FEDERAL ELECTION COMMISSION
Washington, DC 20463

**MEMORANDUM**

**TO:** THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
CHIEF COMMUNICATIONS OFFICER
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

**FROM:** COMMISSION SECRETARY

**DATE:** August 20, 2009

**SUBJECT:** COMMENT ON DRAFT AO 2009-19
Club for Growth

Transmitted herewith is a timely submitted comment from Michael Bayes, Esq., on behalf of Mr. David S. Maney, regarding the above-captioned matter.

Proposed Advisory Opinion 2009-19 is on the agenda for Thursday, August 27, 2009.

Attachment

1870 Glen Ayr Drive
Lakewood, CO 80215

August 20, 2009

Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Rosemary C. Smith
Associate General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

**VIA E-MAIL**

**Re: Comments on Draft Advisory Opinion 2009-19 (Club For Growth)**

Dear Commission Secretary:

I submit these comments on the above-referenced matter, which is scheduled to be considered by the Commission on Thursday, August 27, 2009. I write to you in my individual capacity as someone interested in good government and the open availability of public data to urge the Commission to adopt Draft A of Advisory Opinion 2009-19 (Club For Growth). The result reached in Draft A is consistent with the relevant statutory and regulatory language. However, I believe that Advisory Opinion 2003-24 (NCTFK) was incorrectly decided because its rationale and result are plainly contrary to the statutory restriction and its legislative history. All references to Advisory Opinion 2003-24 should be removed from Draft A. Draft A should not rely upon, claim to be consistent with, or otherwise create the impression that Advisory Opinion 2003-24 continues to be "good law."

As you know, FECA requires the Commission to make public financial disclosure reports and other statements, but specifies that "any information copied from such reports or statements may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes, other than using the name and address of any political committee to solicit contributions from such committee."[1] Commission regulations repeat this language, and further

[1] 2 U.S.C. § 438(a)(4).

state that the phrase "*soliciting contributions* includes soliciting any type of contribution or donation, such as political or charitable contributions."

The origin of this restriction, and its legislative history, has been recounted in Commission Advisory Opinions dating back to 1975.[2] Both Drafts A and B recount this legislative history, although Draft B curiously omits a crucial portion of the legislative history that very clearly indicates that the sale or use restriction was intended to protect contributors from list brokers and those who would their information for commercial purposes.

Specifically, the following language is included in Draft A, but it strangely omitted from Draft B:

> In his remarks on the Senate floor, however, Senator Bellmon acknowledged the limitations of the prohibition. See id. at 30058 (The prohibition "is intended to protect, at least to some degree, the men and women who make contributions to candidates or political parties from being victimized by" having their names sold to list brokers). Indeed, in his response to a question from Senator Nelson, Senator Bellmon confirmed that the "only purpose" of the prohibition is to "prohibit the lists [of contributor names and addresses] from being used for commercial purposes." 117 Cong. Rec. 30058 (daily ed. Aug. 5, 1971) (statements of Sen. Nelson and Sen. Bellmon).

Advisory Opinion 2009-19 (Draft A), page 5, lines 2-10.

In place of this material, Draft B instead claims that:

> The Commission recognizes that 2 U.S.C. 438(a)(4) is a 'broad prophylactic measure intended to protect the privacy of contributors about whom information is disclosed in [Commission] public records." Advisory Opinion 2003-24 (NCTFK). Without this protection, anyone would be free to obtain contact information about an opponent's contributors, or about contributors who support an opposing ideological perspective, from reports that are required by law to be filed with the Commission, and use that contact information to harass the contributors. As discussed on the Senate floor, individuals might well be discouraged from contributing to candidates and political committees if they know that their contributions may expose them to unwanted communications in this way.

A review of the full record demonstrates very clearly that 2 U.S.C. § 438(a)(4) is decidedly not a "broad prophylactic measure intended to protect the privacy of contributors about whom information is disclosed in [Commission] public records." In Advisory Opinion 2003-24, the Commission rewrote the law, disregarding the plain language of the statute and Commission regulations, the legislative history, judicial precedent, and 20 years of prior Advisory Opinions. The Commission should take this opportunity to correct its error.

[2] See Advisory Opinion 1975-124 (Brewster).

