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August 4, 2004

## AGENDA ITEM

For Meeting of: 8-12-04

### MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *JAP*  
Staff Director

FROM: Lawrence H. Norton *LHN*  
General Counsel

Rosemary C. Smith *RCS*  
Associate General Counsel

Mai T. Dinh *MTD*  
Assistant General Counsel

Michael Marinelli *MM*  
Staff Attorney

Subject: Draft AO 2004-21

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for August 12, 2004.

Attachment

2  
3  
4 Mr. Matthew L. Ginsberg  
5 President  
6 Give To USA  
7 1850 Millrace Drive, Suite 1  
8 Eugene, Oregon 97403  
9

**DRAFT**

10  
11 Dear Mr. Ginsberg:

12  
13 This responds to your letters dated May 13 and July 16, 2004, as supplemented by  
14 subsequent phone conversations and electronic mail messages, requesting an advisory  
15 opinion concerning the application of the Federal Election Campaign Act of 1971, as  
16 amended (“the Act”), and Commission regulations, to an Internet service that Give To  
17 USA, Inc. (“Give To USA”) provides.

18 ***Background***

19 You are the President of Give To USA. Give To USA has filed with the Internal  
20 Revenue Service to be recognized as a nonprofit corporation organized under section  
21 501(c)(3) of the Internal Revenue Code (“section 501(c)(3) organization”).<sup>1</sup> See 26  
22 U.S.C. 501(c)(3). It has introduced a website designed to transform “canceling” political  
23 contributions into charitable donations. This website pairs contributions of the same  
24 amount to opposing candidates and changes these paired opposing (and therefore  
25 “canceling”) contributions to donations to charitable organizations.<sup>2</sup>

26 When accessing the website, a contributor is asked to choose a current Federal  
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<sup>1</sup> When you first submitted your request, Give To USA was a limited liability company (“LLC”) owned by On Time, Inc. but has since sought to change its status to a section 501(c)(3) organization. You are also the Chief Executive Officer of On Time Inc.

<sup>2</sup> This website is located at <http://www.givetousa.com>.

1 candidate to support. The contributor also chooses a candidate in that race to oppose.  
2 The contributor then chooses the amount of the contribution and the time period during  
3 which the contribution is to be held before being forwarded to the supported candidate.  
4 Finally, the contributor chooses a “fallback” charity for the contribution. The website  
5 then, within the specified time period, attempts to pair the proposed contribution with  
6 another proposed contribution made through the website from a second contributor who  
7 opposes the candidate supported by the first contributor and supports the candidate  
8 opposed by the first contributor. If paired, the proposed contributions “cancel” each other  
9 and both are forwarded to the “fallback” charities identified by the contributors rather  
10 than to the candidates supported. Unpaired contributions are forwarded to the supported  
11 candidates.

12 The website lists candidates for U.S. President, U.S. House of Representatives  
13 and U.S. Senate, as well as state legislative candidates. Give To USA has contacted, but  
14 has not received a response from, the Democratic National Committee (“DNC”) and the  
15 Republican National Committees (“RNC”). It has no plans to contact any other Federal  
16 political committee or candidates at this time.

17 A webpage from the website offers a list of charities, which are section 501(c)(3)  
18 organizations, from which contributors can choose. The website provides information  
19 regarding fees and charges that apply to charities and authorized committees receiving the  
20 contributions. Give To USA plans to deduct a fee from the contributions forwarded to  
21 charities to cover “credit card processing, development, licensing and operation of the  
22 software underlying the Give To USA website.” From the information provided, Give To

1 USA intends to charge the charities a fee of up to 10 percent of the contribution.<sup>3</sup>  
2 Contributors also will be permitted to designate their own charities or to work with  
3 charities not listed on the website, but Give To USA will first attempt to confirm that the  
4 charity receiving the funds is a section 501(c)(3) organization before it forwards any  
5 “canceling contributions.” If it cannot confirm the section 501(c)(3) status of the  
6 organization, Give To USA will send the contribution to Second Harvest, a section  
7 501(c)(3) organization.

