

August 4, 2004

AO DRAFT COMMENT PROCEDURES

The Commission has approved a revision in its advisory opinion procedures that permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2004-21 is available for public comments under this procedure. It was requested by Matthew L. Ginsberg, on behalf of On Time Systems, Inc.

Proposed Advisory Opinion 2004-21 is scheduled to be on the Commission's agenda for its public meeting of Thursday, August 12, 2004.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern) on August 11, 2004.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2004-21, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

MAILING ADDRESSES

Commission Secretary
Federal Election Commission
999 E Street NW
Washington, DC 20463

Rosemary C. Smith
Associate General Counsel
Office of General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463



FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 4, 2004

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Associate General Counsel

Mai T. Dinh
Assistant General Counsel

Michael Marinelli
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 July 22, 2004.

Attachment

1 ADVISORY OPINION 2004-21

2
3
4
5
6
7
8
9
10

Mr. Matthew L. Ginsberg
President
Give To USA
1850 Millrace Drive, Suite 1
Eugene, Oregon 97403

DRAFT

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”).¹ 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.²

26 When accessing the website, a contributor is asked to choose a current Federal
27

¹ 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.

² 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
9 other and both are forwarded to the “fallback” charities identified by the contributors
10 rather than to the candidates supported. Unpaired contributions are forwarded to the
11 supported 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
20 the contributions. Give To USA plans to deduct a fee from the contributions forwarded
21 to 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

1 To USA intends to charge the charities a fee of up to 10 percent of the contribution.³
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
10 a 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.”⁴

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
18 charities,

³ 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.”

⁴ 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
3 is justified.⁵

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
6 time period that goes past an election or straddles two tax years. Further, Give To USA
7 would be willing to adjust the time period to be shorter or longer, as may be required by
8 law.

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

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

22

⁵ 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.

1 ***Questions Presented***

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

4 ***Legal Analysis and Conclusions***

5 Based on the representations made in the request, the proposal would constitute a
6 commercial transaction and would satisfy the corporate vendor exception to the
7 facilitation of contributions at 11 CFR 114.2(f)(1). The proposal also meets the
8 commercial fundraising firm exception to the definition of “conduit or intermediary” in
9 11 CFR 110.6(b)(2). However, your proposal is permissible subject to the requestor’s
10 adjusting the forwarding time for the contributions to conform to the 10-day period
11 required by 2 U.S.C. 432(b)(1) and 11 CFR 102.8.

12 *I. Corporate Vendors.*

13 Corporations are prohibited from making any “contribution or expenditure” in
14 connection with a Federal election. 2 U.S.C. 441b(a); 11 CFR 114.2(b)(1). Section 441b
15 applies to “any corporation whatever.” Therefore, Give To USA is still subject to the
16 prohibitions of section 441b even if it is a non-profit 501(c)(3) corporation. *See* 2 U.S.C.
17 441b(a) and 11 CFR 114.12(a); *see also Federal Election Commission v. Beaumont*, 539
18 U.S. 146 (2003)(holding that 2 U.S.C. 441b(a) applied to a nonprofit advocacy
19 corporation organized under section 501(c)(4) of the Internal Revenue Code, 26 U.S.C.
20 501(c)(4)). *See* 11 CFR 110.1(g) and 110.1(e)(2)(ii). Consequently, your proposal
21 would be impermissible if it constitutes a “contribution or expenditure.”

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

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

15 The Commission has examined a variety of business proposals by corporations
16 that provided customers the opportunity to make contributions to Federal political
17 committees and candidates. *See* Advisory Opinions 2003-16, 2002-7, 1999-22, 1995-34,
18 1994-33, and 1990-14. In these advisory opinions, the Commission concluded that the
19 corporations were providing services to political committees and that these services are
20 something of value, and, therefore, potential contributions. To avoid the making of a
21 prohibited corporate contribution, the Commission has required that a corporation
22 provide political committees with services in the ordinary course of business for the usual
23 and normal charge. *E.g.* Advisory Opinion 2004-6. The Commission has also required

1 that the charges assessed by a corporate vendor to its political clients be the usual and
2 normal charges offered to non-political business or members of the general public who
3 are similarly situated with respect to the candidates and political committees. *See*
4 Advisory Opinions 2004-6 and 1989-14.

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

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

1 electronic payment of contributions that are well within the safe harbor discussed in
2 previous opinions. *See* Advisory Opinions 2002-7, 1999-22 and 1999-9.

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

9 *2. Commercial Fundraising Firm Exception.*

10 While it appears that Give To USA would qualify for the “commercial vendor”
11 exception in 11 CFR 114.2(f)(1) under the facts you present, it must also satisfy the more
12 narrow exception for a “commercial fundraising firm” under the earmarking regulations
13 in 11 CFR 110.6(b)(2)(i)(D). The Act and Commission regulations permit a conduit or
14 intermediary to collect and forward contributions from individuals that have been
15 earmarked for a specific candidate, subject to certain limitations and reporting
16 requirements. 2 U.S.C. 441a(a)(8); 11 CFR 110.6. However, Commission regulations
17 state that any person who is prohibited from making contributions or expenditures is also
18 prohibited from acting as a conduit or intermediary for contributions earmarked to
19 candidates. 11 CFR 110.6(b)(2)(ii). Because Give To USA is a corporation prohibited
20 from making contributions, it may not collect and forward earmarked contributions under
21 11 CFR 110.6 unless it meets a regulatory exception to the definition of “conduit or
22 intermediary.” *See also* 2 U.S.C. 441b(a); 11 CFR 110.6(b)(2)(ii) and 114.2(b)(1).

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

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

⁶ 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

1 is forwarded to the designated political committee. Therefore, the contributor makes all
2 decisions relevant to making a political contribution. Give To USA is acting in the
3 capacity of a commercial fundraising firm by collecting, processing and forwarding the
4 contributions to political committees through its website.

5 *3. Forwarding Deadlines.*

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

20 While you state that Give To USA is willing to adjust the holding period to be
21 shorter or longer as may be required by law, the initial proposal to hold contributions for

possible diversion of the contribution and identifies the charity that would always receive the contribution should this occur.

1 as long as 12 weeks before forwarding them would violate these statutory and regulatory
2 provisions. Therefore, Give To USA's proposal to transform paired "cancelled"
3 contributions into charitable donations is permissible if Give To USA adjusts the time
4 period for the forwarding the contributions to comply with the 10-day time period
5 required by 2 U.S.C. 432(b)(1) and 11 CFR 102.8.

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

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

19

20

Sincerely,

21

22

23

Bradley A. Smith
Chairman

24

⁷ 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
- 2 Enclosures (AOs 2004-6, 2003-23, 2003-16, 2002-7, 1999-22, 1999-9, 1995-34, 1994-33,
- 3 1990-14 and 1989-14)