## I. Advisory Opinion 2003-24 is Inconsistent with FECA and Commission Regulations

A review of the record demonstrates that the purpose of Section 438(a)(4) asserted in Draft B is a recent invention of the Commission designed to obscure the limitations very clearly placed by Congress on the sale or use restriction. It should go without saying that it is not the Commission's place to rewrite the legislative history. In fact, until 2003, the Commission studiously recognized and adhered to the solicitation/commercial purposes limitation.

As noted above, FECA states that "any information copied from such reports or statements *may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes*, other than using the name and address of any political committee to solicit contributions from such committee" (emphasis added). 2 U.S.C. § 438(a)(4).

Commission regulations implement this provision as follows:

> (a) Any information copied, or otherwise obtained, from any report or statement, or any copy, reproduction, or publication thereof, filed under the Act, shall 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 committee.
> (b) For purposes of 11 CFR 104.15, *soliciting contributions* includes soliciting any type of contribution or donation, such as political or charitable contributions.
> (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.

11 C.F.R. § 104.15.

Neither the statute nor the regulations contain any mention of "broad prophylactics" intended to protect contributors from "harassment" or general invasions of their privacy. To the contrary, the statute and regulations limit the sale or use restriction to the use of contributor information for solicitations and other commercial purposes. Communications that do not contain solicitations, or are non-commercial in nature, are quite simply, not restricted under the plain language of both the statute and the regulations. To the extent that Advisory Opinion 2003-24 concludes otherwise, it is contrary to law.

## II. Advisory Opinion 2003-24 is Inconsistent with Relevant Legislative History

Since the late 1970s, Commission Advisory Opinions have invoked the purposes of the sale or use restriction when applying the provision, and have used the legislative history to provide that purpose. A review of that legislative history demonstrates very clearly that Advisory Opinion 2003-24 presented an incomplete and inaccurate recounting of that history.

*FEC* v. *Political Contributions Data, Inc.*, 943 F.2d 190 (2d Cir. 1991) contains the full Senate floor exchange:

> The § 438(a)(4) "commercial purposes" exception was proposed as an amendment to that section by Senator Bellmon of Oklahoma:
>
> Mr. President, the purpose of this amendment is to protect the privacy of the generally very public-spirited citizens who may make a contribution to a political campaign or a political party. We all know how much of a business the matter of selling lists and list brokering has become. These names would certainly be prime prospects for all kinds of solicitations, and I am of the opinion that unless this amendment is adopted, we will open up the citizens who are generous and public spirited enough to support our political activities to all kinds of harassment, and in that way tend to discourage them from helping out as we need to have them do.
>
> 117 Cong. Rec. 30,057 (daily ed. Aug. 5, 1971) (statement of Sen. Bellmon). Senator Bellmon's amendment was grudgingly accepted by the bill's sponsor, Senator Cannon, who replied:
>
> Mr. President, this is certainly a laudable objective. I do not know who we are going to prevent it from being done. I think as long as we are going to make the lists available, some people are going to use them to make solicitations. But as far as it can be made effective, I am willing to accept the amendment, and I yield back the remainder of my time.
>
> *Id.* (statement of Sen. Cannon). Senator Bellmon went on to give an example of the evils he was attempting to combat with his amendment:
>
> Mr. BELLMON. ***.
>
> In the State of Oklahoma, our own tax division sells the names of new car buyers to list brokers, for example, and I am sure similar practices are widespread elsewhere. This amendment is intended to protect, at least to some degree, the men and women who make contributions to candidates or political parties from being victimized by that practice.
>
> Mr. NELSON. Do I understand that the only purpose is to prohibit the lists from being used for commercial purposes?
>
> Mr. BELLMON. That is correct.
>
> Mr. NELSON. The list is a public document, however.
>
> Mr. BELLMON. That is correct.
>
> Mr. NELSON. And newspapers may, if they wish, run lists of contributors and amounts.

> Mr. BELLMON. That is right; but the list brokers, under this agreement, would be prohibited from selling the list or using it for commercial solicitation.
>
> *Id.* at 30,058.

*FEC* v. *Political Contributions Data, Inc.*, 943 F.2d at 192 *quoting* 117 Cong. Rec. 30,057-30,058 (daily ed. Aug. 5, 1971).