8 Give To USA charges a different fee to political committees and Federal  
9 candidates receiving its services than that charged to charities. The website states that if a  
10 contribution is forwarded to a political committee, the full amount of the contribution is  
11 sent to the political committee less \$0.25 per contribution and 2.5% of the contribution  
12 amount. This fee level was chosen because “it is the same as the transaction fee charged  
13 by Amazon.com and is required because we cannot contribute services to any politician  
14 or campaign.”<sup>4</sup>

15 You state that the difference in fees charged charities and political committees is  
16 based on the difference in services being provided. You explain that “for candidates we  
17 are simply processing donations and should charge a relatively nominal fee. For charities,

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<sup>3</sup> Give To USA states on its website that “[i]n some cases, the charity receiving the money may elect to pay us for our services, but if that happens, we will send your donation to the charity in its entirety, making your entire contribution tax deductible. We will never charge or accept from a charity more than 10% of the amount that you give us to send to them. The result of this is that if our IRS application to be recognized as a charity is approved, 100% of your donation will be a charitable contribution for tax purposes. If our application to be recognized as a charity is not approved, between 90% and 100% of your donation will be a charitable contribution for tax purposes. In all cases, at least 90% of your contribution will be a charitable contribution for tax purposes.”

<sup>4</sup> Your request refers to Amazon.com’s “Presidential Candidate feature” which allowed Amazon.com costumers to make contributions to U.S. Presidential candidates via its website. With the start of the national party conventions, Amazon.com discontinued the service.

1 we are finding matches and, in some sense producing new sources of revenue that would  
2 not otherwise exist.” For this reason, you assert that the higher fee paid by the charities is  
3 justified.<sup>5</sup>

4 The website offers a period as long as 12 weeks to permit the pairing and  
5 processing of the contributions. However, you state that your proposal will not use a time  
6 period that goes past an election or straddles two tax years. Further, Give To USA would  
7 be willing to adjust the time period to be shorter or longer, as may be required by law.

8 Your request also offers some details as to the screening measures Give To USA  
9 will take to ensure that no potential contributor exceeds the individual contribution limits  
10 in any given election. These steps include use of a comprehensive contributor database to  
11 check whether an individual’s contributions exceed permissible limits. The website also  
12 requires that a contributor make several affirmations that the contribution is not  
13 prohibited under the Act.

14 When contributions are designated for the general election campaigns of  
15 presidential candidates that are publicly financed, these contributions, if not paired with a  
16 canceling contribution, would be forwarded to the General Election Legal and  
17 Accounting Compliance Fund of the candidates, or to the DNC or the RNC as indicated  
18 by the contributor. Give To USA also intends to use a separate bank account for the  
19 depositing and forwarding of any funds that might be contributions, and would establish a  
20 separate merchant account for the credit card processing of contributions.

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<sup>5</sup> As added background you offer publicly available information provided by the Office of the Attorney General of California. According to this information, when finding new sources of funds for charities commercial fundraisers produced an average rate of return to the charities of 38.14 percent in 2002.

***Questions Presented***

*Would the proposed program of pairing contributions be permissible under the Act and Commission regulations?*

***Legal Analysis and Conclusions***

Based on the representations made in the request, the proposal would constitute a commercial transaction and would satisfy the corporate vendor exception to the facilitation of contributions at 11 CFR 114.2(f)(1). The proposal also meets the commercial fundraising firm exception to the definition of “conduit or intermediary” in 11 CFR 110.6(b)(2). However, your proposal is permissible subject to the requestor’s adjusting the forwarding time for the contributions to conform to the 10-day period required by 2 U.S.C. 432(b)(1) and 11 CFR 102.8.

***1. Corporate Vendors.***

Corporations are prohibited from making any “contribution or expenditure” in connection with a Federal election. 2 U.S.C. 441b(a); 11 CFR 114.2(b)(1). Section 441b applies to “any corporation whatever.” Therefore, Give To USA is still subject to the prohibitions of section 441b even if it is a non-profit 501(c)(3) corporation. *See* 2 U.S.C. 441b(a) and 11 CFR 114.12(a); *see also Federal Election Commission v. Beaumont*, 539 U.S. 146 (2003)(holding that 2 U.S.C. 441b(a) applied to a nonprofit advocacy corporation organized under section 501(c)(4) of the Internal Revenue Code, 26 U.S.C. 501(c)(4)). *See* 11 CFR 110.1(g) and 110.1(e)(2)(ii). Consequently, your proposal would be impermissible if it constitutes a “contribution or expenditure.”

Under 2 U.S.C. 441b(b)(2), the definition of “contribution or expenditure” incorporates the definitions of “contribution” and “expenditure” in 2 U.S.C. 431(8) and (9) which include “anything of value made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. 441b(b)(2), 431(8)(A)(i) and 431(9)(A)(i); *see also* 11 CFR 100.52(a). Commission regulations further define “anything of value” to include “the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services.” 11 CFR 100.52(d)(1).

