



FEDERAL ELECTION COMMISSION

Washington, DC 20463

**MEMORANDUM**

**TO:** Commissioners  
Staff Director

**FROM:** Commission Secretary's Office *LES*

**DATE:** June 14, 2021

**SUBJECT:** Statement Regarding Advisory Opinion 2021-01  
(Aluminate, Inc.) – Vice Chair Allen Dickerson

**Attached is a statement from Vice Chair Allen Dickerson. This matter was on the March 25, 2021 Open Meeting Agenda.**

**Attachment**



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**STATEMENT OF VICE CHAIR ALLEN DICKERSON REGARDING ADVISORY OPINION  
2021-01 (ALUMINATE, INC.)**

At the March 25, 2021 open meeting of the Commission, we considered an advisory opinion request from Aluminate, Inc. seeking an exemption, based upon a series of advisory opinions, from the Federal Election Campaign Act's ("the Act" or "FECA") prohibition on the use of contributor data for commercial purposes. I abstained on the votes regarding both advisory opinion drafts.

In my view, the Act is clear and does not support our practice in this area. 52 U.S.C. § 30111(a)(4) states that disclosure reports "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." The regulation implementing that statutory provision, codified at 11 C.F.R. § 104.15, is similarly blunt. It states explicitly that "information...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."

Despite these categorical commands, the Commission has developed a significant body of advisory opinions blessing the commercial use of reports entrusted to our care.<sup>1</sup> We have reasoned that such use is acceptable where it "is not of the type that could infringe on the contributors' privacy interests."<sup>2</sup> And we have presumed to judge the boundaries of those privacy interests, "approv[ing] the sale or use of contributor data when it would not disclose sufficient information to generate solicitations."<sup>3</sup>

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<sup>1</sup> See Advisory Opinion 2017-08 (Point Bridge Capital LLC); Advisory Opinion 2015-12 (Ethiq); Advisory Opinion 2014-07 (Crowdpac); *but see* Advisory Opinion 2009-19 (Club for Growth); Advisory Opinion 1995-09 (NewtWatch PAC); Advisory Opinion 1995-05 (14th District TRIM Comm.); Advisory Opinion 1983-44 (Cass Communications).

<sup>2</sup> Advisory Opinion 2014-07 (Crowdpac) at 10 (internal quotation marks and citation omitted).

<sup>3</sup> Advisory Opinion 2021-05 (Tally Up, LLC) at 4 (collecting authority).

This “focus on whether contributor data would be sold or used to solicit contributors”<sup>4</sup> is flawed in two ways.

First, it violates a basic rule of statutory construction. Both FECA and our regulations prohibit the use of our reports for both solicitations *and* “commercial use.” Commercial activity that makes “use of aggregated, non-personally identifiable contribution data,”<sup>5</sup> which we have blessed, is still commercial activity. By concentrating on the solicitation prohibition and building our rules around whether a particular product will allow purchasers to contact potential contributors, we have failed to give effect to the separately enumerated prohibition on general commercial use.<sup>6</sup> Doing so runs counter to the “cardinal principle of statutory construction”<sup>7</sup> that we must “give effect, if possible, to every clause and word of a statute.”<sup>8</sup>

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

<sup>5</sup> Advisory Opinion 2017-08 (Point Bridge Capital) at 4.

<sup>6</sup> In 1991, the Second Circuit, relying on legislative history, noted that “the overarching goal of the [commercial use] prohibitions was to protect campaign contributors from ‘all kinds’ of unwanted solicitations...[including] solicitations for cars, credit cards, magazine subscriptions, cheap vacations and the like.” *Fed. Election Comm'n v. Pol. Contributions Data, Inc.*, 943 F.2d 190, 197 (2d Cir. 1991). Consequently, and in order to avoid an alternative construction of the statute that would “impede, if not entirely frustrate, the underlying purpose of the disclosure provisions of FECA” by “bar[ring] newspapers and other commercial purveyors of news from publishing the information contained in those reports under any circumstances,” *id.* at 194 (citation, emphasis, and quotation marks omitted, brackets supplied), the court read the commercial use prohibition as “encompass[ing] only those commercial purposes that would make contributors prime prospects” for any solicitation. *Id.* at 197 (citation and quotation marks omitted). That decision was a sound application of the doctrine of constitutional avoidance, but its narrowing gloss was directed toward the publication of donor information, not its use as a component in proprietary commercial products. *Id.* at 196 (noting that barring media reporting about contributions “would very likely run afoul of the [F]irst [A]mendment”).

