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For meeting of January 15, 2015
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January 9, 2015

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS by AN*
Deputy General Counsel

Adav Noti *AN*
Acting Associate General Counsel

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Assistant General Counsel

Joanna S. Waldstreicher *ARR for JSW*
Attorney

Subject: AO 2014-19 (ActBlue) Draft A

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 pm (Eastern Time) on January 14, 2015.

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 2014-19

2
3 Melissa Flores, Esq.

4 Steven Gold, Esq.

5 ActBlue

6 366 Summer Street

7 Somerville, MA 02144

8
9 Dear Ms. Flores and Mr. Gold:

DRAFT

10 We are responding to the advisory opinion request that you submitted on behalf of
11 ActBlue concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-
12 30146 (formerly 2 U.S.C. §§ 431-457) (the “Act”), and Commission regulations to ActBlue’s
13 proposal to establish draft funds and nominee funds that would accept contributions earmarked
14 exclusively for candidates who are women. The Commission concludes that the proposed draft
15 and nominee funds would be consistent with the Act and Commission regulations.

16 ***Background***

17 The facts presented in this advisory opinion are based on your advisory opinion request
18 (“AOR”), which consists of your letter and email received on November 19 and December 3,
19 2014, respectively.

20 ActBlue is a nonconnected political committee that serves as an intermediary for
21 contributions earmarked for specific candidates and political committees. ActBlue receives the
22 earmarked contributions via its website, www.actblue.com, and forwards them to the designated
23 candidates and political committees. Users of ActBlue’s website may also make contributions to
24 “nominee funds,” in which the contributions are earmarked for eventual party nominees who
25 have not yet been identified (e.g., the Democratic nominee for President in 2016), and to “draft
26 funds,” in which the contributions are earmarked for specific individuals who may become
27 candidates for specific offices but who have not yet established campaign committees.

1 ActBlue proposes to offer new forms of nominee and draft funds that the request
2 describes as “designed to cater to the public’s strong desire to see a woman run for President on
3 the Democratic ticket in 2016.” AOR at 1. Under the proposed new form of nominee fund,
4 ActBlue’s users would make contributions earmarked for the Democratic Party’s eventual
5 nominee for President in 2016, but ActBlue would forward the contributions to the nominee only
6 if the nominee is a woman.¹ If the Democratic presidential nominee is not a woman, ActBlue
7 would instead forward the contributions to a default recipient, such as the Democratic National
8 Committee. The default recipient would be determined at the time that the fund is created and
9 disclosed to contributors before they make their contributions.

10 Under the proposed new form of draft fund, ActBlue’s users would make contributions
11 earmarked for specific women who are potential candidates for President in 2016 but who have
12 not yet formed authorized presidential campaign committees. ActBlue would establish these
13 draft funds at the request of groups or individuals who want to encourage specific women to run
14 for office. For each such fund, ActBlue’s website would identify the potential candidate by
15 name, and ActBlue would forward the earmarked contributions to that individual if she forms an
16 authorized presidential campaign committee by a certain deadline. If the potential candidate
17 does not establish an authorized committee by the deadline, ActBlue would forward the
18 contributions to a default recipient, as described above.

19 Although ActBlue has “traditional[ly]” set the committee-formation deadline for draft
20 funds at seven days before the political party’s nominating convention, ActBlue proposes to set
21 earlier deadlines for the draft funds at issue here. ActBlue intends these earlier deadlines to

¹ For the purposes of this advisory opinion, ActBlue has asked the Commission to assume that a candidate’s gender is “easily determined.” AOR at 4 n.1. Accordingly, this opinion does not address situations in which the determination of a given candidate’s gender is subjective or requires any inquiry.

1 enable contributors to “convey their strong support for the potential candidate to mount a
2 campaign,” while “indicat[ing] that they intend to shift their support to a different candidate
3 should their chosen candidate fail to enter the race in a timely manner.” AOR at 2. ActBlue
4 states that an earlier deadline could also “prevent the sequestering of funds in the draft fund until
5 the nominating convention.” *Id.*

6 ActBlue also proposes to establish and administer some draft funds that name a series of
7 potential candidates as default recipients, rather than having a single default recipient. In other
8 words, the draft fund would name Candidate A as the primary recipient, Candidate B as the first
9 default recipient (if Candidate A does not establish a candidate committee by the deadline),
10 Candidate C as the second default recipient, etc. A group or individual that establishes such a
11 multiple-candidate draft fund would determine at the time of its establishment who the potential
12 candidates are, the order in which they would be eligible to receive contributions, and the
13 deadline by which each potential candidate must form a campaign committee. ActBlue would
14 require the final default recipient to be a political committee already in existence, such as the
15 Democratic National Committee, “which would be certain to still be active on the last deadline
16 date.” *Id.* Neither the entity that establishes the fund, nor ActBlue, nor any contributor would be
17 able to change the identity or order of primary or default recipients or the deadlines by which
18 potential candidates must establish campaign committees.

