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For meeting of September 18, 2014
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September 12, 2014

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *ALL for LJS*
Deputy General Counsel

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Acting Associate General Counsel

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Assistant General Counsel

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Attorney

Subject: Draft AO 2014-13 (ActBlue)

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00 p.m. (Eastern Time) on September 17, 2014.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <http://www.fec.gov/law/draftaos.shtml>.

Attachment

1 ADVISORY OPINION 2014-13

2
3
4 Steven Gold, Esq.

5 General Counsel

6 ActBlue

7 366 Summer Street

8 Sommerville, MA 02144

DRAFT

9
10
11 Dear Mr. Gold:

12 We are responding to the advisory opinion request that you submitted on behalf of
13 ActBlue concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-
14 30146 (formerly 2 U.S.C. §§ 431-457) (the “Act”), and Commission regulations to contribution
15 forms on ActBlue’s website. ActBlue’s users can configure these forms to allow contributors to
16 make contributions to multiple political committees at one time. Such multiple-recipient forms
17 include a box that allows a contributor to enter a single contribution amount and split that
18 amount among the recipient committees. The Commission concludes that the use of this box to
19 make contributions does not result in ActBlue’s exercising direction or control over the choice of
20 recipient candidates or political committees. Further, the Commission concludes that use of the
21 box under the circumstances described in the request does not subject this fundraising activity to
22 the Commission’s joint fundraising rules.

23 ***Background***

24 The facts presented in this advisory opinion are based on your letter received on August 6
25 and email received on August 25, 2014.

26 ActBlue is a registered nonconnected political committee that receives earmarked
27 contributions made via its website, www.actblue.com, and forwards them to designated
28 candidates and political committees. Visitors to ActBlue’s website make credit or debit card

1 contributions by entering information onto a contribution form webpage. Any candidate or
2 political committee listed on ActBlue's website is potentially eligible to receive earmarked
3 contributions through ActBlue, and ActBlue has created a template contribution form for each
4 such candidate and political committee. Although ActBlue creates template contribution forms
5 for others to use, ActBlue itself does not solicit funds for other political committees through
6 those forms. Rather, any person with an account on ActBlue's website may use the templates to
7 create customized forms that solicit contributions to one or more candidates or political
8 committees. A candidate with an ActBlue account, for example, could create customized
9 contribution forms to solicit contributions to the candidate's own authorized committee, to other
10 candidates or political committees, or to both the candidate's own committee and others.
11 Supporters of candidates and political committees also may create such customized forms.
12 Recipient political committees cannot modify contribution forms created by others.

13 To make a contribution to a single political committee, a visitor to ActBlue's website
14 must enter the specific dollar amount into a box next to the political committee's name on a
15 contribution form. But if the contribution form identifies multiple recipient committees and the
16 contributor wishes to contribute to all of them, the contributor also has the option of entering a
17 single dollar amount into a box labeled "Split It!" This box appears on (and cannot be removed
18 from) all contribution forms that list multiple committees. When a contributor enters a dollar
19 amount into the Split It box, the form divides that amount by the number of committees listed on
20 the form and displays the resulting amount in the specific box next to each listed committee.
21 After using the Split It box, a contributor may change the amount to be contributed to any listed
22 political committee or decide not to make a contribution to a listed committee by changing the

amount appearing next to the committee’s name on the contribution form. To complete the contributions, the contributor must click on a separate button at the bottom of the form.

Once an individual authorizes contributions to be made to multiple recipients through a contribution form, the contributor’s credit card is charged for the total amount of the contributions. ActBlue receives the funds from the credit card processor and transmits them to each recipient committee as designated by the contributor on the contribution form, less ActBlue’s standard processing fees.

