



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

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

FROM: COMMISSION SECRETARY *MWD*

DATE: DECEMBER 13, 2007

SUBJECT: COMMENT ON DRAFT AO 2007-27
ActBlue

Transmitted herewith is a timely submitted comment from Neil Reiff, Esq., regarding the above-captioned matter.

Proposed Advisory Opinion 2007-27 is on the agenda for Friday, December 14, 2007.

Attachment

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December 12, 2007

Ms. Thomasenia P. Duncan, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: AOR 2007-27 (ActBlue)

Dear Ms. Duncan:

This letter is a comment to Advisory Opinion 2007-27 Drafts A and B and is submitted pursuant to the Commission's comment procedures by the Requestor, through Counsel.

The Commission has proposed two separate Drafts for this Advisory Opinion, A and B, in response to our request to implement two distinct fundraising programs to direct contributions to certain political committees registered as Separate Segregated Funds ("SSF") of a corporation, labor union, membership organization, cooperative or trade organization. Under Program 1, ActBlue will independently solicit contributions from the general public to direct to these SSFs. Under Program 2, ActBlue will coordinate with SSFs to solicit contributions only from members of their restricted classes.

Draft A approves of both fundraising programs while Draft B approves only of Program 2. We encourage the Commission to adopt Draft A of the Advisory Opinion (with slight revisions), but we will address each draft in turn.

Draft A

We agree with the Commission's determination that both fundraising programs are permissible under the current regulations. Under Program 1, ActBlue intends to solicit the general public for contributions to certain political committees registered as a Separate Segregated Fund. Acting entirely independently of an SSF's fundraising efforts, ActBlue will make the option available on its website for members of the public to donate directly to an SSF of their choice. The Regulations allow such contributions, for an SSF "may accept contributions from persons otherwise permitted by law to make contributions." 11 C.F.R. § 114.5(j).

The contributions will also comply with the source prohibitions and contribution limitations. ActBlue will not coordinate with any SSFs to solicit contributions on their behalf, but will act of its own accord to earmark such contributions. This is also allowable as long as those contributions "would be subject to other regulations concerning the receipt of contributions by any person on behalf of a political committee." Advisory Opinion 2003-23. In addition, ActBlue will pay all solicitation costs associated with these earmarked contributions from the general public. As such, Program 1 is permissible.

We also agree that fundraising under Program 2 is permissible. In assisting SSFs to solicit contributions from members of their restricted classes, ActBlue will earmark contributions only from a specific group of people. An SSF is "prohibited from soliciting contributions . . . from any person other than its stockholders and their families and its executive or administrative personnel and their families." 11 C.F.R. § 114.5(g). Under Program 2, ActBlue merely provides a means by which SSFs can easily reach out to their members. Using password-protected websites to which only members of the restricted class will have access, ActBlue can ensure that the SSF is only making such fundraising requests to its permissible audience. The Commission has approved of such an arrangement before. See Advisory Opinion 2006-3. Such contributions will also comply with all source prohibitions and limitations, and thus Program 2 should be permitted.

However, we disagree with the requirement in Draft A that ActBlue treat any costs it incurs for solicitations under Program 2 as in-kind contributions. As noted in ActBlue's opinion request, ActBlue will utilize only salaried staff and existing servers to undertake any activities in connection with these activities. In addition, the amount of time spent on such activities would be inconsequential as compared to work for other committees for which funds are raised by ActBlue. Thus, there will be no incremental costs incurred by ActBlue in connection with this program. By analogy, Commission regulations specifically exempt such political committee expenditures (for overhead, general administrative, fund-raising, and other day-to-day costs) from being attributed to individual candidates "unless these expenditures are made on behalf of a clearly identified candidate and the expenditure can be directly attributed to that candidate." 11 C.F.R. § 106.1(c)(1). As noted in the Advisory Opinion request, it is nearly impossible to calculate such expenditures on an individual basis considering the 3000 entities currently participating in ActBlue's fundraising programs. The intent of this regulation is to ensure that committees need not allocate incidental costs of an activity to another entity. As a general matter, the Commission has consistently acknowledged that when a committee undertakes normal day-to-day activities on behalf of multiple entities, allocation of an in-kind contribution to each entity would be impracticable in its administration and thus explicitly exempt from attribution to each entity to the extent that it may receive some benefit for such activity. This is especially true for Internet activity where the Commission has specifically determined that such activities need not be attributable to candidates, even where such activity is coordinated with those candidates. See 11 C.F.R. §§ 100.26; 109.21. See *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421 (January 3, 2003); *Internet Communications*, 71 Fed. Reg. 18589 (April 12, 2006).

