ActBlue

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Want Blue States?
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August 21, 2006

AOR 2006-30

Lawrence Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

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FEDERAL ELECTION COMMISSION
OFFICE OF GENERAL COUNSEL

Re: ActBlue
Committee ID: C00401224
Request for Advisory Opinion

Dear Mr. Norton:

Pursuant to 2 U.S.C. §437f and the rules of the Federal Election Commission (the "Commission"), 11 C.F.R. §112.1, this letter requests an advisory opinion on behalf of ActBlue, a non-connected federal political committee that registered with the Commission on May 17, 2004. As a general matter, ActBlue serves primarily as a conduit within the definition of 11 C.F.R. §110.6 for earmarked contributions made to Democratic candidates and party committees. Contributions received by ActBlue that are earmarked for federal candidates and committees are solicited exclusively on the Internet at www.actblue.com.

Specifically, ActBlue asks the following questions:

1) May ActBlue establish a fundraising project where individual donors may earmark contributions through ActBlue to the primary account of a clearly identified prospective candidate for the nomination of the Democratic Party of the United States for the office of President of the United States for the 2008 election cycle (a "Prospective Candidate") before the candidate has registered with the Commission, with the contributions to be forwarded to the Presidential campaign committee of the Prospective Candidate as soon as the candidate has registered a Presidential campaign committee, but no later than six days prior to the 2008 Democratic National Convention (the "Convention"). In the event that, by the sixth day prior to the Convention, the Prospective Candidate has not registered a Presidential campaign committee, the earmarked contributions will be forwarded to the Democratic National Committee (the "DNC").

   ActBlue understands that, if the answer to this question is affirmative, any such contributions received by the authorized Presidential campaign committee of the Prospective Candidate would not qualify for matching funds under the Presidential Primary Matching Payment Account Act.

2) If the answer to the first question is affirmative, in what way should ActBlue, and the recipient committee, report the receipt of such a donation?

3) If the answer to the first question is affirmative and if such an earmarked contribution were made in a Biennial period (as defined by 11 C.F.R. §110.5) prior to the one in which the earmarked contribution was forwarded to the recipient Presidential campaign committee, to which Aggregate Biennial Contribution Limit (11 C.F.R. §110.5) would this contribution apply: the one covering the period in which ActBlue received the earmarked contribution or the one covering the period in which ActBlue forwarded the contribution to the recipient?

4) If the answer to the first question is affirmative and in the event that funds are required to be forwarded to the DNC by virtue of the circumstances described above, for purposes of an individual's contribution limits to the DNC, to what calendar year should the DNC allocate the contribution: the year that the contribution was made to ActBlue, or the year in which ActBlue forwards the contribution to the DNC?

FACTUAL BACKGROUND

ActBlue is a non-connected political committee, formed to promote the election of Democratic candidates for federal office and registered with the Commission on May 17, 2004. ActBlue was not and is not established, maintained, financed or controlled by any political party committee or other political committee, or any candidate for any federal office.

ActBlue proposes to solicit and accept contributions from individual members of the public, up to the then-applicable limit established by 11 C.F.R. §110.1(b)(1), as indexed (currently $2,100), earmarked for the primary campaign of clearly identified potential candidates for the nomination of the Democratic Party of the United States for the office of President of the United States. ActBlue proposes to begin soliciting such earmarked contributions as soon as possible, contingent upon receiving an affirmative response to this request.

In soliciting the earmarked contributions, ActBlue will inform prospective donors that:

A) their contributions are being earmarked within the meaning of the Commission's regulations (11 C.F.R. §110.6(b));

B) any earmarked contribution must be limited to the contribution limitation established by 11 C.F.R. §110.1(b)(1), as indexed (currently $2,100), at the time the contribution is made.

C) in the event that the donor makes any contribution other than the earmarked contribution to the Prospective Candidate's Presidential campaign committee that, when added to the earmarked contribution, causes the aggregate amount of the donor's contributions to the Prospective Candidate's Presidential campaign committee to exceed the limit set by 11 C.F.R. §110.1(b)(1) (currently $2,100), an excessive contribution will have been made by the donor; and

D) in the event that the Prospective Candidate for which the earmarked contribution is designated has not created a Presidential campaign committee by 11:59 p.m. EDT on the seventh day prior to the first day of the 2008 Democratic National Convention, the earmarked contribution will be forwarded to the Democratic National Committee; provided that, in the event that the donor has made any contribution other than the earmarked contribution to the DNC that, when added to the contribution made to ActBlue, causes the aggregate amount of the donor's contributions to the DNC to exceed the limit set by 11 C.F.R. §110.1(c)(1), as indexed (currently $26,700), an excessive contribution will result. In the event that any of the contributions are ultimately transmitted to the DNC, such contributions will not be earmarked for any candidate.

All other disclaimers required by the Commission's regulations, including 11 C.F.R. §110.11, with respect to the solicitations of funds as described above, will be included in all solicitations.

Each earmarked contribution will be identified as being earmarked for the "Primary account of the Presidential campaign committee of [the Prospective Candidate]" in ActBlue's report for the reporting period in which each such earmarked contribution was received. 11 C.F.R. §110.6(c)(1)(ii).

If and when the Prospective Candidate forms a Presidential campaign committee, ActBlue will issue a check to the authorized committee of said Candidate in the total amount of the earmarked contributions received by ActBlue within 10 days of such registration. Otherwise, the contributions will be forwarded to the DNC, as described above.

