



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2014-19

Melissa Flores, Esq.
Steven Gold, Esq.
ActBlue
366 Summer Street
Somerville, MA 02144

Dear Ms. Flores and Mr. Gold:

We are responding to the advisory opinion request that you submitted on behalf of ActBlue concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-30146 (formerly 2 U.S.C. §§ 431-457) (the “Act”), and Commission regulations to ActBlue’s proposal to establish draft funds and nominee funds that would accept contributions earmarked exclusively for candidates who are women. The Commission concludes that the proposed draft and nominee funds would be consistent with the Act and Commission regulations.

Background

The facts presented in this advisory opinion are based on your advisory opinion request (“AOR”), which consists of your letter and email received on November 19 and December 3, 2014, respectively.

ActBlue is a nonconnected political committee that serves as an intermediary for contributions earmarked for specific candidates and political committees. ActBlue receives the earmarked contributions via its website, www.actblue.com, and forwards them to the designated candidates and political committees. Users of ActBlue’s website may also make contributions to “nominee funds,” in which the contributions are earmarked for eventual party nominees who have not yet been identified (e.g., the Democratic nominee for President in 2016), and to “draft funds,” in which the contributions are earmarked for specific individuals who may become candidates for specific offices but who have not yet established campaign committees.

ActBlue proposes to offer new forms of nominee and draft funds that the request describes as “designed to cater to the public’s strong desire to see a woman run for President on

the Democratic ticket in 2016.” AOR at 1. Under the proposed new form of nominee fund, ActBlue’s users would make contributions earmarked for the Democratic Party’s eventual nominee for President in 2016, but ActBlue would forward the contributions to the nominee only if the nominee is a woman.¹ If the Democratic presidential nominee is not a woman, ActBlue would instead forward the contributions to a default recipient, such as the Democratic National Committee. The default recipient would be determined at the time that the fund is created and disclosed to contributors before they make their contributions.

Under the proposed new form of draft fund, ActBlue’s users would make contributions earmarked for specific women who are potential candidates for President in 2016 but who have not yet formed authorized presidential campaign committees. ActBlue would establish these draft funds at the request of groups or individuals who want to encourage specific women to run for office. For each such fund, ActBlue’s website would identify the potential candidate by name, and ActBlue would forward the earmarked contributions to that individual if she forms an authorized presidential campaign committee by a certain deadline. If the potential candidate does not establish an authorized committee by the deadline, ActBlue would forward the contributions to a default recipient, as described above.

Although ActBlue has “traditional[ly]” set the committee-formation deadline for draft funds at seven days before the political party’s nominating convention, ActBlue proposes to set earlier deadlines for the draft funds at issue here. ActBlue intends these earlier deadlines to enable contributors to “convey their strong support for the potential candidate to mount a campaign,” while “indicat[ing] that they intend to shift their support to a different candidate should their chosen candidate fail to enter the race in a timely manner.” AOR at 2. ActBlue states that an earlier deadline could also “prevent the sequestering of funds in the draft fund until the nominating convention.” *Id.*

ActBlue also proposes to establish and administer some draft funds that name a series of potential candidates as default recipients, rather than having a single default recipient. In other words, the draft fund would name Candidate A as the primary recipient, Candidate B as the first default recipient (if Candidate A does not establish a candidate committee by the deadline), Candidate C as the second default recipient, etc. A group or individual that establishes such a multiple-candidate draft fund would determine at the time of its establishment who the potential candidates are, the order in which they would be eligible to receive contributions, and the deadline by which each potential candidate must form a campaign committee. ActBlue would require the final default recipient to be a political committee already in existence, such as the Democratic National Committee, “which would be certain to still be active on the last deadline date.” *Id.* Neither the entity that establishes the fund, nor ActBlue, nor any contributor would be able to change the identity or order of primary or default recipients or the deadlines by which potential candidates must establish campaign committees.

¹ For the purposes of this advisory opinion, ActBlue has asked the Commission to assume that a candidate’s gender is “easily determined.” AOR at 4 n.1. Accordingly, this opinion does not address situations in which the determination of a given candidate’s gender is subjective or requires any inquiry.