Contrast the above-quoted legislative history with the version found in Advisory Opinion 2003-24:

> In requiring disclosure of contributor information, Congress provided limitations to ensure that such information was not misused. Congress was concerned that the Act's reporting requirements "open up the citizens who are generous and public spirited enough to support our political activities to all kinds of harassment . . . ." 117 Cong. Rec. 30057 (1971) (statement of Senator Bellmon). Specifically, Senator Bellmon stated that the purpose of the amendment adding to the Act the prohibition on use of individual contributors' names and addresses was to "protect the privacy of the generally very public-spirited citizens who may make a contribution to a political campaign or a political party." *Id.*
>
> The Commission, in light of this legislative history, reads section 438(a)(4) to be a broad prophylactic measure intended to protect the privacy of the contributors about whom information is disclosed in FEC public records. The communications proposed in your request would target the very persons Congress intended to protect for the very reasons Congress intended to protect them. You stated that NCTFK wants to send the communications to people who have contributed to political campaigns precisely because politically active people are most likely to be responsive. Although not all the proposed communications are for fundraising purposes, all the proposed communications present the possibility of repetitive and intrusive communications to contributors. Such activity would fall within the realm of "harassment" Congress wanted to prevent. 117 Cong. Reg. 30057. The Commission thus concludes that this proposed activity would be antithetical to the very purpose of section 438(a)(4). Therefore, the proposed communications are impermissible.

Advisory Opinion 2003-24.

The version of events presented in Advisory Opinion 2003-24 is obviously incomplete, so much so that it changed the very meaning of the provision it purported to interpret. It is plainly evident that Advisory Opinion 2003-24 misstated the legislative history for the sake of broadening the scope of the sale or use restriction. The restriction's legislative sponsor, Senator Bellmon, never intended it as a "broad prophylactic" to protect contributors from all manner of harassment and invasions of their privacy. He was concerned that contributors would be subjected to commercial solicitations facilitated by list brokers.

Many of the Commission's Advisory Opinions refer to Senator Bellmon's floor statement regarding protecting the privacy of "very public spirited citizens." *See, e.g.*, Advisory Opinion

1984-02 (Gramm). Prior to Advisory Opinion 2003-24, however, not a single Advisory Opinion quoted Senator Bellmon's concern that FECA's reporting provisions might "open up the citizens who are generous and public spirited enough to support our political activities *to all kinds of harassment* . . ." (emphasis added). The Commission had never before so much as mentioned "harassment" in a sale or use restriction Advisory Opinion, or suggested that there was some "realm of 'harassment' Congress wanted to prevent."

## III. Advisory Opinion 2003-24 is Inconsistent with 20 Years of Advisory Opinions

As explained above, Advisory Opinion 2003-24 marked an abrupt change in the Commission's view of the sale or use restriction. Between 1977-1998, Commission Advisory Opinions regarding the sale or use restriction always emphasized that the scope of the restriction was limited to list brokers, solicitations, and commercial purposes.

- Advisory Opinion 1977-66 (Title Industry PAC): "The express legislative intent behind 2 U.S.C. 438(a)(4) is to protect the persons who make contributions, in this case to a multi-candidate committee, from victimization by the practice of list brokering or selling."

- Advisory Opinion 1980-78 (Richardson): "The principal, if not sole, purpose of the provision was to protect contributor information and lists from being used for commercial purposes. . . . The prevention of list brokering, not the suppression of financial information, is the purpose of 2 U.S.C. 438(a)(4) and 11 CFR 104.15."

- Advisory Opinion 1980-101 (Weinberger): "In a number of advisory opinions the Commission has focused on the apparent Congressional intent behind 2 U.S.C. 438(a)(4). Citing to the language of the proponents of this provision concerning use of information filed with the Commission, those opinions recognize that the principal, if not sole, purpose of the restriction on use of information was to protect contributor information and lists from being used for commercial purposes. See Advisory Opinions 1980-78, 1977-66."

- Advisory Opinion 1981-05 (Findley): "Commission advisory opinions pertaining to 438(a)(4) and 11 CFR 104.15 have concluded that the principal, if not sole, purpose of restricting the use of information copied from reports was to protect individual contributors from having their names used for commercial purposes, or from inclusion on contributor lists that are used for commercial purposes."

- Advisory Opinion 1981-38 (CAMPAC Publications): "In a number of advisory opinions the Commission has focused on the apparent Congressional intent behind 2 U.S.C. 438(a)(4). Citing to the language of the proponents of this provision concerning use of information filed with the Commission, those opinions recognize that the principal, if not sole, purpose of the restriction on use of information was to protect contributor information and lists from being used for commercial purposes. See Advisory Opinions 1980-101, 1980-78, and 1977-66. The focus of the proponents of 2 U.S.C. 438(a)(4) centered on protecting the privacy of the 'very public spirited citizens' who make

contributions to campaigns. The purpose of the provision was to protect contributor information and lists from being used for commercial purposes" (emphasis in original).