Similarly, corporations are prohibited from facilitating the making of contributions to candidates or political committees. 11 CFR 114.2(f)(1). Facilitation means using the corporate or labor organizations resources to engage in fundraising activities in connection with any Federal election. *Id.* However, a corporation does not facilitate the making of contribution to a candidate if it provides goods or services in the ordinary course of its business as a commercial vendor at the usual and normal charge. *Id.*

The Commission has examined a variety of business proposals by corporations that provided customers the opportunity to make contributions to Federal political committees and candidates. *See* Advisory Opinions 2003-16, 2002-7, 1999-22, 1995-34, 1994-33, and 1990-14. In these advisory opinions, the Commission concluded that the corporations were providing services to political committees and that these services are something of value, and, therefore, potential contributions. To avoid the making of a prohibited corporate contribution, the Commission has required that a corporation provide political committees with services in the ordinary course of business for the usual and normal charge. *E.g.* Advisory Opinion 2004-6. The Commission has also required that the charges assessed by a corporate vendor to its political clients be the usual and

1 normal charges offered to non-political business or members of the general public who  
2 are similarly situated with respect to the candidates and political committees. *See*  
3 Advisory Opinions 2004-6 and 1989-14.

4 In Advisory Opinion 2002-7, an Internet company provided subscribers the  
5 ability to use its Internet site either to make a donation to a section 501(c)(3) organization  
6 or to make a contribution to Federal political committees and candidates. The  
7 Commission concluded that although the requestor was providing something of value to  
8 the political committee, its proposal was permissible, in part, because the political  
9 committees would compensate the requestor “for arranging these processing services and  
10 creating a website that facilitates contributions to the individual Federal political  
11 committees.” *See* Advisory Opinion 2002-7.

12 The facts presented in your request appear to be similar in three respects to the  
13 situation in Advisory Opinion 2002-7. First, you represent that the transaction fee you  
14 propose is consistent with industry standards. You propose to charge charities higher fees  
15 than candidates. Assuming your representations are correct regarding the industry  
16 standard for fees charged by commercial fundraisers to charitable organizations for  
17 finding new sources of donations, it appears that Give To USA is offering materially  
18 different services to charities that justify the higher prices. Second, Give To USA plans  
19 to place the contributions in a separate merchant account prior to forwarding them to the  
20 candidates. This ensures that the funds will not become commingled with Give To  
21 USA’s corporate funds. Third, Give To USA’s website has screening procedures for the  
22 electronic payment of contributions that are well within the safe harbor discussed in  
23 previous opinions. *See* Advisory Opinions 2002-7, 1999-22 and 1999-9.



1           Based on your representations, your proposal appears to be a commercially  
2 reasonable relationship in which a vendor receives the usual and normal charge for its  
3 Internet based services, including an adequate profit and compensation. Because Give To  
4 USA would be providing its services in the ordinary course of its business as a  
5 commercial vendor, the Commission concludes that its proposal does not constitute a  
6 prohibited facilitation of contributions under 11 CFR 114.2(f).

7    2. *Commercial Fundraising Firm Exception.*

8           While it appears that Give To USA would qualify for the “commercial vendor”  
9 exception in 11 CFR 114.2(f)(1) under the facts you present, it must also satisfy the more  
10 narrow exception for a “commercial fundraising firm” under the earmarking regulations  
11 in 11 CFR 110.6(b)(2)(i)(D). The Act and Commission regulations permit a conduit or  
12 intermediary to collect and forward contributions from individuals that have been  
13 earmarked for a specific candidate, subject to certain limitations and reporting  
14 requirements. 2 U.S.C. 441a(a)(8); 11 CFR 110.6. However, Commission regulations  
15 state that any person who is prohibited from making contributions or expenditures is also  
16 prohibited from acting as a conduit or intermediary for contributions earmarked to  
17 candidates. 11 CFR 110.6(b)(2)(ii). Because Give To USA is a corporation prohibited  
18 from making contributions, it may not collect and forward earmarked contributions under  
19 11 CFR 110.6 unless it meets a regulatory exception to the definition of “conduit or  
20 intermediary.” *See also* 2 U.S.C. 441b(a); 11 CFR 110.6(b)(2)(ii) and 114.2(b)(1).

21           Give To USA falls within the exception for “[a] commercial fundraising firm  
22 retained by the candidate or the candidate’s authorized committee to assist in  
23 fundraising.” 11 CFR 110.6(b)(2)(i)(D). This exception reflects the fact that a

1 commercial fundraising firm hired by a candidate's authorized committee is more  
2 properly considered an agent of the committee than an independent conduit or  
3 intermediary. *See* Final Rules and Explanation and Justification of Regulations on  
4 Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution  
5 Limitations and Earmarked Contributions, 54 Fed. Reg. 34098, 34106 (Aug. 17, 1989).  
6 This interpretation is consistent with the other exceptions to the definition of "conduit or  
7 intermediary" for campaign employees and volunteers, joint fundraising representatives,  
8 affiliated committees, and authorized individuals who hold significant positions in the  
9 campaign – all of whom are acting as agents of the candidate or the authorized committee  
10 when engaging in fundraising. *See* 11 CFR 110.6(b)(2)(i)(A), (B), (C) and (E).