Questions Presented

1. *May ActBlue establish a traditional nominee fund with the additional criterion that the nominee of the Democratic Party for President in 2016 must be a woman in order to receive the contributions?*
2. *May ActBlue establish a traditional draft fund where the date by which the potential candidate must establish an authorized campaign committee is selected in advance but is unrelated to the date on which the Democratic National Convention begins?*
3. *May ActBlue establish a traditional draft fund² that includes a series of default recipients, each with a deadline to establish an authorized campaign committee that is either the same as or later than the deadline for the previous recipient, such that if the first specifically named person does not establish an authorized campaign committee by the deadline, then the earmarked contributions will go to the next specifically named person, unless that person does not establish a committee by her deadline, and so on?*

Legal Analysis and Conclusions

1. *May ActBlue establish a traditional nominee fund with the additional criterion that the nominee of the Democratic Party for President in 2016 must be a woman in order to receive the contributions?*

Yes, ActBlue may establish a traditional nominee fund with the added criterion that the nominee must be a woman in order to receive the contributions.

Under the Act and Commission regulations, any contribution made by a person on behalf of or to a candidate, including a contribution that is earmarked or otherwise directed to the candidate through an intermediary or conduit, is a contribution from that person to the candidate. 52 U.S.C. § 30116(a)(8) (formerly 2 U.S.C. § 441a(a)(8)); 11 C.F.R. § 110.6(a). If the intermediary or conduit exercises any “direction or control” over the choice of the recipient candidate, then the contribution is treated as a contribution from both the intermediary and the original contributor. 11 C.F.R. § 110.6(d).

“[A] conduit or intermediary does not exercise direction or control where the contributor has the final say over whether to make a contribution to a given recipient and the amount of any contribution.” Advisory Opinion 2014-13 (ActBlue). Thus, in Advisory Opinion 2003-23 (WE LEAD), the Commission concluded that an intermediary could receive contributions earmarked for a party’s presidential nominee before the nominee had been chosen, because the “recipient candidate . . . will be the presumptive Democratic Presidential nominee no matter who that person is,” and therefore the intermediary would “exercise no discretion over which candidate receives the earmarked contributions.” Advisory Opinion 2003-23 (WE LEAD) at 4; *see also*

² Although this question as presented in the AOR refers to a “nominee fund” rather than a “draft fund,” the context in which the question is presented and the accompanying discussion of it in the AOR make clear that the requestor intended to refer to a “draft fund.”

Advisory Opinion 1982-23 (Westchester Citizens for Good Government) (concluding that non-federal committee could make contribution earmarked for nominee through local party committee before nominee was identified); Advisory Opinion 1977-16 (Iowa 1980 U.S. Senate Campaign Committee) (concluding that committee could accept contributions on behalf of candidate not yet identified and that contributions would be “retroactively regarded” as having been accepted by candidate’s principal campaign committee once candidate was identified and “assume[d] . . . control” of funds); *cf.* Advisory Opinion 2006-30 (ActBlue) (concluding that ActBlue could accept contributions earmarked for individuals who had not yet become candidates). In each of these advisory opinions, the intermediary could lawfully accept and transfer earmarked contributions without making contributions of its own because the intended recipient of the contributions was objectively identifiable by office sought, party affiliation, and election cycle, and therefore the intermediary had no discretion in determining which candidate would receive the contributions.

Here, in addition to the criteria discussed in the Commission’s prior opinions, ActBlue proposes to introduce the criterion of gender to identify the designated recipient of earmarked contributions. Like the other criteria, the candidate’s gender is an objective, easily determined fact outside of ActBlue’s discretion or control. *See supra* n.1. Moreover, because ActBlue will clearly notify potential contributors in advance of the default recipient of contributions to the nominee fund, ActBlue will not exercise any direction or control over the disposition of the contributions in the event that the Democratic Party does not nominate a woman as its candidate for President. Accordingly, the Commission concludes that ActBlue may establish a nominee fund that identifies the recipient candidate by gender as well as by office sought, party affiliation, and election cycle and that clearly identifies a default recipient to receive the funds if no candidate satisfies all of the stated criteria. Contributions that ActBlue transfers from such a fund either to the designated candidate or to the default recipient in accordance with the fund’s pre-established criteria would be attributed to the persons who contributed to the fund, and not to ActBlue.