“The avoidance canon, however, ‘is a tool for choosing between competing plausible interpretations of a statutory text.’” *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 239 (2010) (citing *Clark v. Martinez*, 543 U.S. 371, 381 (2005)). As the Tenth Circuit has recognized, “[i]t will frequently be the case, however, that an ambiguous statute susceptible of one interpretation raising serious constitutional doubts will be open to other readings that raise no such doubts. When this is the case, a court’s initial application of the avoidance canon to construe an ambiguous statute would not foreclose the agency from adopting a different reasonable interpretation.” *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1250 (10th Cir. 2008) (McConnell, J.).

<sup>7</sup> *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (O’Connor, J., concurring in the judgment).

<sup>8</sup> *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *United States v. Menasche*, 348 U.S. 528, 538-539 (1955)).

Second, we have consistently undervalued the privacy interests at stake. To take only one example, the use of contributor data “to make inferences about issue positions” held by those contributors plainly implicates the privacy of the individuals involved.<sup>9</sup>

This concern is of constitutional moment. It directly implicates the “privacy of association and belief guaranteed by the First Amendment.”<sup>10</sup> The public disclosure of contributors under the Act is a discrete exception to that general rule, and it is only justified by the government’s compelling interests in preventing corruption, circumvention, and providing the electorate with the financial constituencies of candidates for office.<sup>11</sup> The use of this information for private gain compounds the harm to individuals’ privacy while doing nothing to further those interests.<sup>12</sup>

In sum, we have shortchanged the rights of political contributors while transforming a simple statutory command—“no person” may “use” our reports “for commercial purposes”—into a complex and esoteric question hinging on whether a particular business uses information to solicit contributions and, if so, how directly. Put differently, we have once again muddied campaign finance law by creating an “open-ended rough-and-tumble of factors”<sup>13</sup> that requires “person[s] of ordinary intelligence” to “guess” at the meaning of the law.<sup>14</sup> And we have done so in area of special constitutional sensitivity.

If that were the end of the analysis, this would be a simple matter. But our errors are not easily undone. Advisory opinions are not casual pronouncements; the Act specifically immunizes requesters from legal liability for relying on them, and we have long stated, correctly, that materially similar fact patterns are also protected.<sup>15</sup>

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<sup>9</sup> Advisory Opinion 2014-07 (Crowdpac) at 2.

<sup>10</sup> *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (*per curiam*) (collecting cases).

<sup>11</sup> *Buckley*, 424 U.S. at 67-68, 79-81.

<sup>12</sup> Uses of FEC reports that *do* further these interests are another matter. For instance, § 30111(a)(4)’s commercial purposes restriction cannot be used “to limit the FECA’s broad disclosure requirements.” *Polit. Contr. Data*, 943 F.2d at 191 (2d Cir. 1991). Moreover, profound First Amendment difficulties would arise if we attempted to ban the publication of donor information, whether by “commercial purveyors of news” or by organizations using our reports for advocacy purposes. *Id.* at 194 (internal quotation marks omitted). None of these concerns are implicated where contributor data is not published, but rather used in proprietary commercial algorithms.


<sup>13</sup> *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (Roberts, C.J., controlling op.) (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995)).

<sup>14</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Smith v. Goguen*, 415 U.S. 566, 574 (1974).

<sup>15</sup> 52 U.S.C. § 30108(c)(1)(B) (allowing reliance upon advisory opinions issued by the Commission by “any person involved in any specific transaction or activity which is indistinguishable in all its materials aspects from the transaction or activity with respect to which such advisory opinion is

These reliance interests are serious, and we would err if we did not recognize the immunities we have already granted. But we should not go further.

Accordingly, I abstained in Advisory Opinion Request 2021-01 rather than extend our errors. While individuals and entities may rely on our previous advisory opinions in planning their activities and defending themselves against administrative complaints, I will not support efforts to further undermine Americans' privacy by expanding our administrative exception to the Act's ban on the commercial use of reports filed with the Commission.



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Allen Dickerson  
Vice Chair

June 14, 2021

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Date

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rendered"); 52 U.S.C. § 30108(c)(2) (“Notwithstanding any other provisions of law, any person who relies upon any provision or finding of an advisory opinion...and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this Act”).