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December 14, 2007

To: The Commission

From: Commissioner Ellen L. Weintraub *ELW*

RE: Advisory Opinion 2007-31
Edwards for President

AGENDA ITEM
For Meeting of: 12-14-07

SUBMITTED LATE

Attached please find an alternative draft in response to Advisory Opinion Request 2007-31.

1 **ADVISORY OPINION 2007-31**

2 **Lora M. Haggard**
3 **Chief Financial Officer**
4 **John Edwards for President**
5 **410 Market Street, Suite 400**
6 **Chapel Hill, NC 37516**

WHITE DRAFT B

7 **Dear Ms. Haggard:**

8 **We are responding to your advisory opinion request on behalf of John Edwards**
9 **for President, concerning the application of the Federal Election Campaign Act of 1971,**
10 **as amended (the "Act"), the Presidential Primary Matching Payment Account Act (the**
11 **"Matching Payment Act"), and Commission regulations to contributions processed**
12 **through ActBlue.**

13 **The Commission concludes that credit card contributions made over the Internet**
14 **by individuals using ActBlue's website and subsequently forwarded to the Committee by**
15 **ActBlue may be eligible for matching funds under the Matching Payment Act and**
16 **Commission regulations.**

17 ***Background***

18 **The facts presented in this advisory opinion are based on your letter received on**
19 **October 23, 2007, telephone conversations between Commission staff and your general**
20 **counsel's office on October 31 and November 5, 2007, and your e-mail received on**
21 **November 2, 2007.**

22 **John Edwards for President (the "Committee") is the authorized committee of**
23 **Senator John Edwards, who is seeking the nomination of the Democratic Party for the**
24 **office of President of the United States in 2008. Senator Edwards announced his**
25 **candidacy on December 28, 2006, and filed his statement of candidacy with the**

1 Commission on January 3, 2007.¹ Based on documents filed on October 17, 2007, the
2 Commission declared Senator Edwards eligible to receive federal matching funds on
3 October 31, 2007.²

4 ActBlue is a nonconnected political committee registered with the Commission.³
5 Among other things, ActBlue receives contributions earmarked for federal candidates and
6 forwards them to the authorized committees of those candidates. In some cases, ActBlue
7 receives contributions for prospective Presidential candidates and holds them until
8 candidacy is established and the candidate forms an authorized committee and files a
9 statement of organization with the Commission. See Advisory Opinion 2006-30
10 (ActBlue). ActBlue accepts contributions only by credit card made through its Internet
11 web site. *Id.*

12 After Senator Edwards announced his candidacy, ActBlue served as the
13 Committee's primary online payment processor for credit card contributions, until the
14 Committee set up processing for such contributions through its own website and vendor.
15 Thereafter, the Committee's online fundraising program included two components: In
16 one, the Committee's website contained a hyperlink that took potential contributors to
17 ActBlue's website to make donations, and the second component directed e-mail
18 recipients to the Committee's own contribution webpage hosted on the Committee's
19 website, which processed contributions through the Committee's own third-party

¹ Statement of Candidacy, available at <http://query.nictusa.com/cgi-bin/fecimg/?P40002347>.

² Press Release, Edwards Third Presidential Candidate Declared Eligible for Primary Matching Funds in 2008 Race (Nov. 1, 2007), <http://www.fec.gov/press/press2007/20071101edwards.shtml>.

³ See Statement of Organization, as amended, available at <http://images.nictusa.com/cgi-bin/fecimg/?C00401224>.

1 merchant vendor. Contributors could also contribute to Senator Edwards by going
2 directly to ActBlue's website.

3 Contributors making a contribution to the Committee through ActBlue's website
4 initially access a page dedicated solely to John Edwards for President. This page
5 prominently displays the Committee's logo to inform potential contributors that their
6 contributions would go to the Committee. You stated that this page "includes all the
7 eligibility requirements for Internet contributors" and requires each potential contributor
8 to "confirm that he or she meets those requirements before making a contribution." Each
9 contributor is also required to provide his or her address, occupation, and name of
10 employer.

11 When a contributor enters credit card information on the ActBlue website, the
12 information is processed by ActBlue's service provider, Auburn Quad.⁴ After Auburn
13 Quad verifies the contributor's billing address, the credit card is charged the specified
14 amount and the funds are deposited into ActBlue's account. ActBlue forwards these
15 earmarked contributions to the Committee via check at least once a week. ActBlue also
16 deducts a processing fee of 3.95%, which is paid to Auburn Quad for its services.

17 ***Question Presented***

18 *Are earmarked credit card contributions made over the Internet through ActBlue,*
19 *a nonconnected political committee, and forwarded to the Committee by ActBlue via*
20 *checks drawn on ActBlue's account matchable under the Matching Payment Act and*
21 *Commission regulations?*

⁴ Auburn Quad was established in 2005 by the founders of ActBlue "to develop and operate the technology that powers the ActBlue service." Matt DeBergalis, Built to Last (July 2, 2007), <http://blog.actblue.com/blog/2007/07/auburn-quad.html>.

