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 8, 2006

SUBJECT: COMMENT ON DRAFT AO 2006-30
ActBlue

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 9, 2006.

Attachment

Center for Competitive Politics

November 8, 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 Alternative 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 Alternative Draft Advisory Opinion 2006-30 (ActBlue), released on November 6, 2006. The Center urges the adoption of this alternative draft, which corrects the flaws of the previous draft and is more consistent with the plain meaning of the Act and Commission regulations.

The previous draft, which would have required ActBlue to forward donations received on behalf of prospective candidates within ten days of receipt, raised difficult issues related to prospective candidates' right to "test the waters" before declaring candidacy. Prior to becoming "candidates", individuals have the right to raise and spend money for the purpose of "testing the waters." 11 CFR 100.72 and 100.131. Until engaging in one of the affirmative acts that establishes candidacy, *See* 11 CFR 100.3(a), 100.72(b), 100.131(b), individuals who are merely prospective candidates should be presumed to be in this testing-the-waters phase. Requiring ActBlue to forward donations to individuals in the testing-the-waters phase, however, leads to a contradiction within the regulations: "contributions" must be forwarded, 11 CFR 110.6(b)(2)(iii)[1], but if that money is then used for testing the waters, it is, by definition, not a "contribution" and therefore not subject to the original forwarding requirement. 11 CFR 100.72(a).[2] The alternative draft correctly avoids this contradictory result by interpreting the term "candidate" to exclude prospective candidates and to encompass only actual "candidates" as they are defined by the Act and Commission regulations.

The previous draft also failed to address issues regarding ActBlue's "receipt" of funds as related to the requirements of 11 CFR 102.8 and 110.6. Commission regulations require that

[1] "Any person who receives an earmarked contribution shall forward such earmarked contribution to the candidate or authorized committee in accordance with 11 CFR 102.8...."
[2] "Funds received solely for the purpose of determining whether an individual should become a candidate are not contributions."

901 North Glebe Road, Suite 900
Arlington, Virginia 22203
Tel: (703) 682-9359 Fax: (703) 682-9321
www.campaignfreedom.org

"Every person who receives a contribution for an authorized political committee shall, no later than 10 days after receipt, forward such contribution to the treasurer." 11 CFR 102.8(a). As we have previously argued, it is literally impossible for a conduit to comply with these regulations in the case of prospective candidates, who lack both authorized political committees and treasurers. However, even assuming that compliance were possible, it does not appear that funds delivered to ActBlue are "received" within the meaning of the regulation if ActBlue previously agrees with donors not to distribute the funds until the prospective candidate to whom they are directed becomes a "candidate."

When contributions are made by credit card, the general rule is that "receipt" occurs on the date that a conduit receives authorization from a contributor to charge the contributor's card. Advisory Opinion 1990-4 (American Veterinary Medical Association). However, the Commission has recognized at least one exception to this general rule. In Deloitte & Touche Federal Political Action Committee, Advisory Opinion 1991-1 (Deloitte & Touche), the Commission held that when authorization to charge a contributor's credit card is given with the expectation that the charge will not occur until some time in the future, "receipt" is measured from the date of the charge rather than the date of authorization.

While it is our understanding that ActBlue intends to charge donors' credit cards at the time authorization is given[3], we believe the situation is analogous to Deloitte & Touche. In both situations, relinquishment of control—and therefore receipt by the committee—was subject to a condition precedent. In Deloitte & Touche, that condition was the non-occurrence of a specific event: the contributor's revocation of authorization. In ActBlue's case, the event triggering relinquishment of control is the announcement of candidacy. As noted by Commission Walther, prior to the announcement of candidacy, the situation presented by ActBlue is akin to a trust. ActBlue, acting as a trustee, lacks the authority to distribute the funds until a prospective candidate qualifies or fails to do so by an established deadline. Under the original draft, ActBlue would have been required to violate the terms of this trust by distributing the funds prior to the occurrence of either of these events—prior to having "received" them within the meaning of the Commission regulations. This problem is avoided entirely under the alternative draft, which, by allowing ActBlue to retain funds, permits such trust agreements prior to a prospective candidate becoming a "candidate".

Finally, we note with approval that under the alternative draft, the 10-day forwarding period begins to run following the registration of the candidate's presidential campaign committee rather than from the moment of candidacy. Alternative Draft Advisory Opinion 2006-30 at 6-7. We recognize that there may be as many as 25 days between the moment an

[3] If we are mistaken in this understanding, then we would argue in the alternative that this situation is controlled by Deloitte & Touche and that, accordingly, ActBlue may obtain advance authorization to charge donors' credit cards but delay making the actual charges, with the date of receipt running from the date of the charges. ActBlue could then delay making charges until the prospective candidates to whom donations are directed become "candidates" within the meaning of the Act and Commission regulations. We note in passing that, although it offers substantially less transparency than is offered by the alternative draft advisory opinion, organizations like ActBlue may find this an attractive option should the Commission reject the alternative draft.

individual becomes a candidate and the registration of a principal campaign committee.[4] However, it must be noted that this delay can occur only once and only at the beginning of the campaign. It is, therefore, unlikely that any delay will substantially undermine any of the various purposes of the 10-day forwarding requirement. Moreover, the act of registration provides an unmistakable bright line against which to measure compliance, while candidacy may be triggered by events that are unknowable to an outside party. *See, e.g.,* 11 CFR 100.131 (noting that the testing-the-waters exception not longer applies, and therefore candidacy may be established, if an individual "raises funds in excess of what could *reasonably be expected* to be used for exploratory activities...") (emphasis added).

ActBlue has devised an innovative method for transparently raising hard-dollar contributions. The Center for Competitive Politics believes that these innovations should be encouraged, not stifled. The Commission should not attempt to stave off speculative harms by, in effect, interpreting a regulation that requires "received" "contributions" to be forwarded to "candidates" to *also* require *un*-received *non*-contributions to be forwarded to *non*-candidates. Instead the Commission should adopt a clear, objective rule that comports with the language of the Act and Commission regulations. Accordingly, we urge the Commission to adopt Alternative Draft Advisory Opinion 2006-30.

We appreciate the opportunity to comment on this matter.

Sincerely,

/s/ *Paul M. Sherman*

Paul M. Sherman
Associate Director
Center for Competitive Politics

[4]A candidate is required to designate a principal campaign committee within 15 day of becoming a candidate. 11 CFR 101.1(a). A principal campaign committee must register within 10 days of designation. 11 CFR 102.1(a).