11 Give To USA's website provides a vehicle by which candidates and their  
12 authorized committees can raise contributions. Under your proposal, Give To USA does  
13 not have decision-making authority over which candidate (among those listed on the  
14 website) receives a contribution or the amount or timing of the contribution. The  
15 contributors decide the amount of their contributions and designate the political  
16 committee or candidate or the alternative charity to receive the contribution. The  
17 contributor also selects the time period in which a paired contribution must be found.<sup>6</sup>  
18 Once the contributor's instructions are followed and no match is found, the contribution  
19 is forwarded to the designated political committee. Therefore, the contributor makes all  
20 decisions relevant to making a political contribution. Give To USA is acting in the

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<sup>6</sup> There is only one circumstance where the contribution might not go to any of the contributor's designated recipients. This where the fall back charity is not a section 501(c)(3) organization. Even here, however, the proposal limits Give To USA's autonomy. The website informs the contributor of this possible diversion of the contribution and identifies the charity that would always receive the contribution should this occur.

1 capacity of a commercial fundraising firm by collecting, processing and forwarding the  
2 contributions to political committees through its website.

3 *3. Forwarding Deadlines.*

4       The remaining issue is the processing time for pairing contributions. Under the  
5 Act and Commission regulations every person who receives a contribution for an  
6 authorized committee shall forward the contribution to the committee's treasurer within  
7 ten days of receipt. 2 U.S.C. 432(b)(1) and 11 CFR 102.8. In Advisory Opinion 2003-  
8 23, the Commission concluded that the forwarding requirements of 11 CFR 102.8(a) were  
9 triggered once the candidate to whom a contribution is directed is known.<sup>7</sup> Under your  
10 proposal, the recipient candidates are known at the time the contributors access the  
11 website and make their selections of candidates to oppose and support. The contributor's  
12 selection manifests an intention to make a contribution to a particular candidate. At that  
13 point, there is only a possibility that the contribution will be canceled if a paired opposing  
14 contribution is made. Therefore, the Commission concludes that 10-day period required  
15 by the Act and Commission regulations begins when the contributor makes a selection of  
16 a candidate to support and completes the transaction on Give To USA's website.

17       While you state that Give To USA is willing to adjust the holding period to be  
18 shorter or longer as may be required by law, the initial proposal to hold contributions for  
19 as long as 12 weeks before forwarding them would violate these statutory and regulatory  
20 provisions. Therefore, Give To USA's proposal to transform paired "cancelled"  
21 contributions into charitable donations is permissible if Give To USA adjusts the time

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<sup>7</sup> Advisory Opinion 2003-23 concerned the earmarking of contributions to the presumptive presidential nominee of a political party. The requestor desired to collect the earmarked contributions prior to when the presumptive nominee would be known. *See* Advisory Opinion 2003-23.

1 period for the forwarding the contributions to comply with the 10-day time period  
2 required by 2 U.S.C. 432(b)(1) and 11 CFR 102.8.

3 Finally, we note that prior advisory opinions permitting commercial transactions  
4 with Federal political committees and candidates have involved for-profit businesses.  
5 While your proposal is permissible under the Act and Commission regulations (subject to  
6 the condition discussed above), the Commission expresses no opinion concerning the  
7 application of tax law to your proposal, or whether Give To USA's proposed activities are  
8 consistent with the requirement that section 501(c)(3) organizations refrain from  
9 participating or intervening in campaigns. *See* 26 U.S.C. 501(c)(3).

10 This response constitutes an advisory opinion concerning the application of the  
11 Act and Commission regulations to the specific transaction or activity set forth in your  
12 request. *See* 2 U.S.C. 437f. The Commission emphasizes that if there is a change in any  
13 of the facts or assumptions presented, and such facts or assumptions are material to a  
14 conclusion presented in this advisory opinion, then the requestor may not rely on that  
15 conclusion as support for its proposed activity.

16  
17 Sincerely,

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19  
20 Bradley A. Smith  
21 Chairman  
22

23 Enclosures (AOs 2004-6, 2003-23, 2003-16, 2002-7, 1999-22, 1999-9, 1995-34, 1994-33,  
24 1990-14 and 1989-14)