October 28, 2019

Ellen L. Weintraub, Chair
Caroline C. Hunter, Commissioner
Steven T. Walther, Commissioner
Federal Election Commission
1050 First Street, NE
Washington, DC 20463

Letter in Support of the Rulemaking Petition:
Requiring Reporting of Exchanges of Email Lists

Dear Chair Weintraub, Commissioner Hunter, and Commissioner Walther,

We write to express our strong support of the Campaign Legal Center's recent rulemaking petition requesting that the Federal Election Commission (FEC) close the list-swap loophole. The list-swap exemption from statutory disclosure requirements has proven to be a vehicle for independent expenditure-only committees (i.e. super PACs) to provide direct, valuable aid to candidate committees, in contravention of the law. It is time for the FEC to re-evaluate the wisdom of the 1981 Advisory Opinion that created this loophole. FEC Advisory Opinion 1981-46 (Dellums) lacked a clear legal foundation when it was issued, but, more importantly, the thin reasoning contained therein has no applicability to the modern world where campaigns exchange vast quantities of data and the Supreme Court values disclosure above all.[1]

Advisory Opinion 1981-46 must be rescinded or overturned.

Since 1981, the FEC has consistently allowed campaigns, for-profit organizations, and super PACs to swap mailing lists of equal value without any reporting requirement with no valid legal basis. Usually, when sanctioning such activity, the FEC has referred back to AO 1981-46 (Dellums), citing it in at least nine subsequent advisory opinions. Indeed the Federal Register notice for this rulemaking petition states that the Dellums Advisory Opinion is the source of the Commission's determination that the exchange of equally valued mailing lists between political committees is not reportable. Yet for all the precedential weight that the FEC seems to afford this seminal advisory opinion, the opinion itself contains no legal reasoning supporting the Commission's conclusion.

In 1981, Congressman Dellums's committee sought to increase the size of its own mailing list by working with a broker.[2] The broker proposed that instead of the Congressman paying the fair market value in dollars of the information it received from the third party, the Congressman would provide the third party with names of equal value in exchange for the names he was

[1] See, e.g., Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 370 (2010) ("With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.").

[2] FEC AO 1981-46 (Dellums), http://saos.fec.gov/aodocs/1981-46.pdf at 1.

receiving.[3] The FEC sanctioned this practice.[4] In the FEC's own words, "the Commission concludes that if the exchange of names on a contributor list is an exchange of names of equal 'value' according to accepted industry practice, the exchange would be considered full consideration for services rendered."[5] The FEC then went one step further. It concluded, "thus, no contribution or expenditure would result and the transaction would not be reportable under the Act."[6]

Unfortunately, the legal and logical basis for the conclusion reached in this advisory opinion is unclear because the Commission did not explore the relevant issues in sufficient detail. First, the FEC provided no definition for "mailing list" or "names." In fact, the opinion alternates between calling the list at issue a "mailing list" and a "contributor list." And the Commission sanctioned the swap of "names," but presumably a name alone is not what the Congressman sought. What exactly were the parties swapping? Was it a name and a mailing address? A name and a donation history? A name and a phone number? Perhaps it was all of the above, but the Commission only expressly approved the "exchange of names."[7]

Furthermore, the FEC determined that this exchange was not a reportable expenditure or contribution; however, the Commission did not provide any reasoning to explain that determination.[8] If the Congressman had paid cash for the names he was purchasing, it would be an expenditure. But because he was making what was, in effect, an in-kind disbursement, the FEC declared that it was not a reportable expenditure. And because this swap was neither a reportable contribution nor an expenditure, it could occur between organizations that typically would not be allowed to provide contributions to campaigns, like super PACs or corporations.

The Dellums Advisory Opinion's holdings did not stop there. The FEC went on to sanction a practice that is now called a "deferred swap" by industry professionals but which operates in practice as an advance. The Congressman asked whether he could provide names *now* to another political committee in exchange for *future* use of a corresponding number of names from that committee.[9] The Commission answered in the affirmative, with a limited caveat.[10] The Commission reasoned that this was a common and widely accepted practice in the fundraising field, so it should be permitted by political committees. The only condition the Commission placed on this practice was that the future provision of names must actually take place; if not, this deal would be a contribution to the committee that originally received the names.[11] The FEC further clarified that a transaction of this kind was not even subject to reporting,[12] raising the question of how one would discover that a committee had not fulfilled its end of the bargain in the future.

