

July 15, 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, July 22, 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 July 21, 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.

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 15, 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

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Mr. Matthew L. Ginsberg
Chief Executive Officer
On Time Systems Inc.
1850 Millrace Drive, Suite 1
Eugene, Oregon 97403

DRAFT

11 Dear Mr. Ginsberg:

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

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 plans to introduce a website designed to transform “canceling”
23 political contributions into charitable donations. This website would pair contributions to
24 opposing candidates and change these matched opposing (and therefore “canceling”)
25 contributions to donations to charitable organizations. You have established a prototype
26 of this site at <http://www.givetousa.com>.

27 When accessing the website, a contributor is asked to choose a current Federal
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¹ When you first submitted your request, Give to USA was a limited liability company (“LLC”) owned by On Time, Inc. You are also the President of On Time Inc.

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 in which
3 the contribution is to be held before being forwarded to the supported candidate. Finally,
4 the contributor chooses a “fallback” charity for the contribution. The website would
5 then, within the specified time period, attempt to match the contribution with another
6 contribution made through the website from a second contributor who opposes the
7 candidate supported by the first contributor and supports the candidate opposed by the
8 first contributor. When matched, the contributions would “cancel” each other and both
9 contributions would be forwarded to the “fallback” charities identified by the
10 contributors rather than to the candidates supported. Unmatched contributions would be
11 forwarded to the supported candidates.

12 In its final form, the website will list candidates for U.S. President, U.S. House of
13 Representatives and U.S. Senate, as well as state legislative candidates and ballot
14 measures. Give to USA has contacted but received no response from the Democratic
15 National Committee (“DNC”) and the Republican National Committees (“RNC”). It has
16 no plans to contact any other Federal political committee or candidates at this time.

17 A sample webpage indicates that the website would offer a list of charities from
18 which contributors could choose. The charities listed on the website would need to enter
19 into a contract or listing agreement with Give to USA. A sample contract is available on
20 the website at <http://www.givetousa.com>. This sample contract provides for a 10 percent
21 fee per contribution to be paid to Give to USA and requires the charity to be a

1 section 501(c)(3) organization.² You also state that contributors will be permitted to
2 designate their own charities or to work with charities that have not signed the listing
3 agreement. In either case, however, the charity must confirm that it is a section 501(c)(3)
4 organization before it receives any “canceling contributions.” Although you plan to
5 charge a fee to the 501(c)(3) organizations to forward contributions to them, you do not
6 plan at this time to charge a fee to the political committees that receive contributions
7 through your website.

8 The prototype website offers a period as long as 12 weeks to permit the matching
9 and processing of the contributions. However, you state that the proposal will not use a
10 period that goes past an election or straddles two tax years. Further, Give to USA would
11 be willing to adjust the period to be shorter or longer, as may be required by law.

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

18 When contributions are designated for the general election campaigns of
19 presidential candidates that are publicly financed, these contributions, if “unmatched,”
20 would be forwarded to the General Election Legal and Accounting Compliance Fund of
21 the candidates, or to the DNC or the RNC as indicated by the contributor. Give to USA

² The sample contract states that the contracting charity be “recognized by the Internal Revenue Service as exempt from federal income tax under Internal Revenue Code section 501(c)(3), as amended.” It requires that the charity “not violate any restriction imposed by applicable law on Internal Revenue Code section

1 also intends to use a separate bank account for the depositing and forwarding of any
2 funds that might be contributions, and would establish a separate merchant account for
3 the credit card processing of contributions.

4 ***Question Presented***

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

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8 ***Legal Analysis and Conclusions***

9 No, Give to USA's proposed program as currently proposed is not permissible
10 under the Act and Commission regulations for the reasons stated below.

