MEMORANDUM

TO: The Commission

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Associate General Counsel

Amy L. Rothstein
Acting Assistant General Counsel

Cheryl A.F. Hemsley
Attorney

Subject: Draft AO 2006-30

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for November 2, 2006.

Attachment
ADVISORY OPINION 2006-30

Jonathan Zucker, Esq.
Senior Strategist and Counsel
ActBlue
P.O. Box 382110
Cambridge, MA 02138

Dear Mr. Zucker:

We are responding to your advisory opinion request on behalf of ActBlue, concerning the application of the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to ActBlue’s proposal to receive and forward earmarked contributions to specific individuals who may become candidates for the 2008 nomination of the Democratic Party for the office of President of the United States (“Prospective Candidates”). ActBlue asks whether it may postpone forwarding those earmarked contributions to the Prospective Candidates until the Prospective Candidates register their presidential campaign committees with the Commission. ActBlue also asks if it may forward contributions to the Democratic National Committee (“DNC”) if a Prospective Candidate to whom the contributions are earmarked does not register a presidential campaign committee by 11:59 p.m. EDT on the seventh day before the first day of the 2008 Democratic National Convention.

The Commission concludes that ActBlue may solicit and receive contributions from individuals earmarked for clearly identified Prospective Candidates. ActBlue must forward all earmarked contributions to the Prospective Candidates within ten days of receipt.
Background

The facts presented in this advisory opinion are based on your letter received on August 28, 2006, and a September 7, 2006, telephone conversation with you.

ActBlue is a nonconnected political committee that was formed to promote the election of Democratic candidates for Federal office and is registered with the Commission. ActBlue currently serves as a conduit for contributions earmarked for Democratic candidates and party committees. See 2 U.S.C. 441a(a)(8); 2 U.S.C. 432(b)(1) and (2); 11 CFR 110.6 and 102.8. ActBlue solicits only on its web site, www.actblue.com, and accepts contributions made only by credit card. The recipient candidates and party committees pay all credit card transaction fees.

ActBlue proposes to solicit and receive earmarked contributions designated for the primary election campaigns of Prospective Candidates listed on ActBlue’s web site.¹ ActBlue would list the names of individuals who ActBlue considers to be “serious” Prospective Candidates, based on media reports, pundit lists of possible candidates, and requests from the public. ActBlue would identify each contribution as being designated for the primary election of the Prospective Candidate in its report to the Commission for the reporting period in which the contribution is received, in accordance with 11 CFR 110.6(c)(1)(ii).

Although ActBlue would like to begin soliciting and receiving contributions earmarked for Prospective Candidates “as soon as possible,” ActBlue proposes to postpone forwarding the earmarked contributions until each Prospective Candidate registers a presidential campaign committee with the Commission. At that point,

¹ ActBlue intends to undertake these activities independently of any Prospective Candidates or political committees or agents of either of them.
ActBlue would send a check to the candidate’s presidential campaign committee within ten days for the total amount of the earmarked contributions that ActBlue has received for that candidate. If a Prospective Candidate does not register a presidential campaign committee with the Commission by 11:59 p.m. EDT on the seventh day before the first day of the 2008 Democratic National Convention, then ActBlue proposes to forward the contributions earmarked for that individual to the DNC.

ActBlue proposes to provide the recipient presidential campaign committee, or the DNC, with a report containing all of the required information with respect to the source of each earmarked contribution as required in 2 U.S.C. 441a(a)(8) or 2 U.S.C. 432(b)(2) and 11 CFR 110.6(c)(1)(iv) or 11 CFR 102.8, respectively. ActBlue also proposes to disclose the forwarded contributions on ActBlue’s next regular report filed with the Commission.

ActBlue’s proposed solicitations would inform prospective contributors that, among other things: 1) contributions are being “earmarked” within the meaning of 11 CFR 110.6(b)(1); 2) contributions must be within the amount limitations for contributions to candidates in accordance with 11 CFR 110.1(b)(1) as indexed for inflation; 3) contributions earmarked to Prospective Candidates will be forwarded to the DNC under certain circumstances, and the circumstances under which the forwarding will occur; and 4) contributions, when aggregated with any other contributions the individual makes to the Prospective Candidate or the DNC, must be within the appropriate amount limitations for contributions in accordance with 11 CFR 110.1 and 110.5. You state that ActBlue’s solicitations would also include “[a]ll disclaimers required by the Commission’s regulations, including 11 CFR 110.11.”
Questions Presented

1. May ActBlue solicit and receive contributions earmarked for a Prospective Candidate, and then postpone forwarding the earmarked contributions to the designated candidate until after the designated candidate registers a presidential campaign committee with the Commission?

