

December 7, 2007

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

DRAFT ADVISORY OPINION 2007-31 is available for public comments under this procedure. It was requested by Lora Haggard on behalf of John Edwards for President.

Draft Advisory Opinion 2007-31 is scheduled to be on the Commission's agenda for its public meeting of Friday, December 14, 2007.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00pm noon (Eastern Time) on December 13, 2007.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2007-31, contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission's website at www.fec.gov.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

MAILING ADDRESSES

Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Rosemary C. Smith
Associate General Counsel
Office of General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

2007 DEC -7 P 2:53

December 7, 2007

MEMORANDUM

AGENDA ITEM
For Meeting of: 12-14-07

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *ACS*
Associate General Counsel

Amy L. Rothstein *AR*
Assistant General Counsel

Eric C. Hallstrom *ECH*
Attorney

Subject: Draft AO 2007-31

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for December 14, 2007.

Attachment

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2007 DEC -7 P 2:53 DRAFT

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

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 contributions forwarded to the Committee by
14 checks drawn on ActBlue's account are not matchable under the Matching Payment Act
15 and Commission regulations.

16 ***Background***

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

21 John Edwards for President (the "Committee") is the authorized committee of
22 Senator John Edwards, who is seeking the nomination of the Democratic Party for the
23 office of President of the United States in 2008. Senator Edwards announced his
24 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 contributions, 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 No, contributions forwarded to the Committee by checks drawn on ActBlue's
3 account are not matchable under the Matching Payment Act and Commission
4 regulations.⁵

5 The Matching Payment Act specifies those contributions that are entitled to be
6 matched. 26 U.S.C. 9034(a). A matchable contribution consists of "a gift of money
7 made by a written instrument which identifies the person making the contribution by full
8 name and mailing address." *Id.* The Matching Payment Act specifically excludes from
9 the definition of matchable contribution "funds received by a political committee which
10 are transferred to that committee from another committee." 26 U.S.C. 9032(4)(C) and
11 9034(a). Commission regulations further define non-matchable contributions to include
12 "[c]ontributions in the form of a check drawn on the account of a committee, corporation,
13 union or government contractor even though the funds represent personal funds
14 earmarked by a contributing individual to a Presidential candidate." 11 CFR 9034.3(f).

15 ActBlue is a nonconnected political committee formed to promote the election of
16 Democratic candidates for Federal office. Advisory Opinion 2006-30 (ActBlue). As a

⁵ In Advisory Opinion 2003-23, WE LEAD, a nonconnected political committee, stated in its request that it would inform the presumptive nominee's primary campaign committee to which it forwarded earmarked contributions that the earmarked contributions would not qualify for matching funds under the Matching Payment Act and 11 CFR 9034.3(f). The Commission there acknowledged that statement without deciding whether it was required, so this Advisory Opinion is the first time the Commission has squarely addressed this issue. The Commission relied on Advisory Opinion 2003-23 in determining that ActBlue could solicit and receive contributions earmarked for prospective presidential candidates and forward the earmarked contributions after the designated candidates had registered their principal campaign committees with the Commission. See Advisory Opinion 2006-30 (ActBlue). The Commission did not revisit the issue of whether the earmarked contributions forwarded by ActBlue would qualify for matching funds pursuant to 11-CFR 9034.3(f). ActBlue has independently informed Commission staff that it customarily notifies presidential candidates and their committees that the earmarked contributions it forwards to them by check do not qualify for matching funds under the Matching Payment Act.

1 "committee, association or organization . . . which accepts contributions . . . for the
2 purpose of influencing, or attempting to influence, the nomination of any person for
3 election to the office of President of the United States," 26 U.S.C. 9032(8), ActBlue is
4 both a "political committee" under 26 U.S.C. 9032(4)(C) and 11 CFR 9032.8, and a
5 "committee" under 11 CFR 9034.3(f). Accordingly, the earmarked contributions that
6 ActBlue forwards to the Committee by check drawn on ActBlue's account fall squarely
7 within the categories of contributions that both the Matching Payment Act and
8 Commission regulations specifically exclude from qualifying for matching funds.⁶ 26
9 U.S.C. 9034(a) and 9032(4)(C); 11 CFR 9034.3(f).

10 This response constitutes an advisory opinion concerning the application of the
11 Act and Commission regulations to the specific transaction or activity set forth in your
12 request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
13 of the facts or assumptions presented and such facts or assumptions are material to a
14 conclusion presented in this advisory opinion, then the requester may not rely on that
15 conclusion as support for its proposed activity. All cited advisory opinions are available
16 on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

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Sincerely,

Robert D. Lenhard
Chairman

⁶ Moreover, matchable contributions made by check must be "written on a personal, escrow or trust account representing or containing the contributor's personal funds." 11 CFR 9034.2(b). There is no indication that checks drawn on ActBlue's account would meet this requirement.