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[3] *Id.* at 2.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] See *id.*
[9] *Id.* at 2.
[10] *Id.*
[11] *Id.* (caveating that it may be a contribution "depending on the circumstances of the particular situation").
[12] *Id.*

More concerning, the Commission seems to have accidentally or intentionally deregulated what the FECA regulated: an advance. Advances are permissible, but political committees must treat advances as outstanding debt until reimbursed.[13] Here, a candidate was receiving an advance of a certain number of names and was thereby incurring an obligation to disburse names equal in value in the future. A plain reading of 11 C.F.R. § 116.5 seems to encompass exactly the sort of activity at issue here, but the FEC has chosen to exempt advances of names on a mailing list under the guise of standard industry practice.

The Dellums Advisory Opinion opened and promptly sidestepped one final can of worms—valuation of names on mailing lists. The opinion at first appeared to endorse the idea that organizations can swap an equal number of names and call it a swap of equal value.[14] However, it also introduced the idea of swapping a list of names for "multiple use[s] of a smaller number of names or some other variation which the parties believe is an exchange of equal value."[15] The Commission then punted on this issue and approved all swaps "of equal 'value' according to accepted industry practice."[16] Subjective valuations performed by interested parties combined with a lack of reporting to expose transactions to public scrutiny present significant and obvious issues.

Later FEC advisory opinions exhibit an increasing willingness to provide *sui generis* treatment for mailing and contributor lists. In 1982, the FEC clarified that a mailing list or a contributor list can constitute the "usual and normal charge" for goods if the list is equal in value.[17] The 1983 Commission admitted that the regulation of these lists was atypical, calling it an "exception" to the normal contribution rules.[18] The opinion revealed that "the Commission views such lists as a unique type of asset" because the "list's value, at least in part, is determined on the basis of the committee's political fundraising efforts or other political use of the list."[19]

The unique treatment of mailing lists stands in stark contrast to the standard treatment for virtually any other type of campaign asset, no matter their value. In 1986 Congressman Burton's committee attempted to sell a van that it had previously purchased for travel and advertising.[20] The Commission held that so long as the committee received the usual and normal charge for the van in the marketplace, the funds received would not be considered a contribution.[21] However, the committee was still required to report the proceeds of the sale with itemized information that identified the purchaser as well as the amount and date.[22] The committee argued that this situation was "materially distinguishable" from that of a mailing list, finding that the van was a "depreciated asset . . . acquired for and used by the Committee in two previous election cycles, and that it will be sold outright in a single isolated transaction."[23] Why this reasoning could not

[13] 11 C.F.R. § 116.5(c) (2018).
[14] See FEC AO 1981-46 (Dellums), supra note 2, at 1.
[15] *Id.*
[16] *Id.* at 2.
[17] FEC AO 1982-41, at 2 (1982), https://www.fec.gov/files/legal/aos/1982-41/1982-41.pdf (quoting 11 C.F.R. § 100.7(a)(1)(iii)(B) (2018)).
[18] FEC AO 1983-2, at 2 (1983), https://www.fec.gov/files/legal/aos/1983-02/1983-02.pdf.
[19] *Id.*
[20] See FEC AO1986-14, at 1 (1986), https://www.fec.gov/files/legal/aos/1986-14/1986-14.pdf.
[21] *Id.* at 3.
[22] *Id.*
[23] *Id.*

be equally true of a mailing list is not addressed in the opinion. Mailing lists are frequently sold outright in single transactions, and their value certainly depreciates over time.

To put a finer point on this absurd result, consider the following example. Today, if Senator Sanders and Senator Warren decided to swap campaign buses, both of these campaigns would have to report this swap on their FEC filings. But if the Senators decide instead to swap their campaign databases, valued well into the millions of dollars, they would have no obligation to disclose anything to the FEC or the public. If the former swap requires disclosure, surely so should the latter.