- Advisory Opinion 1983-44 (Cass Communications): "In a number of advisory opinions the Commission has relied on the legislative history of 2 U.S.C. 438(a)(4), construing that the purpose of the restriction on use of information specifically is to protect contributor information and lists from being used for commercial purposes."

- Advisory Opinion 1984-02 (Gramm): "The proponents of 2 U.S.C. 438(a)(4) focused on protecting the privacy of the 'very public spirited citizens' who make contributions to campaigns. Thus, the purpose of this section was to protect contributor information and lists from being used for contribution solicitation or for commercial purposes. 117 Cong. Rec. 30057-58 (1971) (remarks of Senator Bellmon, amendment sponsor). Subsequent legislative history further reinforces this view. Specifically, the history of the 1979 Amendments to the Act indicates that a commercial vendor may compile information from FEC reports for the purpose of selling that information, but that the prohibition on copying and use of names and addresses of individual contributors is crucial and so was maintained. H.R. Rep. No. 422, 96th Cong., 1st Sess. 23 (1979). The purpose of 2 U.S.C. 438(a)(4) is the prevention of list brokering, not the suppression of financial information. See Advisory Opinions 1983-44, 1981-38, and 1980-78. 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. See Advisory Opinion 1981-5."

- Advisory Opinion 1985-16 (Weiss): "The Commission has declared that the purpose of this restriction is to protect individuals who make contributions to campaigns from being victimized by list-brokering. Advisory Opinions 1984-2, 1981-38, 1981-5, 1980-78, and opinions cited therein. . . . By contrast, the Commission has permitted the use of individual contributor information only in narrow circumstances not related to solicitation or commercial purposes."

- Advisory Opinion 1986-25 (Public Data Access, Inc.): "The Commission has previously stated that the principal, if not sole, 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." (Advisory Opinion 1988-02 contains the exact same language.)

- Advisory Opinion 1989-19 (Johnson): "Based on the legislative history of the Act, the Commission has previously explained that the principal purpose of this restriction is the protection of individuals who make contributions to political committees from having their names used for commercial purposes, not the suppression of financial information. See Advisory Opinions 1988-2, 1986-25, 1983-44, 1981-38, 1980-101, and 1980-78."

- Advisory Opinion 1991-16 (Feigenbaum): "The Commission has previously stated that the principal purpose of restricting the sale or use of information copied from reports is

the protection of individuals who have contributed to political committees from having their names sold or used for commercial purposes. Advisory Opinions 1989-19, 1986-25, 1981-38, and 1980-101."

- Advisory Opinion 1995-05 (14th District TRIM Committee): "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. See Advisory Opinions 1989-19, 1984-2, and 1980-101. The prohibition against use for commercial purposes extends the protection of individual contributors beyond the solicitation for contributions to encompass commercial purposes that could make contributors vulnerable to all kinds of solicitations, "i.e., not merely for solicitations for 'contributions', but solicitations for cars, credit cards, magazine subscriptions, cheap vacations, and the like." Federal Election Commission v. Political Contributions Data, Inc., 943 F.2d 190, 197 (2d Cir. 1991). . . . The Commission has also determined that the Act permits communications to persons whose names were obtained from reports of contributors as long as no solicitation or commercial purpose is involved."

- Advisory Opinion 1995-09 (NewtWatch PAC): "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. See Advisory Opinions 1995-5, 1989-19, 1984-2 and 1980-101."

- Advisory Opinion 1998-04 (White Oak Technologies, Inc.): "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. See *Federal Election Commission v. Legi-Tech, Inc.*, 967 F.Supp. 523 (D.D.C. 1997) and Advisory Opinions 1995-5, 1989-19, 1986-25, 1981-38, and 1980-101.3 See also *Federal Election Commission v. Political Contributions Data, Inc.*, 943 F.2d 190 (2nd Cir. 1991)."

