

## Center for Competitive Politics

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November 5, 2007

Thomasenia P. Duncan, Esq.  
General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

VIA ELECTRONIC MAIL

**Re: Comments on Advisory Opinion Request 2007-27 (ActBlue II)**

Dear Ms. Duncan:

Separate Segregated Funds ("SSFs"), whether of business or labor orientation, have, up until now, received contributions only from members of their restricted classes. Until this moment, it has been the contributions of members that have marked the upper limit of SSF funding. But this historical limit is a matter of legal coincidence, not one of legal command.

The upper limit on SSF funding has occurred only because connected organizations have been permitted an exception to the Federal Election Campaign Act of 1971's<sup>1</sup> ("FECA") §441b source prohibition and have made full use of it: SSFs have been permitted to solicit only their members in exchange for the ability to use soft dollars to fund those solicitations. The law is not, however, that SSFs may receive funds only from their members. Indeed, the law is that SSFs "may accept contributions from persons ... permitted by law to make contributions."<sup>2</sup>

The law is that corporate or union treasury funds may not be used to solicit outside their restricted class. Where solicitations are made by hard-money organizations, FECA's §441b source prohibition is satisfied and there remains no reason that individual citizens, whether or not they are members of a restricted class, cannot choose the political operatives hired by an SSF as the organization best suited to speak or work for them in the 2008 Presidential election cycle.

CCP urges the Commission to approve both programs proposed by ActBlue because neither allows for the insertion of corporate or union treasury funds into the federal election system. Permitting these programs will amplify the ability of citizens to engage in lawful political fundraising activity and will increase the amount of hard money supported political speech in our political discourse.

<sup>1</sup> Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §431, *et. seq.*

<sup>2</sup> 2 U.S.C. §114.5(j).

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## Discussion

### Program 1

Under fundraising Program 1, ActBlue intends to "solicit the general public and serve as a conduit for earmarked contributions to political committees registered as a Separate Segregated Fund of a Corporation (with or without stock), Labor Union, Membership Organization, Cooperative or Trade Association with the Commission." Advisory Opinion Request 2007-27 at 1 (ActBlue II). Here, ActBlue requests that it be allowed to act as a conduit for earmarked contributions to SSFs in much the same way it currently acts as a conduit for earmarked contributions to political committees and candidates for federal office. See Advisory Opinion 2006-30 (ActBlue I).

The Commission may worry that the approval of Program 1 would create a solicitation "loophole" by allowing non-connected political committees to solicit the general public on behalf of a SSF. But the concern the Commission rightly has is in preventing the solicitation of individuals outside of restricted classes with corporate or union treasury funds. Under current law, corporations and labor unions are barred from soliciting the general public and instead must restrict their solicitations to a restricted class of individuals.<sup>3</sup> Nothing in the Act or Commission's regulations bars solicitation of individuals by a non-connected committee on behalf of a SSF using hard dollars, and, in fact, 11 CFR 114.5(j) specifically endorses the idea of hard money flowing into SSFs from all sources.<sup>4</sup> Thus, a proper reading of the Commission's regulations, taking into account the authority of 11 CFR §114.5(j) (supporting a liberal SSF contribution receipt paradigm) as well as the lack of any authority barring non-connected committee solicitations, suggests that Program 1 should be approved by the Commission.

### Program 2

Program 2 is also a valid fundraising proposal because it merely allows a non-connected committee to do with hard dollars what the connected organization of a SSF is already permitted to do with soft dollars: to solicit voluntary contributions from members of the restricted class.<sup>5</sup> The Commission's legitimate concerns are the possibility 1) that corporate or union treasury funds will be used to fund solicitations outside of the restricted class or (as a variation of 1) 2) that a SSF would coordinate activity with ActBlue paid for with non-federal funds in soliciting members of the general public. Neither concern is raised by Program 2. Program 2 contemplates solicitations of members of the restricted class, and contemplates the use of federal funds (or hard money) for these solicitations. ActBlue will fund the coordinated solicitation entirely with individual PAC contributions. It has also refused to accept any corporate or union

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<sup>3</sup> A corporation or an SSF established by a corporation may only solicit contributions from its stockholders and their families, its executive or administrative personnel and their families, and the executive or administrative personnel of its subsidiaries, branches, divisions, and affiliates and their families. See 11 CFR §114.5(g)(1). A labor union and/or its SSF may not solicit individuals other than "its members and executive or administrative personnel, and their families." 11 CFR §114.5(g)(2).

<sup>4</sup> U.S.C. §114.5(j) states that a SSF "may accept contributions from persons otherwise permitted by law to make contributions."

<sup>5</sup> Subject to the restrictions laid out in 11 CFR §§ 114.5(k), 114.6, 114.7, and 114.8, a corporation (and/or its SSF) and a labor union (and/or its SSF) is allowed to solicit from its restricted class at will. 11 CFR §114.5(g).

treasury funds. Advisory Opinion Request 2007-27 at 3 (ActBlue II). Without the danger of treasury funds paying for the solicitation, the Commission should note that its regulations are silent regarding the ability of a SSF to coordinate solicitations of its restricted class with a non-connected committee. Therefore, the Commission should allow a hard money non-connected committee to assist a SSF with these solicitations.

If ActBlue were proposing to assist a connected organization to solicit contributions from individuals outside of its restricted class, in coordinated fashion, that might raise another set of concerns. See 11 CFR 114.5(g)(1); 11 CFR 114.5(g)(2). That is not what ActBlue proposes in Program 2.

CCP also agrees that a single password known by the entire restricted class is sufficient. AO 2006-3 (Whirlpool) states that a common password provided by the SSF to the entire restricted class adequately prevents access to the restricted webpage by individuals outside of the restricted class. Advisory Opinion 2006-3 at 3 (Whirlpool). The factual distinction between AO 2006-3 (Whirlpool) and the request of ActBlue in AOR 2007-27 (ActBlue II) is immaterial. A website accessible by single password provides the same amount of protection as a website accessible by a common username and password.

### Conclusion

In both its proposed fundraising programs, ActBlue requests that it be allowed to enhance, streamline, and otherwise improve the ability of an individual to give to a SSF and the ability of a SSF to solicit its restricted class. CCP suggests that ActBlue be permitted to act as an independent conduit for SSF contributions because:

- the Commission's regulations at 11 CFR §114.5 permit both activities;
- the Commission has already endorsed the ability of ActBlue to act as a hard money conduit for candidates and party committees;
- ActBlue intends to comply with the Act's source prohibitions, reporting, and disclaimer requirements.<sup>6</sup>

As the barriers to individual contribution to SSFs reduce, there will be a corresponding increase in the amount of political speech in our political system, with no detriment to the integrity of federal campaign law. The First Amendment favors the inclusion of this type of speech in our political discourse and CCP believes that the approval of both programs will enhance our nation's continuing democratic discussion.

We appreciate the opportunity to comment on this matter.

Sincerely,

*/s/ Michael P. Darner*

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<sup>6</sup> See Advisory Opinion Request 2007-27 at 2,3. (ActBlue II) (Procedure #4 of Program 1; Procedure #2 of Program 2).

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*/s/ Stephen M. Hoersting*

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