Draft B

As stated above, we agree with the Commission's assertion in Draft A that ActBlue's *independent* solicitations to the general public constitute a valid fundraising arrangement. In Draft B, the Commission denies the validity of this program because of concern that ActBlue is acting *on behalf of* an SSF and therefore runs afoul of the prohibition in 11 C.F.R. § 114.5(g) against soliciting contributions outside the restricted class.

However, this concern is unfounded. First, Draft B claims that "ActBlue would represent to the public that contributing to an SSF through ActBlue is the functional equivalent of contributing directly to the SSF." See AOR 2007-27 Draft B at 7. We admit that this is technically true, but the Commission's regulations do not prohibit such a contribution. In fact, the regulations specifically *allow* outside groups and individuals to donate to SSFs, as long as they are not otherwise prohibited by law. See 11 C.F.R. § 114.5(j). In addition, there is also nothing in the regulations that prohibits bundling of contributions to SSFs. Thus, it is clearly permissible for ActBlue to act as a conduit for, and for SSFs to receive, contributions from the general public.

Second, Draft B asserts that because an SSF would continually receive checks from ActBlue, knowledge of the solicitations would be imputed to the SSF, the functional equivalent of ActBlue acting *on behalf of* the SSF. This concern is also unsupported by the Commission's regulations and the nature of the fundraising program. As ActBlue has asserted and the Commission relies upon in Draft A, other than forwarding contributions to an SSF, ActBlue will have no contact with the SSFs or their connected organizations regarding the solicitation of contributions outside the restricted class. Thus, ActBlue will not be working *on behalf of* the SSF as the Commission asserts.

Simply because an SSF receives a check from ActBlue does not mean that the solicitation originated with the SSF itself, an act which is prohibited under 11 C.F.R. § 114.5(g). Much like political action committees, interest groups, and political parties may make independent expenditures on behalf of candidates without their knowledge or consent, ActBlue should be permitted to independently earmark money for SSFs. A candidate becomes aware of an independent expenditure made on his or her behalf when a television advertisement is aired or a pamphlet is released, but such knowledge after the fact does not invalidate the independent nature of the expenditure. Similarly, an SSF will be made aware of ActBlue's fundraising efforts when it receives a check for contributions made through ActBlue's website. While ActBlue is certainly acting for the SSF's benefit, this does not mean that ActBlue is working *in cooperation with* the SSF. There is no agreement between ActBlue and the SSF to guarantee contributions or even make assurances that future contributions will be forthcoming, and the SSF will have no part in making, approving, or releasing any solicitation or requests that ActBlue disseminates to its online audience. Thus, there is no direct cooperation between the entities, and the regulations do not prohibit such independent fundraising efforts by ActBlue. It would be incorrect for the Commission to impute such coordination merely by making assumptions that an SSF's receipt of earmarked funds from ActBlue signifies improper communication and cooperation between the parties.

ActBlue urges the Commission to approve Draft A submitted by the Office of General Counsel as modified per our request to exclude the administrative costs of ActBlue as an in-kind contribution to any particular SSF.

Sincerely yours,



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Elizabeth Getman, Esq.
Counsel for ActBlue

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