In Advisory Opinion 2003-24, however, the Commission's description of the legislative intent behind the sale or use restriction abruptly changed. For the first time, the Commission's emphasis shifted from preventing contributor data from being used for solicitations and commercial purposes, to protecting contributor privacy in a more general sense. In fact, all references to Congress's intent to prevent contributor data from being used to make solicitations and for commercial purposes – which appeared in Advisory Opinions from 1977-1998 – disappeared entirely.[3]

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[3] The restrictive language reappeared in Advisory Opinion 2004-24 (NGP Software), along with an acknowledgment that the broad "harassment prevention" rationale first used in Advisory Opinion 2003-24 was something new:

> 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. Additionally, in Advisory Opinion 2003-24, the Commission reasoned that section

Not even the Campaign Legal Center (CLC) advocated this new extension of Commission authority. In written comments, the CLC noted that:

> In past Advisory Opinions, the FEC has correctly recognized that 2 U.S.C. § 438(a)(4)'s prohibition on the use or sale of information copied from Commission reports or statements extends only so far as such use or sale is for the purpose of soliciting contributions or for commercial purposes. Conversely, it has stated that 'the Act permits communications to persons whose names were obtained from reports of contributors as long as no solicitation or commercial purpose is involved.' See FEC Advisory Opinion 1995-5. . . . Where the use or sale of information copied from Commission reports or statements is not for the purpose of soliciting contributions or for a commercial purpose, such activity is neither forbidden by this provision of the Federal Election Campaign Act nor implicates its purposes.

*Comments of Campaign Legal Center on Advisory Opinion 2003-24* (Aug. 25, 2003).

Notably, Commissioner Thomas did not adopt the broad "harassment prevention" rationale in Advisory Opinion 2003-24. In a Concurring Opinion, he indicated that he believed the proposed activity could be construed as a use for "commercial purposes," and limited for that reason, but stated that he "would not read § 438(a)(4) to preclude the use of names on FEC filings to issue purely campaign-related mailings." (I do not agree with Commissioner Thomas's exceedingly broad reading of the term "commercial purposes.")

## IV. Advisory Opinion 2003-24 is Inconsistent with Judicial Precedent

In addition to ignoring the plain language of the statute, intentionally misrepresenting the legislative history, and departing from 20 years of Advisory Opinions, Advisory Opinion 2003-24 is also inconsistent with judicial precedent on the subject.

The Second Circuit Court of Appeals provided the following discussion of 2 U.S.C. § 438(a)(4):

> [T]he overarching goal of the prohibitions was to protect campaign contributors from "all kinds" of unwanted solicitations. Without the "commercial purposes" prohibition, the only solicitations at which the statute would be aimed would be solicitations for contributions. Since those prohibitions extend to "the purpose of soliciting contributions" and "commercial purposes," we read the latter prohibition to encompass only those commercial purposes that could make contributors "prime prospects for *all kinds of solicitations*", 117 Cong. Rec. 30,057 (remarks of Sen. Bellmon) (emphasis added), *i.e.*, not merely solicitations for "contributions", but solicitations for cars, credit cards, magazine subscriptions, cheap vacations, and the like. In light of the prohibition's purported aim of protecting the privacy of campaign contributors and the FECA's

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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."

> broader aim of full disclosure, not to mention the serious constitutional problems that FEC's reading would engender, *see, e.g., Communications Workers of America v. Beck, 487 U.S. 735, 761, 101 L. Ed. 2d 634, 108 S. Ct. 2641 (1988)*, this is the proper, reasonable reading of the "commercial purposes" provision.

*FEC* v. *Political Contributions Data, Inc.*, 943 F.2d at 197. This construction of the sale or use restriction suggests that even the Commission's pre-2003 view of the provision may be overly broad. Nevertheless, it certainly provides no support for the "broad prophylactic" view stated in Advisory Opinion 2003-24.

In *FEC* v. *Legi-Tech, Inc.*, the court recognized the limits the sale or use restriction:

> The state [statute?] and the FEC's implementing regulation provide for the full disclosure of political contributions, and that regulation generally permits the use and publication of the information. The exception is where the principal purpose of the use of this information is the solicitation of contributions or the commercial sale of the information itself.

*FEC* v. *Legi-Tech, Inc.*, 967 F.Supp. 523, 530 (D.D.C. 1997).