ActBlue asks the Commission how the Act and Commission regulations apply to the use of the Split It box on a form that a single political committee — acting independently of any other recipient committee — creates to solicit contributions to multiple political committees.¹

Questions Presented

1. *If a person makes a contribution on the ActBlue website using the Split It box, does use of the Split It box result in ActBlue exercising “direction or control” over that contribution within the meaning of 11 C.F.R. § 110.6(d)?*
2. *If a person makes a contribution on the ActBlue website using the Split It box, do the joint fundraising rules apply to that contribution?*

Legal Analysis and Conclusions

1. *If a person makes a contribution on the ActBlue website using the Split It box, does use of the Split It box result in ActBlue exercising “direction or control” over that contribution within the meaning of 11 C.F.R. § 110.6(d)?*

¹ The request states that ActBlue would be neither the soliciting nor a recipient committee in this scenario.

1 No, a person’s use of the Split It box when making contributions on ActBlue’s website
2 does not result in ActBlue’s exercising “direction or control” over those contributions under
3 11 C.F.R. § 110.6(d).

4 The Act provides that “all contributions made by a person, either directly or indirectly, on
5 behalf of a particular candidate, including contributions which are in any way earmarked or
6 otherwise directed through an intermediary or conduit to such candidate, shall be treated as
7 contributions from such person to such candidate.” 52 U.S.C. § 30116(a)(8) (formerly 2 U.S.C.
8 § 441a(a)(8)); *see also* 11 C.F.R. § 110.6(a). “Earmarked” means “a designation, instruction, or
9 encumbrance, whether direct or indirect, express or implied, oral or written, which results in all
10 or any part of a contribution . . . being made to . . . a clearly identified candidate or a candidate’s
11 authorized committee.”² 11 C.F.R. § 110.6(b)(1). A “person who receives and forwards an
12 earmarked contribution to a candidate or a candidate’s authorized committee” is a “conduit or
13 intermediary.” 11 C.F.R. § 110.6(b)(2). A forwarded earmarked contribution does not count
14 against the conduit’s contribution limits unless the conduit “exercises any direction or control
15 over the choice of the recipient candidate”; if that occurs, then the entire earmarked contribution
16 is treated as a contribution from both the original contributor and from the conduit to the
17 recipient. *See* 11 C.F.R. § 110.6(d).

18 The Commission has repeatedly found that a conduit or intermediary does not exercise
19 direction or control when the contributor has the final say over whether to make a contribution to

² Although the Act and Commission regulations specifically address contributions earmarked only to the authorized committees of candidates, the Commission has concluded that contributions may also be earmarked to nonconnected committees. *See e.g.*, Advisory Opinion 2003-23 (Women Engaged in Leadership, Education, and Action in Democracy) (“WE LEAD”) at 5-6 (concluding that nonconnected committee may forward earmarked contributions to national party committee); Advisory Opinion 2012-03 (ActRight) at 3-4 (concluding that nonconnected committee may solicit and forward earmarked contributions to independent-expenditure-only political committees).

1 a given recipient and the amount of any contribution. In Advisory Opinion 1980-46 (National
2 Conservative PAC), for example, the Commission concluded that a conduit’s mailing to
3 supporters containing a “clear suggestion that the individual receiving the communication make
4 a contribution to a specific candidate through [the committee] as an intermediary” did not evince
5 direction or control over the choice of the recipient candidate. *Id.* at 3. The Commission found
6 significant that the contributor, not the conduit, made the choice whether to contribute to the
7 specific candidate. *Id.* The Commission also noted that the conduit did not control the
8 contributions’ timing, amounts, or designated recipients. *Id.*

9 More recently, in Advisory Opinion 2006-30 (ActBlue), the Commission concluded that
10 a conduit’s collection and forwarding of earmarked contributions for only those prospective
11 candidates that the conduit deemed to be “serious” did not constitute direction or control. The
12 Commission rested its conclusion on the fact that the individual contributor — not the conduit —
13 decided whether and how much to contribute to a specified candidate. *See also* Advisory
14 Opinion 2003-23 (WE LEAD) (concluding that conduit collecting earmarked contributions for
15 presumptive party nominee did not exercise direction or control over choice of recipient
16 candidate).

