributions, the total contribution amount of voters in a segment, or any information about the

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

1 contributions of any individual voter. Tally Up provides a “simplified example” of how it would  
2 score a segment:

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

9 Furthermore, Tally Up states that it has “designed two mechanisms to ensure there is no  
10 way for candidates to trace donations to individual donors” by using the information provided by  
11 Tally Up.<sup>9</sup> First, segments would not receive a score if there are less than 100 individuals in a  
12 segment. Second, if any two segments have a difference of less than 100 voters, they would  
13 receive the same score, regardless of when the reports are generated.

14 ***Question Presented***

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

18 ***Legal Analysis and Conclusions***

19 Yes, Tally Up may aggregate individual contributions to generate the Voter Segment  
20 Scores that it proposes to provide to candidates, because such use is not prohibited under the Act  
21 or Commission regulations.

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<sup>8</sup> AOR002.

<sup>9</sup> *Id.*

1           The Act requires each political committee to report the name, mailing address,  
2           occupation, and employer of any individual who contributes more than \$200 to the committee in  
3           a calendar year, along with the amount and date of the individual’s contributions.<sup>10</sup> The Act also  
4           requires the Commission to make these reports available for public inspection and copying.<sup>11</sup>

5           In enacting these requirements, Congress was concerned about “protect[ing] the privacy  
6           of the generally very public-spirited citizens who may make a contribution to a political  
7           campaign or a political party.”<sup>12</sup> Accordingly, the Act prohibits any information copied from  
8           Commission reports from being “sold or used by any person for the purpose of soliciting  
9           contributions or for commercial purposes, other than using the name and address of any political  
10          committee to solicit contributions from such committee.”<sup>13</sup> The Commission has interpreted  
11          “soliciting contributions” to include soliciting any type of contribution or donation, such as  
12          political or charitable contributions.<sup>14</sup>

13          The Commission has previously determined that the use of contributor data to produce  
14          generalized factual information that does not disclose individual contributors’ contact

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<sup>10</sup>        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).

<sup>11</sup>        See 52 U.S.C. § 30111(a)(4); see also 52 U.S.C. § 30112 (requiring Commission to make all reports publicly available online).

<sup>12</sup>        117 Cong. Rec. S30057 (daily ed. Aug. 5, 1971) (statement of Sen. Bellmon).

<sup>13</sup>        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).

<sup>14</sup>        11 C.F.R. § 104.15(b).

1 information is not prohibited. In Advisory Opinion 2017-08 (Point Bridge Capital), for example,  
2 the Commission approved an investment advisory firm’s proposal to use contributor data from  
3 Commission reports to create an index that scored companies based on their employees’ and  
4 separate segregated funds’ aggregate contributions and expenditures. And, in Advisory Opinion  
5 2014-07 (Crowdpac), the Commission approved a for-profit company’s proposal to use  
6 contributor data in an algorithm that analyzed, among other things, the contribution histories of  
7 individuals who had contributed to certain candidates, to enable its users to identify and make  
8 contributions to like-minded candidates.<sup>15</sup> Although both companies planned to use contributor  
9 data in commercial ventures to produce information for their customers, the Commission  
10 determined that the Act and Commission regulations did not prohibit their proposed uses because  
11 the resulting information would not provide “sufficient information to generate solicitations.”<sup>16</sup>

12 Nor would Tally Up’s analysis result in “sufficient information to generate  
13 solicitations.”<sup>17</sup> First, Tally Up would *only* calculate from Commission data the aggregated  
14 amount of contributions made by individuals in a segment (and other similar individuals).

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<sup>15</sup> Crowdpac also planned to display aggregated campaign finance data, as well as the names and locations of certain individual contributors.

<sup>16</sup> Advisory Opinion 2017-08 (Point Bridge Capital) at 4 (quoting Advisory Opinion 1995-09 (NewtWatch PAC) at 7)); *see also* Advisory Opinion 2014-07 (Crowdpac) at 10 (concluding that “Crowdpac may also use data derived from Commission reports in its algorithm, provided that doing so does not entail disclosing individual contributors’ contact information”); Advisory Opinion 2021-02 (FEN-PAC) (approving use of aggregated data to inform Members of Congress and congressional candidates in communications advocating legislative issue or policy); Advisory Opinion 2015-12 (Ethiq) (approving use of contributor data to match users to candidates and corporations with similar values); 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); *FEC v. Political Contributions Data Inc.*, 943 F.2d 190, 197-98 (2d Cir. 1991) (concluding that corporation may sell compilation of Commission reports that did not include individual contributors’ mailing addresses and phone numbers).

<sup>17</sup> Advisory Opinion 2017-08 (Point Bridge Capital) at 4 (quoting Advisory Opinion 1995-09 (NewtWatch PAC) at 7).