1 ***Legal Analysis and Conclusions***

2 Yes, credit card contributions made over the Internet by individuals using
3 ActBlue's website and subsequently forwarded to the Committee by ActBlue may be
4 may be eligible for matching funds under the Matching Payment Act and Commission
5 regulations.

6 The Matching Payment Act defines "contribution" to mean "a gift, subscription,
7 loan, advance, or deposit of money, or anything of value . . . for the purpose of
8 influencing the result of a primary election." 26 U.S.C. 9032(4)(A). A matchable
9 contribution consists of "a gift of money made by a written instrument which identifies
10 the person making the contribution by full name and mailing address." 26 U.S.C.
11 9034(a).

12 To satisfy the "written instrument" requirement, contributions by check must be
13 "written on a personal, escrow or trust account representing or containing the
14 contributor's personal funds." 11 CFR 9034.2(b). In the instant inquiry, the
15 contributions for which the Committee seeks matching funds are not made by ActBlue;
16 rather, they are made by individual contributors via credit card over the Internet, though a
17 webpage maintained by ActBlue on behalf of the Committee. As such, these
18 contributions are matchable if they meet the "written instrument" requirement of 11 CFR
19 9034.2(b) (for credit card contributions made over the Internet, the term "written
20 instrument" means an electronic record of the transaction created and transmitted by the
21 cardholder, and including the name of the cardholder and the card number, which can be
22 maintained electronically and reproduced in a written form by the recipient candidate or

1 candidate's committee) and satisfy the signature requirement of 11 CFR 9034.2(b)(c).

2 *See* 11 CFR 9034.2(b), (c), (c)(8).

3 Commission regulations did not anticipate the current scenario. The regulations
4 provide, by way of example, that a contribution is not matchable if it is "in the form of a
5 check drawn on the account of a *committee*, corporation, union or government contractor
6 even though the funds represent personal funds earmarked by a contributing individual to
7 a Presidential candidate." 11 C.F.R. 9034.3(f) (emphasis added). ActBlue is a registered
8 political committee.

9 However, this section of the regulations refers to a "committee," not a "political
10 committee," the latter being a defined term under the Act, referring to an entity that (1)
11 may only accept funds subject to the source restrictions and amount limitations of the Act
12 and (2) must register and report receipts and disbursements to the Commission. The
13 Explanation and Justification fails to shed any light on this word choice, but we assume
14 that the use of one term ("committee") rather than another ("political committee") was
15 intentional.

16 Section 9034.3(f) may thus be read as precluding the matching of earmarked
17 contributions that are drawn on the account of an unregistered and unregulated
18 committee, but not those processed by a registered political committee, such as ActBlue.
19 At a minimum, the use of the term "committee" creates an ambiguity in meaning that the
20 Commission must resolve in light of Congressional intent and public policy.

21 The Commission received an unusual number of comments on this request. Many
22 commenters pointed out that permitting matching in the circumstances of this request
23 would encourage participation in the Presidential public funding system, empower small

1 donors, and recognize technological innovations. This response also recognizes one of
2 the downsides of technology, internet fraud. A number of commenters explained that it is
3 sometimes difficult to tell whether an individual candidate site is genuine, and that they
4 felt safe inputting their credit card information at a trusted site such as ActBlue.
5 Moreover, allowing earmarked contributions to be matched only in these narrow
6 circumstances, when they are from non-connected political committees acting as
7 conduits, would ensure, as the Commission noted in a related context, “that controls and
8 procedures are in place to minimize the possibility of contributions by foreign nationals,
9 by Federal Government contractors, and by labor organizations or by an individual using
10 corporate or other business entity credit accounts” being matched with public funds.⁵

11 The close working relationship between ActBlue and the Committee clearly
12 establishes that ActBlue is acting on behalf of the Committee in receiving, processing,
13 and transmitting the contributions in question. As noted above, ActBlue served as the
14 Committee’s primary online payment processor for credit card contributions after Senator
15 Edwards announced his candidacy; thereafter, the Committee continued to view
16 ActBlue’s activity as an integral component of its own fundraising efforts, and the
17 Committee’s website continued to direct contributors to ActBlue’s website. Accordingly,
18 the Commission concludes that the contributions are not excluded from matchability
19 under 26 U.S.C. 9032(4)(C) and 9034(a) or 11 CFR 9034.3(f).

20 This response constitutes an advisory opinion concerning the application of the
21 Act and Commission regulations to the specific transaction or activity set forth in your

⁵ Explanation and Justification for Final Rule on Matching Credit Card and Debit Card Contributions in Presidential Elections, 64 Fed. Reg. 32394-01 (June 17, 1999).

1 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
2 of the facts or assumptions presented and such facts or assumptions are material to a
3 conclusion presented in this advisory opinion, then the requester may not rely on that
4 conclusion as support for its proposed activity. All cited advisory opinions are available
5 on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

6 Sincerely,
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9

10 Robert D. Lenhard
11 Chairman