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

20 Under 2 U.S.C. 441b(b)(2), the definition of "contribution or expenditure"
21 incorporates the definitions of "contribution" and "expenditure" in 2 U.S.C. 431(8) and
22 (9) which include "anything of value made by any person for the purpose of influencing

1 any election for Federal office.” 2 U.S.C. 441b(b)(2), 431(8)(A)(i) and 431(9)(A)(i); *see*
2 *also* 11 CFR 100.52(a). Commission regulations further define “anything of value” to
3 include “the provision of any goods or services without charge or at a charge that is less
4 than the usual and normal charge for such goods or services.” 11 CFR 100.52(d)(1).

5 The Commission has examined a variety of business proposals by corporations
6 that provided customers the opportunity to make contributions to Federal political
7 committees and candidates. *See* Advisory Opinions 2003-16, 2002-7, 1999-22, 1995-34,
8 1994-33, and 1990-14. In these advisory opinions, the Commission concluded that the
9 corporations were providing a service to the political committees that was something of
10 value in itself and, therefore, a potential contribution. To avoid the making of a
11 prohibited corporate contribution, the Commission required that the corporations provide
12 political committees with services in the ordinary course of business for the usual and
13 normal charge. *E.g.* AO 2004-6.

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

1 As evidenced by the listing agreement, Give to USA would be providing a service
2 when it lists a charity and forwards donations to it. The listing agreement establishes a
3 monetary value for the service by requiring that the charities pay a 10% processing fee
4 per contribution. The same service is provided to candidates that are listed on the
5 website; however, your proposal would not charge political committees and candidates
6 any fee. Because Give to USA would be providing the service free of charge to political
7 committees and candidates, it would make a prohibited corporate contribution every time
8 it processes and forwards a contribution to a political committee or candidate.

9 Under Commission regulations, except for commercial fundraising firms retained
10 by candidates and their authorized committees to assist in fundraising, a corporation is
11 prohibited from acting as a conduit or intermediary for contributions earmarked to
12 candidates. *See* 11 CFR 110.6(b)(2)(i)(D) and (2)(ii). Because Give to USA is a
13 corporation that is prohibited from making contributions, it may not act as a conduit or
14 intermediary under 11 CFR 110.6. Additionally, Give to USA is not a commercial
15 fundraising firm under 11 CFR 110.6(b)(2)(i)(D) because it would not charge Federal
16 candidates or their authorized committees for its services.

17 An additional problem lies in the processing time for matching of contributions.
18 Under the Act and Commission regulations every person who receives a contribution for
19 an authorized committee shall, no later than 10 days after receipt, forward the
20 contribution to the committee's treasurer. 2 U.S.C. 432(b)(1) and 11 CFR 102.8. While
21 you state that Give to USA is willing to adjust the holding period to be shorter or longer
22 as may be required by law, the initial proposal to hold contributions for as long as 12
23 weeks before forwarding them would violate these statutory and regulatory provisions.

1 Therefore, Give to USA’s proposal to transform matching “cancelled”
2 contributions into charitable donations as currently constructed would violate the Act and
3 Commission regulations. However, the Commission notes that it has approved proposals
4 where the requestor is a commercial vendor that charges Federal political committees and
5 candidates for its services at the usual and normal charges and establishes a merchant
6 account to ensure that corporate funds are not mingled with contributions. *See Advisory*
7 *Opinions 2003-16 and 2002-7.* Additionally, commercial vendors must forward the
8 contributions within the time period required by 2 U.S.C. 432(b)(1) and 11 CFR 102.8.

9 Give to USA’s status as a section 501(c)(3) organization may present an
10 additional concern. The advisory opinions approving commercial transactions with
11 Federal political committees and candidates have involved for-profit entities. The
12 Commission expresses no opinion concerning the application of the tax law on your
13 proposal, or whether Give to USA’s proposed activities may or may not be consistent
14 with its status as a non-profit corporation or the requirement that section 501(c)(3)
15 organizations refrain from participating or intervening in campaigns. *See 26 U.S.C.*
16 *501(c)(3).*

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

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Sincerely,

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Bradley A. Smith

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Chairman

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