19 ***Questions Presented***

20 1. *May ActBlue establish a traditional nominee fund with the additional criterion that the*
21 *nominee of the Democratic Party for President in 2016 must be a woman in order to receive the*
22 *contributions?*

2. *May ActBlue establish a traditional draft fund where the date by which the potential candidate must establish an authorized campaign committee is selected in advance but is unrelated to the date on which the Democratic National Convention begins?*

3. *May ActBlue establish a traditional draft fund² that includes a series of default recipients, each with a deadline to establish an authorized campaign committee that is either the same as or later than the deadline for the previous recipient, such that if the first specifically named person does not establish an authorized campaign committee by the deadline, then the earmarked contributions will go to the next specifically named person, unless that person does not establish a committee by her deadline, and so on?*

Legal Analysis and Conclusions

1. *May ActBlue establish a traditional nominee fund with the additional criterion that the nominee of the Democratic Party for President in 2016 must be a woman in order to receive the contributions?*

Yes, ActBlue may establish a traditional nominee fund with the added criterion that the nominee must be a woman in order to receive the contributions.

Under the Act and Commission regulations, any contribution made by a person on behalf of or to a candidate, including a contribution that is earmarked or otherwise directed to the candidate through an intermediary or conduit, is a contribution from that person to the candidate.

52 U.S.C. § 30116(a)(8) (formerly 2 U.S.C. § 441a(a)(8)); 11 C.F.R. § 110.6(a). If the intermediary or conduit exercises any “direction or control” over the choice of the recipient

² Although this question as presented in the AOR refers to a “nominee fund” rather than a “draft fund,” the context in which the question is presented and the accompanying discussion of it in the AOR make clear that the requestor intended to refer to a “draft fund.”

1 candidate, then the contribution is treated as a contribution from both the intermediary and the
2 original contributor. 11 C.F.R. § 110.6(d).

3 “[A] conduit or intermediary does not exercise direction or control where the contributor
4 has the final say over whether to make a contribution to a given recipient and the amount of any
5 contribution.” Advisory Opinion 2014-13 (ActBlue). Thus, in Advisory Opinion 2003-23 (WE
6 LEAD), the Commission concluded that an intermediary could receive contributions earmarked
7 for a party’s presidential nominee before the nominee had been chosen, because the “recipient
8 candidate . . . will be the presumptive Democratic Presidential nominee no matter who that
9 person is,” and therefore the intermediary would “exercise no discretion over which candidate
10 receives the earmarked contributions.” Advisory Opinion 2003-23 (WE LEAD) at 4; *see also*
11 Advisory Opinion 1982-23 (Westchester Citizens for Good Government) (concluding that non-
12 federal committee could make contribution earmarked for nominee through local party
13 committee before nominee was identified); Advisory Opinion 1977-16 (Iowa 1980 U.S. Senate
14 Campaign Committee) (concluding that committee could accept contributions on behalf of
15 candidate not yet identified and that contributions would be “retroactively regarded” as having
16 been accepted by candidate’s principal campaign committee once candidate was identified and
17 “assume[d] . . . control” of funds); *cf.* Advisory Opinion 2006-30 (ActBlue) (concluding that
18 ActBlue could accept contributions earmarked for individuals who had not yet become
19 candidates). In each of these advisory opinions, the intermediary could lawfully accept and
20 transfer earmarked contributions without making contributions of its own because the intended
21 recipient of the contributions was objectively identifiable by office sought, party affiliation, and
22 election cycle, and therefore the intermediary had no discretion in determining which candidate
23 would receive the contributions.

1 Here, in addition to the criteria discussed in the Commission's prior opinions, ActBlue
2 proposes to introduce the criterion of gender to identify the designated recipient of earmarked
3 contributions. Like the other criteria, the candidate's gender is an objective, easily determined
4 fact outside of ActBlue's discretion or control. *See supra* n.1. Moreover, because ActBlue will
5 clearly notify potential contributors in advance of the default recipient of contributions to the
6 nominee fund, ActBlue will not exercise any direction or control over the disposition of the
7 contributions in the event that the Democratic Party does not nominate a woman as its candidate
8 for President. Accordingly, the Commission concludes that ActBlue may establish a nominee
9 fund that identifies the recipient candidate by gender as well as by office sought, party affiliation,
10 and election cycle and that clearly identifies a default recipient to receive the funds if no
11 candidate satisfies all of the stated criteria. Contributions that ActBlue transfers from such a
12 fund either to the designated candidate or to the default recipient in accordance with the fund's
13 pre-established criteria would be attributed to the persons who contributed to the fund, and not to
14 ActBlue.

15 2. *May ActBlue establish a traditional draft fund where the date by which the potential*
16 *candidate must establish an authorized campaign committee is selected in advance but is*
17 *unrelated to the date on which the Democratic National Convention begins?*

18 3. *May ActBlue establish a traditional draft fund that includes a series of default recipients,*
19 *each with a deadline to establish an authorized campaign committee that is either the same as or*
20 *later than the deadline for the previous recipient, such that if the first specifically named person*
21 *does not establish an authorized campaign committee by the deadline, then the earmarked*
22 *contributions will go to the next specifically named person, unless that person does not establish*
23 *a committee by her deadline, and so on?*

1 Yes, ActBlue may establish a traditional draft fund where the pre-determined date by
2 which the potential candidate must establish an authorized campaign committee is unrelated to
3 the date on which the Democratic National Convention begins. ActBlue may also establish a
4 draft fund with a series of default recipients as proposed.