The term "mailing list" must be updated.

Despite the prevalence of the term "mailing list" in countless advisory opinions and enforcement actions, the FEC has never defined it. At various times, regulations and opinions also discuss "polling results," "contributor lists," and "lists of activists." Perhaps a mailing list was a known quantity in 1981, but political organizations no longer segregate information in this way. It is not even clear that a 1981 Advisory Opinion that sanctioned the swap of one "mailing list" for another can reasonably be relied on to permit one campaign to swap a multi-million-dollar database for another. The FEC must embrace modern campaign terminology and adapt campaign finance regulations to keep pace with technological developments.

The term "mailing list" has practically no meaning anymore as campaigns aggregate increasingly massive amounts of information on any potential supporter and voter. A recent leak by the political data firm Deep Root Analytics revealed sensitive personal information collected on over 198 million American voters.[24] The information the firm had compiled on individual voters went far beyond the bare minimum information on state voter rolls. The breach revealed that the firm was collecting a wide array of data including what appeared to be polling results, demographic information, and even content gleaned from Reddit and Facebook use.[25] The firm also made attempts to predict individuals' race and religion and recorded the results of those predictions.[26]

Perhaps the most significant development in campaign data practices over the last decade is that data is no longer siloed into particular databases with discrete uses. Fundraising data has been merged with voter contact and demographic data, which has been further combined with polling information. The 2012 Obama campaign appears to be the first campaign to have attempted this on a large scale.[27] That data team recognized an issue with inaccurate information and noted that "the problem in Democratic politics was you had databases all over

[24] Dan O'Sullivan, The RNC Files: Inside the Largest US Voter Data Leak, UpGuard (last updated on May 1, 2018), https://www.upguard.com/breaches/the-rnc-files.
[25] *Id.* See also Evan Halper & Paresh Dave, A Republican Voter Data Firm Probably Exposed Your Personal Information for Days—and You Don't Have Much Recourse, L.A. Times (June 19, 2017, 4:25 PM) (discussing the various types of personal data that was collected).
[26] O'Sullivan, supra note 24.
[27] Michael Scherer, Inside the Secret World of the Data Crunchers Who Helped Obama Win, Time (Nov. 7, 2012), http://swampland.time.com/2012/11/07/inside-the-secret-world-of-quants-and-data-crunchers-who-helped-obama-win.

the place."[28] To address this concern, "the campaign started over, creating a single massive system that could merge the information collected from pollsters, fundraisers, field workers and consumer databases as well as social-media and mobile contacts with the main Democratic voter files in the swing states."[29] The "mailing list" was gone. The Republican Party may have been slightly slower on this adoption, but it soon emulated the Democrats.[30] There is no longer a single "email list" or a single "donor list"; all of this data now exists in combination for sophisticated campaigns. And the term "mailing list" is practically anachronistic. Campaigns no longer send a singular message to every mailbox at their disposal. Instead, campaigns rely on the rest of the data at their disposal to send specific messages to specific targets.[31]

Beyond the combination of disparate types of factual data into a singular file, perhaps the next largest innovation in campaign data analytics is that all of this information is synthesized and processed into new types of predictive models.[32] These predictive models enable campaigns to micro-target campaign communications and fundraising appeals.[33]

The 2017 Deep Roots leak discussed above demonstrated the incredible array of modeled scores available to campaigns today.[34] That leak contained at least forty-six different types of scores, ranging from modeled support for an Obamacare repeal to opinions on whether Democratic leaders should work with President Trump to whether the voter may be a reluctant supporter of Hillary Clinton.[35] The data also modeled the race and religion of individuals, sensitive information that is purposefully excluded from most state voter rolls.[36]

These scores, created by predictive models, have values of their own that can vastly exceed that of the raw data. Recent revelations about Cambridge Analytica and Facebook underscore the importance of these models. While Mark Zuckerberg was emphatic in his congressional testimony that Cambridge Analytica has deleted all of the data it took from Facebook,[37] any predictive models built using that data can still be deployed indefinitely. As one commentator put it, "[m]uch more important are the behavioral models Cambridge Analytica built from the data. Even though the company claims to have deleted the data sets . . . those models live on, and can still be used to target highly specific groups of voters . . . ."[38] In many