2. If a Prospective Candidate does not register a presidential campaign committee with the Commission before 11:59 p.m. EDT on the seventh day before the first day of the 2008 Democratic National Convention, may ActBlue forward the contributions earmarked for that individual to the DNC?

You then ask, if Questions 1 and 2 are answered in the affirmative:

3. How must ActBlue report the receipt of the earmarked contributions?

4. What information should ActBlue provide to contributors, Prospective Candidates, and the DNC?

Legal Analysis and Conclusions

1. May ActBlue solicit and receive contributions earmarked for a Prospective Candidate, and then postpone forwarding the earmarked contributions to the designated candidate until after the designated candidate registers a presidential campaign committee with the Commission?

ActBlue may solicit and receive contributions from individuals earmarked for Prospective Candidates. However, ActBlue must forward the earmarked contributions to the Prospective Candidates within ten days after receiving them.

Nonconnected committees may solicit earmarked contributions from the general public and then forward the contributions to a Federal Candidate. See Advisory Opinion
2003-23 (WE LEAD). Such solicitations, however, must comply with the source prohibitions and the contribution limitations in the Act and Commission regulations. For example, nonconnected committees may not solicit or receive contributions from foreign nationals, corporations, or labor organizations. See 2 U.S.C. 441b and 441e; 11 CFR 110.20 and 114.2.

The Act and Commission regulations provide for the earmarking of contributions “made by a person, either directly or indirectly, on behalf of a particular candidate.” 2

2 U.S.C. 441a(a)(8) and 11 CFR 110.6. A conduit or intermediary for earmarked contributions is “any person who receives and forwards an earmarked contribution to a candidate or a candidate’s authorized committee.” 11 CFR 110.6(b)(2). None of the exceptions to this definition would apply to ActBlue. See 11 CFR 110.6(b)(2)(i) and (ii).

Although the earmarking provisions speak in terms of contributions made on behalf of a “candidate,” Commission regulations recognize that an individual may receive contributions before becoming a candidate. In such cases, when the individual becomes a candidate, the funds are deemed to have been received by the candidate as an agent of his or her authorized committee. See 2 U.S.C. 432(e)(2); 11 CFR 101.2(b) and 101.3.

Accordingly, ActBlue may act as a conduit or intermediary for contributions earmarked for Prospective Candidates. ActBlue must forward earmarked contributions to the Prospective Candidates within ten days of receipt. See 2 U.S.C. 432(b)(1); 11 CFR 110.6(b)(2)(iii). The date of receipt is the date that ActBlue receives authorization from a

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2 “Earmarked” means a designation, instruction, or encumbrance, which results in all or any part of a contribution being made to, or expended on behalf of, a clearly identified candidate or a candidate’s authorized committee. See 11 CFR 110.6(b)(1).
contributor to charge the contributor’s credit card. See Advisory Opinion 1990-4
(American Veterinary Medical Association).

The situation presented here differs in this respect from the situation in Advisory
Opinion 2003-23 (WE LEAD), in which the Commission determined that the ten-day
forwarding requirement in 2 U.S.C. 432(b)(2) and 11 CFR 102.8(a) did not begin to run
for contributions earmarked to the Democratic Party’s “presumptive nominee” for
President until the nominee had been chosen and his or her name became known. Here,
by contrast, all of the Prospective Candidates on whose behalf ActBlue proposes to solicit
contributions would be identified by name at the time of the solicitation. Accordingly,
there would be no basis for tolling the ten-day forwarding requirement with respect to
ActBlue.

Upon receiving earmarked contributions from ActBlue, a Prospective Candidate
must either deposit the contributions or return them to ActBlue within ten days of receipt.
See 11 CFR 103.3(a). If the Prospective Candidate deposits the contributions, then the
Prospective Candidate must deposit them in an account that is separate from any accounts
containing the Prospective Candidate’s personal funds, to avoid commingling funds. See
2 U.S.C. 432(b)(3) and 11 CFR 102.15. Any Prospective Candidate who receives
contributions aggregating in excess of $5,000 becomes a candidate under the Act and
Commission regulations and must register a principal campaign committee with the
Commission. See 2 U.S.C. 431(2)(A); 11 CFR 100.3(a)(1); 11 CFR 101.1(a); 11 CFR
102.12.

If, on the other hand, the Prospective Candidate returns the earmarked
contributions to ActBlue, then ActBlue may either refund the contributions to the original
contributors or forward the contributions to a political party committee, such as the DNC.

In Advisory Opinion 2003-23 (WE LEAD), the Commission concluded that a
nonconnected committee could forward contributions to the DNC that had been
earmarked to the Democratic Party’s “presumptive nominee” for President, in the event
that the “presumptive nominee” could not be determined by a date certain, subject to the
requirements of 2 U.S.C. 432(b)(2) and 11 CFR 102.8(b). Similarly, here, ActBlue may
designate a “default recipient” for the earmarked contributions in the event that the
contributions are returned by one or more of the Prospective Candidates, subject to the
requirements of 11 CFR 102.8. ActBlue must clearly state in its solicitations what it will
do with the earmarked contributions if a Prospective Candidate returns them to ActBlue.