5 Although the earmarking provisions discussed above speak in terms of contributions
6 made to or on behalf of a “candidate,” Commission regulations recognize that an individual may
7 receive contributions before becoming a candidate. In such cases, “[w]hen an individual
8 becomes a candidate, any funds received, loans obtained, or disbursements made prior to
9 becoming a candidate in connection with his or her campaign shall be deemed to have been
10 received, obtained or made as an agent of his or her authorized committee(s).” 11 C.F.R.
11 § 101.2(b); *see also* 52 U.S.C. § 30102(e)(2) (formerly 2 U.S.C. § 432(e)(2)); 11 C.F.R. § 101.3;
12 Advisory Opinion 2006-30 (ActBlue) at 4.

13 The Commission has previously concluded that ActBlue may act as a conduit or
14 intermediary for contributions earmarked for prospective candidates, as it is proposing to do
15 here. In Advisory Opinion 2006-30 (ActBlue), ActBlue proposed to solicit contributions
16 earmarked for certain prospective Democratic presidential candidates and to forward the
17 contributions to the Democratic National Committee if the prospective candidates did not
18 register presidential campaign committees by the end of the seventh day before the Democratic
19 National Convention. The Commission concluded that this proposal was permissible, noting that
20 registering an authorized committee with the Commission is an “easily verifiable act[] that
21 do[es] not require the conduit to make determinations about when a person technically satisfies
22 the Act’s definition of ‘candidate.’” *Id.* at 4-5. The Commission required ActBlue to state
23 clearly in its solicitations how it would distribute earmarked contributions if the prospective

1 candidate did not register a presidential campaign committee by the stated deadline. In and of
2 itself, however, the specific deadline selected by ActBlue for the prospective candidate to
3 register a campaign committee was not a factor in either the discussion or the decision. *See id.* at
4 5; *see also* Advisory Opinion 2003-23 (WE LEAD) (indicating that deadline for determining
5 nominee is significant only insofar as intermediary must inform contributor about deadline and
6 consequence of missed deadline before contributor makes earmarked contribution).

7 Here, ActBlue proposes to establish a draft fund where the deadline for a potential
8 candidate to establish an authorized campaign committee is unrelated to the date of the
9 Democratic National Convention. Given the Commission's prior advisory opinions, the
10 Commission concludes that ActBlue may establish such a draft fund so long as the deadline is
11 established in advance, objectively verifiable, not subject to change by ActBlue (or by any entity
12 establishing such a fund), and clearly communicated to contributors before they make their
13 contributions. Under these circumstances, the Commission concludes that ActBlue will not
14 exercise any direction or control over the disbursement of the earmarked contributions.

15 ActBlue also proposes to create or administer draft funds that identify a series of default
16 recipients of earmarked contributions, each with her own deadline to register a principal
17 campaign committee. As noted above, the Commission has previously determined that ActBlue
18 may, using certain objective criteria, establish a draft fund for an individual who is not yet a
19 candidate and may set a deadline by which that individual must register a principal campaign
20 committee to avoid forfeiting earmarked contributions to a default recipient. Nothing in the
21 rationale of the Commission's prior opinions prevents ActBlue from selecting another potential
22 candidate as a default recipient (rather than a political party committee or other non-authorized
23 committee) or from establishing multiple sequential default recipients. For the reasons stated

1 above, the Commission concludes that ActBlue will not exercise any direction or control over
2 the contributor's choice of recipient candidates for draft funds as described in the request so long
3 as the identity of each potential candidate and the corresponding deadline for that individual to
4 register her principal campaign committee is selected in advance, not subject to change, and
5 clearly communicated to contributors.

6 This response constitutes an advisory opinion concerning the application of the Act and
7 Commission regulations to the specific transaction or activity set forth in your request. *See* 52
8 U.S.C. § 30108 (formerly 2 U.S.C. § 437f). The Commission emphasizes that, if there is a
9 change in any of the facts or assumptions presented, and such facts or assumptions are material
10 to a conclusion presented in this advisory opinion, then the requestor may not rely on that
11 conclusion as support for its proposed activity. Any person involved in any specific transaction
12 or activity that is indistinguishable in all its material aspects from the transaction or activity with
13 respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 52
14 U.S.C. § 30108(c)(1)(B) (formerly 2 U.S.C. § 437f(c)(1)(B)). Please note that the analysis or
15 conclusions in this advisory opinion may be affected by subsequent developments in the law
16 including, but not limited to, statutes, regulations, advisory opinions, and case law. Any
17 advisory opinions cited herein are available on the Commission's website.

18
19 On behalf of the Commission,

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22
23 Ann M. Ravel
24 Chair
25