2. *May ActBlue establish a traditional draft fund where the date by which the potential candidate must establish an authorized campaign committee is selected in advance but is unrelated to the date on which the Democratic National Convention begins?*

3. *May ActBlue establish a traditional draft fund that includes a series of default recipients, each with a deadline to establish an authorized campaign committee that is either the same as or later than the deadline for the previous recipient, such that if the first specifically named person does not establish an authorized campaign committee by the deadline, then the earmarked contributions will go to the next specifically named person, unless that person does not establish a committee by her deadline, and so on?*

Yes, ActBlue may establish a traditional draft fund where the pre-determined date by which the potential candidate must establish an authorized campaign committee is unrelated to the date on which the Democratic National Convention begins. ActBlue may also establish a draft fund with a series of default recipients as proposed.

Although the earmarking provisions discussed above speak in terms of contributions made to or on behalf of a “candidate,” Commission regulations recognize that an individual may receive contributions before becoming a candidate. In such cases, “[w]hen an individual becomes a candidate, any funds received, loans obtained, or disbursements made prior to becoming a candidate in connection with his or her campaign shall be deemed to have been received, obtained or made as an agent of his or her authorized committee(s).” 11 C.F.R. § 101.2(b); *see also* 52 U.S.C. § 30102(e)(2) (formerly 2 U.S.C. § 432(e)(2)); 11 C.F.R. § 101.3; Advisory Opinion 2006-30 (ActBlue) at 4.

The Commission has previously concluded that ActBlue may act as a conduit or intermediary for contributions earmarked for prospective candidates, as it is proposing to do here. In Advisory Opinion 2006-30 (ActBlue), ActBlue proposed to solicit contributions earmarked for certain prospective Democratic presidential candidates and to forward the contributions to the Democratic National Committee if the prospective candidates did not register presidential campaign committees by the end of the seventh day before the Democratic National Convention. The Commission concluded that this proposal was permissible, noting that registering an authorized committee with the Commission is an “easily verifiable act[] that do[es] not require the conduit to make determinations about when a person technically satisfies the Act’s definition of ‘candidate.’” *Id.* at 4-5. The Commission required ActBlue to state clearly in its solicitations how it would distribute earmarked contributions if the prospective candidate did not register a presidential campaign committee by the stated deadline. In and of itself, however, the specific deadline selected by ActBlue for the prospective candidate to register a campaign committee was not a factor in either the discussion or the decision. *See id.* at 5; *see also* Advisory Opinion 2003-23 (WE LEAD) (indicating that deadline for determining nominee is significant only insofar as intermediary must inform contributor about deadline and consequence of missed deadline before contributor makes earmarked contribution).

Here, ActBlue proposes to establish a draft fund where the deadline for a potential candidate to establish an authorized campaign committee is unrelated to the date of the Democratic National Convention. Given the Commission’s prior advisory opinions, the Commission concludes that ActBlue may establish such a draft fund so long as the deadline is established in advance, objectively verifiable, not subject to change by ActBlue (or by any entity establishing such a fund), and clearly communicated to contributors before they make their contributions. Under these circumstances, the Commission concludes that ActBlue will not exercise any direction or control over the disbursement of the earmarked contributions.

ActBlue also proposes to create or administer draft funds that identify a series of default recipients of earmarked contributions, each with her own deadline to register a principal campaign committee. As noted above, the Commission has previously determined that ActBlue may, using certain objective criteria, establish a draft fund for an individual who is not yet a candidate and may set a deadline by which that individual must register a principal campaign committee to avoid forfeiting earmarked contributions to a default recipient. Nothing in the rationale of the Commission’s prior opinions prevents ActBlue from selecting another potential candidate as a default recipient (rather than a political party committee or other non-authorized committee) or from establishing multiple sequential default recipients. For the reasons stated above, the Commission concludes that ActBlue will not exercise any direction or control over

the contributor's choice of recipient candidates for draft funds as described in the request so long as the identity of each potential candidate and the corresponding deadline for that individual to register her principal campaign committee is selected in advance, not subject to change, and clearly communicated to contributors.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 52 U.S.C. § 30108 (formerly 2 U.S.C. § 437f). The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity that is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B) (formerly 2 U.S.C. § 437f(c)(1)(B)). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. Any advisory opinions cited herein are available on the Commission's website.

On behalf of the Commission,

(signed)
Ann M. Ravel
Chair