17 Similarly, in MUR 6390 (Senate Conservatives Fund), the Commission found no reason
18 to believe that a conduit exercised direction or control over contributions where the conduit used
19 a web-based contribution form with a separate box — known as the “easy button” — that split a
20 single contribution amount among a list of candidates. *See* Factual and Legal Analysis, MUR
21 6390 (Senate Conservatives Fund). In that matter, the total contribution was apportioned among
22 recipients according to a formula created by the conduit and unknown to the contributor, rather
23 than being split equally among all recipients. Even so, the Commission found that the easy

button merely provided the contributor with a “suggested apportionment of the contribution,” and that the contributor could choose to accept the suggested apportionment, change it, or make contributions to only some of the candidates and not others. *Id.* at 6.

Similar to earlier Commission determinations, the Split It box described by ActBlue merely suggests an allocation to each recipient committee after the contributor chooses the total amount of the contribution. Ultimately, it is the contributor and not ActBlue who decides whether and how much to contribute. The contributor may follow the suggested allocation, change the allocation as desired, or decide not to contribute at all. In fact, even to contribute the amounts generated by the Split It box requires a distinct, affirmative act by the contributor because the transaction is not completed until the contributor clicks on a separate button on the contribution form. Accordingly, the Commission concludes that ActBlue does not exercise direction or control over the choice of the recipient candidate or political committee when a person uses the Split It box to make contributions on ActBlue’s website.

2. *If a person makes a contribution on the ActBlue website using the Split It box, do the joint fundraising rules apply to that contribution?*

No, use of the Split It box under the circumstances described in the request does not subject contributions on ActBlue’s website to the Commission’s joint fundraising rules.

Commission regulations specify the requirements that apply when a political committee “engage[s] in joint fundraising with other political committees or with unregistered committees or organizations.” 11 C.F.R. § 102.17(a)(1)(i). Among other requirements, the participants in a joint fundraising effort must establish a separate political committee or select a participating

committee to serve as their joint fundraising representative.³ *Id.* The participants must also enter into a written agreement that identifies the joint fundraising representative and states a formula for the allocation of fundraising proceeds.⁴ 11 C.F.R. § 102.17(c)(1). The fundraising representative collects contributions, screens and reports all contributions received, pays fundraising costs from gross proceeds and from funds advanced by participants, and disburses net proceeds according to the allocation formula agreed to by the participants. 11 C.F.R. §§ 102.17(b)(1)-(2), (c)(4)(i), (c)(4)(8)(A), (c)(6).

ActBlue asks whether use of the Split It box on a contribution form would trigger the Commission's joint fundraising rules when the solicitation at issue would otherwise not be considered joint fundraising. The Commission concludes that it would not. The existence of a Split It box does not indicate that the recipient political committees have agreed to fundraise jointly or have collectively arranged for the disposition of any contributions raised. Indeed, the request specifically posits that any person soliciting contributions to multiple political committees on ActBlue's website does so "independent of all other recipient political committees." Under these circumstances, where the other recipient committees have no involvement in the creation, modification, or administration of the contribution form, the Commission concludes that use of the Split It box would not be joint fundraising under 11 C.F.R.

³ A joint fundraising representative is not a conduit or intermediary under 11 C.F.R. § 110.6. 11 C.F.R. § 110.6(b)(2)(i)(B).

⁴ Each joint fundraising solicitation must include a joint fundraising notice that includes the names of all committees participating in the joint fundraising activity; the allocation formula used for distributing joint fundraising proceeds; a statement informing contributors that, notwithstanding the stated allocation formula, they may designate their contributions for a particular participant or participants; and a statement informing contributors that the allocation formula may change if a contributor makes a contribution exceeding the amount limitations under the Act and Commission regulations. 11 C.F.R. § 102.17(c)(2)(i)(A)-(D).

