FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: COMMISSION SECRETARY

DATE: NOVEMBER 1, 2006

SUBJECT: COMMENT ON DRAFT AO 2006-30

Transmitted herewith is a timely submitted comment from Paul M. Sherman, Associate Director of the Center for Competitive Politics, regarding the above-captioned matter.

Proposed Advisory Opinion 2006-30 is on the agenda for Thursday, November 2, 2006.

Attachment

Center for Competitive Politics

November 1, 2006

Ms. Mary Dove
Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Mr. Lawrence H. Norton
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Comments on Draft Ad. Op. 2006-30 (ActBlue)

Dear Ms. Dove and Mr. Norton:

These comments are filed on behalf of the Center for Competitive Politics in regard to Draft Advisory Opinion 2006-30, released by the Commission's Office of General Counsel on October 26, 2006. ActBlue has asked, among other things, whether it may solicit donations to be directed to prospective candidates in the 2008 Democratic presidential primary and, further, if it may retain donations directed to individual prospective candidates until such time as they register a presidential campaign committee with the Commission and become "candidates" within the meaning of the Act. We believe that ActBlue has this right, and we disagree with the draft advisory opinion's contrary holding, which is at odds with both the plain meaning and the purpose of the applicable provisions. We also disagree with the draft advisory opinion's holding that prospective candidates who receive donations are required to choose between depositing or returning the funds within 10 days of receipt. This holding is similarly contrary to the text and purpose of the applicable provisions. Moreover, it ignores the right of prospective candidates to conduct "testing the waters" activities prior to becoming candidates.

Regardless of how ActBlue has characterized the donations it wishes to solicit, they are not "earmarked" within the meaning of 2 U.SC. 441a(a)(8) and 11 CFR 110.6. The plain language of both the Act and Commission regulations speak in terms of contributions made on behalf of a "candidate". The draft advisory opinion, however, extends the rule to include transfers to *prospective* candidates. The difference between a "candidate" and a "prospective candidate" is not formalistic, the terms mean different things. The advisory opinion too quickly dismisses the distinctions between the two by noting "Although the earmarking provisions speak in terms of contributions made on behalf of a 'candidate,' Commission regulations recognize that an individual may receive [donations of federally eligible funds] before becoming a candidate." Draft Advisory Opinion 2006-30 at 5.

While it is true that a prospective candidate may raise a small amount of money ($\leq$ $5,000) without becoming a "candidate", 2 U.S.C. 431(2)(A) and 11 CFR 100.3(a)(1), it does

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not necessarily follow that "candidate" and "prospective candidate" should be treated as otherwise interchangeable terms. It is particularly troublesome to treat them as such in this instance. For example, 11 CFR 110.6, in addition to defining "earmarked" contributions as being "made to...a clearly identified candidate or a candidate's authorized committee," also requires that earmarked contributions be forwarded "to the candidate or authorized committee in accordance with 11 CFR 102.8." However, §102.8, by its own terms, applies to persons "who receive[] contribution[s] for an *authorized political committee*" and requires that these be forwarded to the "treasurer". 11 CFR 102.8(a) (emphasis added). In the case of donations directed towards a prospective candidate, who has not established an authorized political committee, let alone appointed a treasurer, it may be literally impossible to comply with these regulations, which strongly suggests that such donations were not intended for inclusion in the 10-day forwarding requirement.

In addition to contravening the statutory and regulatory text, the advisory opinion's interpretation of 11 CFR 110.6(b)(2)(iii) fails to serve the purpose of the 10-day forwarding requirement, which "is designed to prevent individuals and entities from being able to influence or manipulate cash-on-hand figures by holding onto contributions for designated candidates." Advisory Opinions 2003-23 at 5 (WE LEAD). Naturally, requiring donations directed to prospective candidates to be forwarded within 10 days of their receipt cannot serve this regulatory goal because, having not yet come with the Act's reporting requirements, prospective candidates do not have cash-on-hand figures to manipulate. Accordingly, we ask the commission to hold that donations made for the benefit of a prospective candidate are not subject to the 10-day forwarding requirement and may be retained by a intermediary organization until the prospective candidate becomes a "candidate" within the meaning of the Act.

If the Commission concludes that ActBlue has the right to retain donations directed to prospective candidates until they become "candidates", it becomes unnecessary to consider how prospective candidates must treat the receipt of such donations, as ActBlue intends to distribute donations only to "candidates". However, should the Commission reach this issue, we wish to note strong disagreement with the advisory opinions conclusion that receipts by prospective candidates are subject to the 10-day deposit requirement of 11 CFR 103.3(a).

Applying the 10-day deposit requirement to prospective candidates is inappropriate for reasons similar to those already discussed; the regulation itself refers to receipts by a "political committee" and is similarly intended to prevent distortion of cash-on-hand figures. Additionally, applying the 10-day deposit requirement to prospective candidates trenches on their right to "test the waters". The advisory opinion ignores the option of testing the waters, and holds that prospective candidates have only two choices: "either deposit the contributions or return them to ActBlue within ten days of receipt." Draft Advisory Opinion 2006-30 at 6. It further holds that "[a]ny Prospective Candidate who receives contributions aggregating in excess of $5,000 becomes a candidate under the Act and Commission regulations and must register a principal campaign committee with the Commission." Id. While this is correct, not all receipts by prospective candidates are "contributions"; prospective candidates may raise funds in excess of $5,000 without becoming "candidates", if the funds are raised and spent for the purpose of "testing to waters" and not campaigning. *See* 11 CFR 100.71 ("Funds received solely for the purpose of determining whether an individual should become a candidate are not

contributions."). Accordingly, should the Commission find it necessary to reach this issue, we ask that the Commission make clear that prospective candidates may freely test the waters without becoming "candidates". Additionally, we would ask the Commission to establish a presumption that a prospective candidate is "testing the waters"—and therefore not subject to the 10-day deposit requirement—until such time as the prospective candidate begins "campaigning" and becomes a "candidate" within the meaning of the Act.

We appreciate the opportunity to comment on this matter.

Sincerely,

/s/ *Paul M. Sherman*

Paul M. Sherman
Associate Director
Center for Competitive Politics