2. If a Prospective Candidate does not register a presidential campaign committee
with the Commission before 11:59 p.m. EDT on the seventh day before the first day of the
2008 Democratic National Convention, may ActBlue forward the contributions
earmarked for that individual to the DNC?

This question is moot, given the answer to Question 1, above.

3. How must ActBlue report the receipt of the earmarked contributions?

Contributions earmarked for a candidate through a conduit or intermediary are
contributions from the original contributor to that candidate, and are reportable as such.

See 2 U.S.C. 441a(a)(8); 11 CFR 110.6(a). If, however, the conduit or intermediary
exercises direction or control over the choice of the recipient candidate, then the
contributions are treated as contributions from both the original contributor and from the
conduit or intermediary to the recipient candidate. See 11 CFR 110.6(d).
The collection and forwarding of earmarked contributions by ActBlue only for those Prospective Candidates that ActBlue deems to be “serious” would not, by itself, result in ActBlue exercising direction or control over an individual’s choice about whether to make a contribution to a specific candidate, because “the individual contributor, not [ActBlue], makes the choice whether to make a contribution to the specified candidate.” See Advisory Opinion 1980-46 (National Conservative Political Action Committee) (a mailing containing a “clear suggestion that the individual receiving the communication make a contribution to a specific candidate through [the PAC] as an intermediary” did not constitute direction or control by the PAC).

Accordingly, the earmarked contributions would be contributions from the original contributor to the Prospective Candidate or third party political committee. Thus, on its regular report to the Commission for any period in which it receives earmarked contributions, ActBlue must report the original contributions and their sources, and the Prospective Candidate for whom each contribution is earmarked. See 2 U.S.C. 441a(a)(8); 11 CFR 110.6(c)(1)(i) and (ii). On its regular report for any period in which ActBlue forwards earmarked contributions, ActBlue must report the disbursement in accordance with 2 U.S.C. 441a(a)(8) and 11 CFR 110.6(c)(1).³

4. What information should ActBlue provide to contributors, Prospective Candidates, and the DNC?

ActBlue would have to conform the information that it provides to potential contributors in its solicitations to the terms of this advisory opinion, including the

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³ You also ask about the reporting requirements of the recipient committees. Because ActBlue does not represent the recipient committees in this request, reporting by those committees constitutes third party activity, which is not appropriately addressed in an advisory opinion. See 11 CFR 112.1(b).
requirement that ActBlue forward earmarked contributions to Prospective Candidates within 10 days of receipt. ActBlue would also have to include in its solicitations the information required in 2 U.S.C. 441d(a)(3) and 11 CFR 110.11(b)(3) and (c)(1). In addition, although not required by the Act or Commission regulations, ActBlue should inform each contributor of the identity of the actual recipient of the contributor’s funds. For example, if ActBlue forwards a contribution to the DNC because the Prospective Candidate for whom the contribution was earmarked rejected the contribution, then ActBlue should notify the contributor of that fact. This information will help contributors keep track of their contributions for purposes of their bi-annual contribution limits.\(^4\)

Upon forwarding each earmarked contribution to a Prospective Candidate, ActBlue would have to provide a report to the Prospective Candidate containing the contributor’s name and mailing address; the amount of the contribution; the date the contribution was received by ActBlue; the name of the designated recipient; the date the contribution was forwarded; and whether the earmarked contribution was forwarded in cash, by contributor’s check, or by ActBlue’s check. See 2 U.S.C. 441a(a)(8); 11 CFR 110.6(c)(iv). For each earmarked contribution in excess of $200, ActBlue would also have to provide the contributor’s occupation and the name of the contributor’s employer. \(\text{Id.}\)

In addition, ActBlue would have to provide contributor information to the DNC when it forwards a contribution to the DNC in excess of $50. See 2 U.S.C. 432(b)(2)(B);

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\(^4\) Contributions aggregate towards the contributor’s bi-annual limits based on the calendar year in which they are made, not the calendar year of the election. See 2 U.S.C. 441a(a)(3); 2 U.S.C. 441a(a)(1)(B); 11 CFR 110.5(c)(1) and 110.1(c)(1). A contribution is “made” when the contributor relinquishes control of the funds. See 11 CFR 110.1(b)(6).
11 CFR 102.8(b)(2). The information would have to include the name and address of the contributor, and the date of receipt of the contribution. Id. If the contribution exceeds $200, then ActBlue would also have to provide the contributor’s occupation and employer. See 11 CFR 102.8(b)(2).

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

Sincerely,

Michael E. Toner
Chairman