At the time the earmarked contributions are forwarded to the recipient presidential campaign committee, in accordance with 11 C.F.R. §110.6(c)(1)(i) & (iii), ActBlue will provide to the recipient presidential candidate committee a report containing all required information with respect to each earmarked contribution, as set forth in 11 C.F.R. §110.6(c)(1)(iv). The disbursement of the earmarked contributions will also be reported on ActBlue's next report that is filed with the Commission.

It is understood (and will be communicated to the recipient presidential campaign committees) that by virtue of 11 C.F.R. §9034.3(f), none of the earmarked contributions received by the recipient presidential candidate committees will qualify for matching funds.

DISCUSSION

The Federal Election Campaign Act of 1971, as amended, provides for the earmarking of contributions "made by a person, either directly or indirectly, on behalf of a particular candidate." 2 U.S.C. §441a(a)(8). All contributions by a person that are made on behalf of, or to, a candidate, including contributions that are in any way earmarked or otherwise directed to the candidate through an intermediary or conduit, are contributions from the person to the candidate. 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 candidate, however, the

contributions are treated as contributions from both the original contributors and from the intermediary or conduit to the recipient candidate. 11 C.F.R. §110.6(d).

Based on the above facts, it seems clear that the contributions earmarked for the Prospective Candidate will be earmarked through ActBlue in such a way that they will constitute contributions from the individual donors to the Prospective Candidate, but not from ActBlue to such a candidate (11 C.F.R. §110.6). Furthermore, ActBlue, as conduit, will not exercise any direction or control over the choice of the recipient candidate or the ultimate recipient of the funds, under and for purposes of 11 C.F.R. §100.6(d). ActBlue expects to create a fundraising program for all prospective major candidates for Democratic nomination for President. Each of these candidates will be listed in ActBlue's directory, and persons who visit the ActBlue website will have the opportunity to create fundraising pages for and contribute to the prospective candidate of their choice.

Under these circumstances, the earmarking process should be permissible notwithstanding the fact that the Prospective Candidate will not have formed a Presidential campaign committee until after most of the earmarked contributions are received.

In Advisory Opinion 1977-16, the Commission approved formation and operation of a committee formed to search for "the best Republican candidate" for the 1980 Senate election in Iowa. The committee would eventually select the candidate it planned to support in the Republican Senate primary and, upon that selection, the committee would begin to function as the candidate's principal campaign committee. Prior to that selection the committee was to receive contributions and regard itself as subject to the same limits of FECA applied to a candidate and his or her principal campaign committee. The committee indicated that when the 1980 candidate to be supported was selected, all contributions previously received would be reviewed and refunds would be made in any case where a contributor exceeded the relevant limits because of contributions made to the selected candidate prior to his selection by the committee.

In Advisory Opinion 1982-23, a federal political committee asked whether it could earmark a contribution through a local party committee to a congressional candidate. The federal committee was terminating and wanted to contribute its excess funds, prior to the congressional primary, to an unregistered local party committee to be used by whomever ultimately won the Republican primary for U.S. House for the 24th CD in New York. The Commission ruled that the federal committee could indeed earmark a maximum of $1,000 in this way, noting that the Commission had "allowed a contribution to be earmarked for an undetermined Federal candidate where the facts indicated that the candidate was identifiable as to specific office, party affiliation and election cycle."

In Advisory Opinion 2003-23, a federal political committee asked whether it could solicit earmarked contributions of up to $2,000 for the "presumptive nominee" of the Democratic Party for President of the United States, defined to mean the candidate, if any, who has received enough pledged delegates (then 2,163), as registered with and certified by the Secretary of the Democratic National Committee, to win the nomination on the first ballot at the Convention, or,

in the event that no "presumptive nominee" was selected seven days prior to the party convention, to the Democratic National Committee. The Commission ruled that the federal committee could indeed solicit such contributions.

Further, in each of the above-referenced Advisory Opinions, the Commission determined that the normal 10 day time limit to forward contributions to the earmarked candidate did not apply.

In the program to be conducted by ActBlue, the Prospective Candidate is identifiable by name as well as office, party affiliation and election cycle, and there is an objective, predetermined process to identify the actual candidate to receive the earmarked funds. Further, as in AO 1977-16, AO 1982-23, and AO 2003-23, ActBlue plans to implement procedures to ensure that no applicable contribution limits are exceeded with respect to the earmarked contributions received by ActBlue and ultimately forwarded to the recipient Presidential campaign committees (or the DNC, in the event a named Prospective Candidate does not form a Presidential campaign committee prior to the Convention).

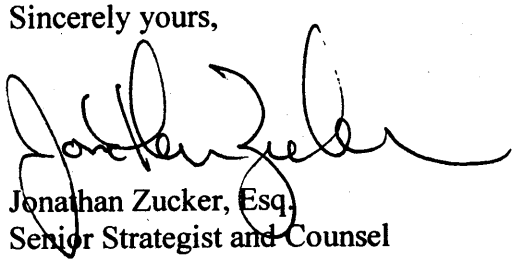
CONCLUSION

For the reasons set forth above, the Commission should issue an advisory opinion holding that the ActBlue may accept contributions earmarked for Prospective Candidates for the nomination of the Democratic Party for the office of President, prior to the formation of a Presidential campaign committee by the Prospective Candidate, and forward such earmarked contributions to the Prospective Candidate so identified as soon as he or she forms a Presidential campaign committee, but no later than six days prior to the beginning of the 2008 Democratic National Convention.

If the Commission has any questions or needs any further information concerning this request, please contact the undersigned at jonathan@actblue.com or (202) 256-6639 or our general counsel, Neil Reiff, at (202) 479-1111.

Thank you for your time and attention to this matter.

Sincerely yours,



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