[28] *Id.* (quoting an Obama campaign official).
[29] *Id.*
[30] Eliana Johnson, The GOP's Data Surge, National Review (Jan. 16 2014, 9:00 AM), https://www.nationalreview.com/2014/01/gops-data-surge-eliana-johnson.
[31] See, e.g., Dan Eggen, Obama Campaign Puts Bo on the Trail, Wash. Post (Apr. 30, 2012), https://www.washingtonpost.com/politics/obama-campaign-puts-bo-on-the-trail/2012/04/30/gIQAgZrYsT_story.html?utm_term=.06b2d0d951c0. ("Pet lovers are just one niche among many, with specific appeals aimed at women, African Americans, students, military families, and countless others.").
[32] David W. Nickerson & Todd Rogers, Political Campaigns and Big Data, 28 J. Econ. Persp., Spring 2014, at 51, 54.
[33] *Id.* at 54.
[34] O'Sullivan, supra note 24.
[35] *Id.*
[36] *Id.*
[37] Transcript of Mark Zuckerberg's Senate Hearing, Wash. Post (Apr. 10, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/04/10/transcript-of-mark-zuckerbergs-senate-hearing.
[38] Jacob Metcalf, Facebook May Stop the Data Leaks, But It's Too Late: Cambridge Analytica's Models Live On, MIT Tech. Rev. (Apr. 9, 2018), https://www.technologyreview.com/s/610801/facebook-may-stop-the-data-leaks-but-its-too-late-cambridge-analyticas-models-live-on/. Metcalf also raises an interesting, related campaign finance

instances, it is "the models, not the data, where the actual economic value resides."[39] This proposition is intuitive. If you were able to choose between knowing a few discrete data points, like the age, race, and religion, of an individual, or knowing on a scale of 1-100 how likely that individual is to vote for you without any additional campaign contact, the latter would frequently be more useful and, therefore, more valuable.

Unfortunately, it is rarely clear what the FEC means by terms like "mailing list," "polling results," or "contributor list." Not only are these terms never clearly defined in regulations, but they also do not reflect modern campaign practices. And regulations drafted using those terms no longer provide sufficient guidance to the regulated community. The FEC should simply collapse all of these terms into the term "data." This inherently broad term is instantly recognizable and captures the full scope of campaign practices.

We have not yet seen an advisory opinion or enforcement action that addresses the transfer of an analytical model, built using a combination of all of the above plus more. Can campaigns legally swap models? Would it be a reportable receipt or disbursement? These questions must be answered, because campaigns are already swapping these tools. It is important that the FEC provide clear guidance to campaigns in advance, rather than passively allowing campaigns to push the limits.

The FEC predicted this issue in 2003.

This is not the first time the Commission will consider this issue, though it is certainly a more urgent matter now. In September 2003, the Commission posted a Notice of Proposed Rulemaking Mailing Lists of Political Committees in the Federal Register.[40] The notice requested comments on proposed additions to the "rules covering the sale, rental, and exchange of political committee mailing lists."[41] The proposed rules covered situations in which an organization seeks to rent lists,[42] sell lists,[43] or exchange them for lists of equal value[44]—a wish list for reformers. The rules proposed specific, objective valuation criteria that must be met before any transaction could proceed.[45] The rules would also have imposed record-keeping requirements of all transactions, including a valuation of the lists involved.[46] Finally, the rules would require that all transactions be bona fide arm's length transactions, and the Commission even questioned whether list exchanges between closely aligned committees could ever be at arm's length.[47]

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question: If a machine-learning algorithm improves a model using data shared between a campaign and a super PAC, would that constitute coordination? *Id.*

[39] *Id.*

[40] Mailing Lists of Political Committees, 68 Fed. Reg. 171, at 52,531 (proposed Sept. 4, 2003), https://www.fec.gov/resources/legal-resources/rulemakings/nprm/mailing_lists/fr68n171p52531.pdf.

