

FEC Advisory Opinion Roundup: Contributor-Centric Analysis Appears Here to Stay

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The Federal Election Commission (FEC) recently issued three noteworthy advisory opinions covering a variety of topics. These opinions are briefly summarized below.

Contribution Processors: Advisory Opinion 2022-10 (Sprinkle)

In Advisory Opinion 2022-10, the FEC continued its trend of permissive advisory opinions for online contribution processors. Sprinkle, a for-profit online payment platform specifically focused on young contributors, asked the FEC (1) whether Sprinkle's services constituted a prohibited corporate contribution, and (2) whether Sprinkle could use and display aggregated FEC data on candidates including "average contribution amount, geographic concentration of donor support, and individual versus organizational support." Sprinkle further clarified that it will use a proprietary algorithm and machine learning to match potential contributors with candidates in whom they might be interested and races in which their contribution will make an impact as part of Sprinkle's efforts to target young voters with limited contribution histories.

Consistent with past advisory opinions in the payment processing area, the FEC determined that Sprinkle's business model is permissible as its services are directed toward the benefit of contributors rather than the benefit of candidates or committees. Interestingly, the proposed use of the algorithm to promote specific candidates to certain contributors did not appear to complicate this analysis for the FEC. The FEC likewise approved Sprinkle's proposed use of aggregated FEC data, pointing to the fact that the aggregated data would not be usable for fundraising activity targeting any specific donor.

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While this opinion continues the FEC's permissive trend in contributor-centric analysis for online payment processors, this field continues to grow rapidly and evolve. Payment processors should continue to consult with counsel before rolling out new features or implementing aggressive candidate promotion algorithms.

Email and Spam: Advisory Opinion 2022-14 (Google LLC)

In Advisory Opinion 2022-14, the FEC approved a pilot program exempting authorized candidate committees, political party committees, and leadership PACs ("Eligible Participants") from Gmail's usual spam detection algorithms. The pilot program instead relies on direct feedback from Gmail users to classify bulk emails from the Eligible Participants as spam on a user-by-user basis. Enrollment in the pilot program was free. The pilot program has the stated goals of improving the Gmail user experience and testing the alternative approach to spam reduction for use on a wider scale. Google specifically identified several other types of entities it hopes to include in a more comprehensive program if the pilot program is successful, including government services, government contractors, class-action notice providers, and nonprofits.

In approving the pilot program, the FEC noted that Google was implementing the pilot program for ordinary commercial goals, including improving the Gmail user experience and enhancing the Google brand. The FEC also stated that Google had chosen the Eligible Participants on an industry-wide, nonpartisan basis due in part to conditions that made the Eligible Participants an attractive testing ground before expanding the pilot program to other industries. Pointing to Google's assertions regarding the contemplated expansion of the pilot program, the FEC advised that the pilot program appeared to be offered "to all similarly situated entities for commercial and not political reasons ... [in] the ordinary course of business." Accordingly, the FEC determined that the pilot program more closely resembled services ordinarily provided at no charge than services usually offered for a fee.

This opinion continues the FEC's pattern of looking favorably at nonpartisan business decisions by service providers or vendors, particularly when those decisions do not involve the provision of goods or services for which there is usually a charge. It is also another example of the FEC endorsing a contributor-focused or user-focused approach to questions raised by the provision of third-party digital services.

Campaign Debt and *FEC v. Cruz*: Advisory Opinion 2022-15 (Harley Rouda for Congress)

In Advisory Opinion 2022-15, the FEC confirmed that a candidate committee was free to reinstate candidate loans made in connection with a 2018 primary election that had previously been converted to candidate contributions according to 11 C.F.R. § 116.11(c)(2), and could repay those loans with committee funds currently on hand or funds raised to repay those loans, provided those funds were properly attributed to the 2018 primary election.

This marks the first meaningful application of *FEC v. Cruz*, 142 S. Ct. 1638 (2022) by the FEC. Before the Supreme Court's ruling in *Cruz*, candidate committees could repay no more than \$250,000 in candidate loans using funds raised after the relevant election date. The FEC expressly recognized that the *Cruz* decision had invalidated the candidate loan repayment provisions of 52 U.S.C. § 30116(j) and 11 C.F.R. § 116.11(c)(2). The FEC pointed to the original classification of the loans as loans and the compulsory nature of the conversion to

a candidate contribution under 11 C.F.R. § 116.11(c)(2) as compelling evidence that the loans at issue were intended as loans rather than candidate contributions. The FEC accordingly approved the reinstatement of the loan.

The FEC also noted that the candidate committee could repay the loans with funds currently on hand or contributions raised now that were designated for the 2018 primary election, provided that funds raised now must not exceed the committee's net debts outstanding for the 2018 primary.

For now, candidate committees seeking to reinstate candidate loans previously converted to contributions under 11 C.F.R. § 116.11(c)(2) should exercise caution, consult with an attorney, and have evidence of a consistent desire to treat the candidate loan as a loan rather than a contribution.