



This week the Federal Election Commission (FEC or the Commission) issued Advisory Opinion 2021-05 (Tally Up), telling a campaign vendor that it may not integrate federal campaign finance data into software that scores groups of voters based on how likely the group is to support certain candidates. The opinion holds that campaigns and other organizations cannot incorporate information obtained from FEC reports into a product or service that is then used to make or facilitate solicitations—even if the product or service only uses aggregated or anonymized data, and even if it does not disclose personally identifiable information taken from FEC reports.

The Federal Election Campaign Act (FECA or the Act) prohibits any information copied from campaign finance reports filed with the FEC from being "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." Congress passed the so-called "sale and use" restriction "to protect the

privacy of the generally very public-spirited citizens who make a contribution." The FEC has issued several advisory opinions finding some uses of FEC report data permissible, and others not permissible. The Tally Up opinion offers the Commission's most recent, detailed guidance on how the law affects the use of FEC data in analysis functions related to fundraising and solicitation.

In its advisory opinion request, Tally Up told the FEC that it offers its campaign clients the ability to create customized lists of voters based on different variables, such as age or ZIP code. (Tally Up calls these lists "segments"). The segment information Tally Up provides to clients includes voter contact information, but Tally Up obtains that information from sources besides FEC reports. Tally Up proposed to add a feature to its product called a "Voter Segment Score." It would use aggregated individual contribution information from FEC reports to assign a score from 0 to 100 to reflect how likely any given voter within a segment would be to support a particular political party and its candidates. Tally Up represented that it would not disclose any individual contribution information to its campaign clients, and said it had several safeguards in place to ensure there was no way for a campaign to trace any particular contribution to a specific donor.

The FEC found by a 5-0 vote that Tally Up's proposal to calculate a Voter Segment Score was impermissible. The Commission focused on the fact that "Tally Up's segments would link voters' names and contact information to a score based, in part, on the aggregated contributions of individuals within the segment...." Campaigns could then use the score for a variety of purposes, one of which is to solicit funds from voters in a segment with a high score. Despite the fact that Tally Up does not draw contact information from FEC reports, the Commission concluded that incorporating contribution histories into a scoring methodology that clients could use to make solicitations would implicate the privacy concerns Congress sought to address when it wrote the Act, and therefore be impermissible.

The Tally Up opinion left in place three prior opinions in which the FEC allowed companies to use campaign finance data in an aggregate fashion: 2017-08 (Point Bridge Capital), 2015-12 (Ethiq), and 2014-07 (Crowdpac). The FEC distinguished those earlier opinions from the facts in Tally Up by saying that using aggregated, non-personally identifiable FEC contribution data does not violate the Act only when the data are used to derive generalized information for purposes besides solicitation.

Takeaways

While the Commission's approach to the sale-and-use restriction has varied over the years, Advisory Opinion 2021-05 clearly shows that campaigns and other organizations seeking to use and analyze FEC report data must be careful to do so in a way that "would not disclose sufficient information to generate solicitations." Instead, they must hew closely to "situations where data is analyzed to derive generalized information for uses other than solicitation, which the Commission [has] concluded would not implicate the Act's privacy concerns." The highly fact-specific distinctions drawn by the FEC underscore the need for anyone proposing to use FEC report data in a product or service to seek specific legal advice first.

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