[41] *Id.*

[42] *Id.* at 52,532.

[43] *Id.* at 52,533.

[44] *Id.* at 52,535.

[45] *Id.* at 52,532.

[46] *Id.* at 52,534.

[47] *Id.* at 52,535.

These proposed rules were discussed at an October 2003 public hearing. The transcript reveals that the commissioners had a keen understanding of the potential dangers of leaving mailing lists unregulated. For example, Commissioner Mason voiced concern about the practice of deferred list swaps.[48] And notably, in response to a question, one attorney revealed that Democrats rarely use list brokers for list exchanges, leaving open the question of how the parties ensure the lists being exchanged are of equal value.[49]

Perhaps most importantly, at least four commissioners posited the transfer of mailing lists as a method of circumventing contribution limits. Vice Chair Smith asked about a situation in which allied groups, like EMILY's List and the Democratic Senatorial Campaign Committee, exchange a list. He queried:

> [W]ould the problem be that such groups would give you a list for more than you would give them? In other words, the problem . . . [is] that somebody who wants to help your committee out is going to give you more than you're giving them . . . .
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> . . . .
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> . . . [I]f they're limited on giving cash, perhaps names is an adequate substitute to accomplish their mission.[50]

In response, the General Counsel for the National Republican Senatorial Campaign explained that the self-interest of both organizations was the only thing ensuring an equal value exchange.[51] Chair Weintraub followed up on this example, asking whether an organization that wanted to bolster the odds of a long-shot candidate might be incentivized to "lowbal[l] on the price of a mailing list, give them a good mailing list and give it to them really cheap . . ."[52] A Democratic attorney replied that the value of the mailing lists is a primary asset of some organizations like political parties, and there is no evidence that organizations are willing to part with their assets for less than their value.[53]

Two other commissioners questioned whether a party or organization that wanted to assist a particular candidate but which had already contributed the maximum amount could exchange a list of high value for a list of lower value to bypass these limits.[54] In all of these exchanges, the attorneys appearing in front of the Commission relied on the self-interest of the parties to the transaction to prevent less than fair market value list transfers.

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[48] *Id.* at 161–62 ("[T]here was news coverage of the fact that the NRCC was exchanging names with Judicial Watch, and that Judicial Watch had built up a large balance owed . . . . in the normal commercial marketplace, it is not unusual to have name exchanges going on where large balances are built up and owing, and maybe sometimes those never get paid back on a one-for-one basis.").
[49] *Id.* at 162 ("I'm not sure that, especially with exchanges, that [using list brokers] is the rule at all. In fact, I'd say it's the exception.").
[50] *Id.* at 44–46.
[51] *Id.* at 45.
[52] *Id.* at 48–49.
[53] *Id.* at 50.
[54] See *id.* at 139, 145–48.

It appears that the Commission accepted the proposition that long-standing groups, like the Sierra Club or the NRA, are the only organizations that maintain valuable, exclusive lists and they therefore have a powerful incentive to protect the market values of those lists.[55] In other words, the market was working as intended. While this may have been true in 2003, it is no longer true in the age of super PACs that are established to support one particular candidate and cease to exist after the election.

Independent valuation of data-swaps is essential.

While the Campaign Legal Center's rule-making petition urges the FEC to require disclosure of list swaps, we encourage you to go one step further. Organizations that wish to swap data must be required to obtain an independent valuation of the data that they claim is of equal value. Without obtaining, and disclosing, the market value of these swaps, a campaign or super PAC's claim that the swap was above board should not pass the laugh test.

Recently, super PACs have begun to create especially perverse incentives in the political data marketplace. Increasingly they possess data that would help their preferred candidates. For some super PACs, generating and sharing data with candidates is part of their purpose. Right to Rise gathered data on behalf of the Jeb Bush campaign[56], and Ready for Hillary PAC did the same work for Hillary Clinton.[57] Legally, a super PAC cannot collect personal information about voters and then give it directly to a candidate for free, but the list-swap exception allows them to swap that data for data of purportedly equal value back from the campaign.