1 Significantly, Tally Up would *not* harvest contributors’ names and contact information from  
2 reports filed with the Commission. Indeed, Tally Up does not propose to include or remove any  
3 individuals’ names from a segment based on their contribution histories.<sup>18</sup> And that Tally Up  
4 will obtain individuals’ names and addresses from sources other than Commission data is not a  
5 reason to deny Tally Up’s request, because the Act’s sale-and-use prohibition applies only to  
6 “information copied from . . . reports or statements”<sup>19</sup> filed with the Commission.

7 Furthermore, the segments that Tally Up would provide to its clients are generalized  
8 scores applicable to the entire segment, not individualized scores applicable to particular  
9 contributors. Thus, the segment scores, which also reflect the aggregated contributions of  
10 individuals not in the segment, do not reflect or reveal the contribution history of any given  
11 individual identified in a segment.<sup>20</sup> Tally Up would not disclose the aggregated amount of  
12 contributions made by individuals within its segments. Nor would Tally Up disclose the number  
13 of contributors in a segment, or any information about the contributions of any specific  
14 individual in the segment. Indeed, Tally Up has designed two mechanisms to prevent its clients  
15 from identifying or “tracing” contributors by generating and cross-referencing multiple

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<sup>18</sup> See Conciliation Agreement ¶ V. in MURs 6960 & 6991 (SW Technologies, LLC) (“Respondent violated 52 U.S.C. § 30111(a)(4) by inserting names and addresses from FEC disclosure reports into . . . a commercial mailing list, and by matching the pre-existing names in [Respondent’s] voter file to FEC disclosure reports in order to identify the known contributors who were later added to the [commercial mailing list].”); Advisory Opinion 1985-16 (Weiss) (rejecting proposal to compare names on vendor’s list to names of contributors in Commission reports); see also *FEC v. Legi-Tech, Inc.*, 967 F. Supp. 523, 530 (D.D.C. 1997) (“Legi-Tech’s [database] is nothing more than a computerized list of campaign contribution information copied from FEC files. . . . [T]he mere fact that the [database] provided users with [a] list of contributors on a computer screen rather than on paper is of no significance.” (internal quotations and citations omitted)); Advisory Opinion 1991-16 (Feigenbaum) at 4 (“[Y]our publication may not be sold or otherwise offered for commercial use if it includes information listing individual contributors obtained from the copies of reports filed with the Commission. . . .”).

<sup>19</sup> 52 U.S.C. § 30111(a)(4).

<sup>20</sup> See Advisory Opinion 2004-24 (NGP) at 1, 3.

1 segments: Segments with less than 100 individuals would not receive a score, and any two  
2 segments with a difference of less than 100 voters would receive the same score.

3 At bottom, Tally Up’s proposed use of Commission data resembles the generalized  
4 analyses that the Commission approved in prior advisory opinions. Tally Up proposes to derive  
5 an overall conclusion (*i.e.*, a score) about a pool of contributors (*i.e.*, a segment), like in  
6 Advisory Opinion 2017-12 (Point Bridge Capital). That the pools of contributors are themselves  
7 a function of customizable variables, rather than simply the individuals employed by different  
8 corporations, is an immaterial distinction.

9 Thus, Tally Up’s use of aggregated individual contributions would not “implicate the  
10 privacy concerns at the heart of section 30111(a)(4).”<sup>21</sup> Accordingly, Tally Up may aggregate  
11 individual contributions to generate the Voter Segment Scores that it proposes to provide to  
12 candidates, because such use is not prohibited under the Act or Commission regulations.

13 This response constitutes an advisory opinion concerning the application of the Act and  
14 Commission regulations to the specific transactions or activities set forth in Tally Up’s request.<sup>22</sup>  
15 The Commission emphasizes that, if there is a change in any of the facts or assumptions  
16 presented, and such facts or assumptions are material to a conclusion presented in this advisory  
17 opinion, then Tally Up may not rely on that conclusion as support for its proposed transactions or  
18 activity. Any person involved in any specific transaction or activity which is indistinguishable in  
19 all its material aspects from the transaction or activity with respect to which this advisory

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<sup>21</sup> Advisory Opinion 2017-08 (Point Bridge Capital) at 3.

<sup>22</sup> *See* 52 U.S.C. § 30108.



1 opinion is rendered may rely on this advisory opinion.<sup>23</sup> Please note that the analysis or  
2 conclusions in this advisory opinion may be affected by subsequent developments in the law  
3 including, but not limited to, statutes, regulations, advisory opinions, and case law. Any  
4 advisory opinions cited herein are available on the Commission's website.

5 On behalf of the Commission,

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9 Shana M. Broussard  
10 Chair  
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<sup>23</sup> See *id.* § 30108(c)(1)(B).