In *FEC* v. *International Funding Institute, Inc.*, the defendants presented the following view of Section 438(a)(4), which the court did not contend was inaccurate:

> The defendants do not contend - nor could they - that § 438(a)(4) is anything but neutral as to the views for which it bars soliciting contributions. Instead, they argue that by providing the public with access to an inexpensive source of names, the Act in effect facilitates all forms of political speech except (and in that limited sense "selectively prohibits") the solicitation of contributions: Under § 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. Under the implementing regulation promulgated by the FEC, they may even publish information from another committee's list "in newspapers, books, magazines or other similar communications . . . as long as the principal purpose of such communication is not to communicate any contributor information listed on such reports for the purpose of soliciting contributions or for other commercial purposes." 11 C.F.R. § 104.15(c).

*FEC* v. *International Funding Institute, Inc.*, 969 F.2d 1110, 1114-1115 (D.C. Cir. 1992).

No court considering Section 438(a)(4) has ever suggested that the provision restricts anything but solicitations and commercial uses of contributor information, or otherwise posited a view that justifies the approach taken in Advisory Opinion 2003-24.

## V. Advisory Opinion 2003-24 Is An Anomaly That Should Be Corrected

Advisory Opinion 2003-24 stands out as an anomaly in the Commission's 30 years of experience enforcing the sale or use restriction. Up until 2003, there had never been any suggestion that Section 438(a)(4) had a "broad prophylactic" purpose and was intended to protect against all manner of "harassment." No support for this view is found in the statute, the regulations, the legislative history, prior Commission Advisory Opinions, or the court cases. For some reason that is completely unexplained in Advisory Opinion 2003-24, the Commission simply adopted a new view of Section 438(a)(4) when it met on October 9, 2003.

In prior Advisory Opinions, the Commission stated very clearly that the sale or use restriction "is not intended to foreclose the use of this information for other, albeit political, purposes," (Advisory Opinion 1984-02) and "that the Act permits communications to persons whose names were obtained from reports of contributors as long as no solicitation or commercial purpose is involved" (Advisory Opinion 1995-05). These are precisely the sorts of communications that the National Center for Tobacco-Free Kids sought to distribute in Advisory Opinion 2003-24. The same can be said of Club For Growth's proposal in Advisory Opinion Request 2009-19.

Had the Commission adhered to its earlier guidance and construed the sale or use restriction in terms of limiting solicitations and commercial uses, it presumably would have approved the request in Advisory Opinion 2003-24. As the current Draft B frankly acknowledges, "Despite the fact that the communications [in Advisory Opinion 2003-24] *did not include any solicitation, and the contributor information was not to be used for any commercial purpose*, the Commission found that NCTFK's proposed use of contributor information would expose contributors to harassment and would violate 2 U.S.C. § 438(a)(4)" (emphasis added). As is demonstrated above, the plain language of Section 438(a)(4) does not purport to protect contributors from "harassment," nor is this the underlying purpose of the provision.

There is some indication in Commissioner Thomas' Concurring Opinion in Advisory Opinion 2003-24 that the Commission may have been influenced by the Federal Communications Commission's and Federal Trade Commission's actions regarding the Federal "do-not-fax" rule and the "do-not-call" list. It should go without saying that the Telephone Consumer Protection Act[4], the Telemarketing and Consumer Fraud and Abuse Prevention Act[5], and the FTC's Telemarketing Sales Rule[6] did not amend FECA, and none has any bearing whatsoever on the Commission. As we all know, however, the "do-not-call" list does not prohibit *all* unsolicited telephone calls – it only prohibits commercial telemarketing calls that attempt to "induce purchases of goods or services."[7] Calls seeking charitable solicitations are exempted.[8] In other words, it protects only against commercial sales pitches. The "do-not-call" list protects against a *narrower* range of activity than the sale or use restriction (which also

[4] 47 U.S.C. § 227.
[5] 15 U.S.C. §§ 6101 – 6108.
[6] 16 C.F.R. § 310.
[7] 15 U.S.C. § 6106(4).
[8] 16 C.F.R. § 310.4(b)(1)(iii)(B).

restricts solicitations). If the Commission in 2003 was guided to some extent by the newly-created "do-not-call" registry, it was misguided.

Finally, it is worth noting that the FTC's line drawing in its Telemarketing Sales Rule was guided by the constitutional distinction between commercial and non-commercial speech. While the commercial speech doctrine may or may not have application to 2 U.S.C. § 438(a)(4), the Commission should certainly be cognizant of it when construing FECA's sale or use restriction.

I appreciate the opportunity to provide comments in this matter.

Sincerely,

/s/

David S. Maney