Currently, the FEC requires that the data being sold have an "ascertainable fair market value" and that the parties involved engage in a "*bona fide*, arm's-length transaction."[58] As with many areas of campaign finance, enforcement is a challenge. "Fair market value" is notoriously difficult to define, and one wonders how often transactions between candidates and super PACs supporting them are really "arm's-length."[59] The FEC has declined to provide instructions on how one should value data, acknowledging in 2004 that "[r]easonable persons can disagree about how . . . to determine the value of [a] mailing list."[60]

This problem is especially acute when considering swaps. The FEC allows candidates, parties, and super PACs to swap voter information so long as the databases are of "equal value," but it has not provided clear guidance on how to ensure that this requirement is satisfied.[61] Some

[55] *Id.* at 42–55.
[56] Thomas Beaumont, Jeb Bush Prepares to Give Traditional Campaign a Makeover, AP News (Apr. 21, 2015), https://apnews.com/409837aa09ee405493ad64a94b8c2c3d.
[57] Phil Mattingly, Inside the First Super-PAC Dedicated to Collecting Data All About You, Bloomberg Politics (Apr. 15, 2015, 12:30 PM), https://www.bloomberg.com/news/features/2015-04-15/the-care-and-feeding-of-the-ready-for-hillary-list.
[58] FEC AO 2014-06, at 3 (2014), http://saos.fec.gov/aodocs/2014-06.pdf
[59] Jim Zarroli, Trump's Campaign Paid Millions To His Own Properties, FEC Documents Say, NPR (Feb. 3, 2017), https://www.npr.org/sections/thetwo-way/2017/02/03/512888131/trumps-campaign-paid-millions-to-his-own-properties-fec-documents-say.
[60] FEC's Motion to Dismiss, or in the Alternative, for Summary Judgment, *Alliance for Democract v. FEC*, 2004 WL 3628083 (D.D.C. 2004).
[61] FEC AO 1989-04, at 2 (May 26, 1989), https://www.fec.gov/files/legal/aos/1989-04/1989-04.pdf (endorsing but not requiring the use of an independent valuation).

organizations, like the non-profit Citizens United, use a commercial firm to rent their data to candidates.[62] Firms like this can help ensure that buyers pay a reasonable price, but of course, if the seller is only willing to sell to certain buyers, we should worry that prices may be distorted. In any case, the use of a broker to facilitate a swap might be the exception rather than the rule. In the absence of an independent valuation, the parties to the exchange are the ones determining if the databases are of equal value, out of view of regulators or the public.

Some lawyers, we are told, discourage their super PAC clients from swapping data for fear of violating coordination rules, but this practice is not universal. In the past, as discussed above, FEC commissioners have argued that the self-interest of long-standing political organizations like the NRA or the Sierra Club ensures that databases sell or trade at market value. For organizations like these, a database of donors, for example, is a valuable asset because it is a primary source of income, and the organization has an interest in ensuring its own sustainability. But single-cycle super PACs upend this conventional wisdom. They exist to benefit candidates *this* cycle, and their purpose is to maximize their benefit to candidates before disbanding after the election.

Reforms could close some of these loopholes. Currently, parties engaged in data swaps do not have to disclose any details to the FEC. Since data is valuable and swaps can involve illegal coordination, mandating disclosure seems like an obvious first step. If data is sold rather than swapped, FEC filings say only general things like "email list purchase." Requiring parties to file a form describing the information being exchanged or sold could help keep candidates and super PACs honest.

Another reform would prohibit super PACs from selling data to or swapping data with a campaign unless a broker acts as an intermediary. A broker could appraise the data, which could at least mitigate concerns about discount prices. A more aggressive reform would entirely forbid sales or swaps between super PACs and campaigns. Any of these options are better than the status quo. Without better regulation, data sales and exchanges erode the reasoning at the heart of *Citizen's United*, that "independent expenditures . . . do not give rise to corruption or the appearance of corruption."

Sincerely,

Samir Sheth and Professor Michael D. Gilbert, University of Virginia School of Law

[62] FEC AO 2010-30 (Dec. 23, 2010), https://www.fec.gov/files/legal/aos/2010-30/AO-2010-30.pdf.