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 SAN FRANCISCO SEOUL SHANGHAI WASHINGTON

Covington & Burling LLP
 One CityCenter
 850 Tenth Street, NW
 Washington, DC 20001-4956
 T +1 202 662 6000

June 20, 2023

Ms. Wanda Brown
 Federal Election Commission
 Office of Complaints Examination
 & Legal Administration
 1050 First Street, NE
 Washington, DC 20463

Re: MUR 8132 (Biden for President, et al.)

Dear Ms. Brown:

We write on behalf of Respondents President Joseph R. Biden, Biden for President (“BFP” or “the campaign”), and Keana Spencer in her official capacity as Treasurer of BFP in response to the Complaint filed by Committee to Defeat the President and designated as MUR 8132.

The Complaint should be dismissed with no further action because it does not allege a violation of the Federal Election Campaign Act of 1971, as amended (“the Act”). The Complaint claims that ActBlue provided BFP with email addresses and phone numbers it collected from contributors to BFP through its services, and that doing so constituted unreported in-kind contributions in excess of the Act’s contribution limits. The Complaint fails to recognize, however, a central and dispositive fact: BFP paid ActBlue for all of its services as part of a commercially reasonable transaction. Under the Act and a long line of Federal Election Commission (“FEC” or “Commission”) precedent, such a commercial transaction provided by a vendor at its *usual and normal charge* does not result in a contribution. Therefore, the Commission should find no reason to believe a violation occurred and close the matter.

I. The Complaint Does Not Support Finding Reason to Believe that ActBlue’s Provision of Phone and Email Information to BFP is a Contribution.

The Complaint alleges that BFP accepted an in-kind contribution from ActBlue in the form of phone numbers and email addresses associated with individuals who used ActBlue’s service to contribute to BFP during the 2020 election cycle.¹ The Complaint entirely ignores, however, that ActBlue provided contributor information to BFP as part of a larger arm’s-length

¹ Compl. ¶ 50, 51.

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commercial transaction in which BFP paid a fee to ActBlue for its services. The Commission has repeatedly affirmed that in such situations there is no contribution.

A. The FEC has Concluded that Transferring Contact Information in a Commercially Reasonable Transaction is not a Contribution.

Under the Act, a contribution includes “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.”² Commission regulations define an in-kind contribution as “the provision of any goods or services *without charge or at a charge that is less than the usual and normal charge*.”³ The Commission has long recognized that contact information is a thing of value, but that the provision of such information to a political committee does not constitute an in-kind contribution if the information is exchanged in a commercially reasonable transaction.⁴

The Commission has approved numerous proposals in which organizations process political contributions for a fee, concluding that those organizations are providing a commercial service to the contributor or recipient committee and therefore do not result in an in-kind contribution. These proposals have included traditional commercial contribution processing arrangements;⁵ as well as arrangements in which a contribution is directed by the commercial entity’s customer to a political committee as part of a distinct transaction, so long as the commercial entity charges a reasonable fee to the customer or recipient committee.⁶

As part of these permissible contribution processing services, the FEC has allowed vendors to provide the recipient with contributor information — including elements that go beyond the information required to be disclosed on FEC reports — as part of the commercial transaction. In Advisory Opinion 2010-21 (ReCellular), the requestor asked whether it could

² 52 U.S.C. § 30101(8)(A)(i).

³ 11 C.F.R. § 100.52(d)(1) (emphasis added). For services, the “usual and normal charge” is the “charge for the services at a commercially reasonable rate prevailing at the time the services were rendered.” *Id.* § 100.52(d)(2).

⁴ *See, e.g.*, Advisory Opinion 2014-06 (Ryan for Congress, *et. al*) at 8; Advisory Opinion 1979-18 (FEC’s Former Employees Committee) at 2-3 (“[T]he Commission notes that the sale of the [contributor] list to a candidate or another political committee could involve the making of a contribution by FEC-FEC to the purchaser if the purchase price is less than the usual and normal charge for such a list in the market from which it would ordinarily be purchased.”).

⁵ *See, e.g.*, Advisory Opinion 2019-04 (Prytany); Advisory Opinion 2018-05 (CaringCent); Advisory Opinion 2016-08 (eBundler); Advisory Opinion 2012-09 (Points for Politics).

⁶ *See, e.g.*, Advisory Opinion 2014-09 (Reed Marketing); Advisory Opinion 2010-06 (Famos); Advisory Opinion 2006-34 (Working Assets); Advisory Opinion 2003-16 (Providian).

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buy used cell phones and allow the seller to direct the proceeds to a political committee.⁷ As part of the proposed transaction, the requestor would send a notification to the recipient committees with each contributor's personal contact information, including not only details required for FEC reporting *but also email addresses*.⁸ The Commission explained that there would not be a contribution from the requestor to the recipient political committee so long as "the recipient political committees would . . . pay ReCellular for the cost of the notification emails."⁹ The Commission noted that one reasonable method of charging for these contribution processing services and the notification emails is "by taking a fee out of the contributions transmitted by the company to political committees."¹⁰

More recently, in Advisory Opinion 2022-03 (Democracy Engine), the FEC approved a requestor's proposal to create custom contribution websites for corporations and their PACs. The requestor's websites would process contributions from individuals to political committees after subtracting "a commercially reasonable convenience fee" from each individual's contribution.¹¹ Contributors would provide contact information through the website, including email addresses, and this information would be shared with the recipient committees.¹² The Commission concluded that this contribution processing method was permissible.¹³

The FEC recently articulated its position on this issue in *Ready for Ron v. FEC*, an action challenging its opinion in Advisory Opinion 2022-12 (Ready for Ron). The Commission explained that its decisions "generally opine that the candidate should cover the cost of the provision of email addresses of contributors to a federal candidate," noting that in decisions like Advisory Opinions 2010-21 and 2022-03, it "approved of the requestor[s] conduct under circumstances where the *candidate receiving emails would be charged a fee for the services* provided by the requestor (including the collection and provision of emails)."¹⁴

⁷ Advisory Opinion 2010-21 (ReCellular) at 3.

⁸ *Id.* at 5.

⁹ *Id.* at 7.

¹⁰ *Id.* at 7-8.

¹¹ Advisory Opinion 2022-03 (Democracy Engine) at 2.

¹² *Id.* at 2-3.

¹³ *Id.* at 1-2.

¹⁴ FEC's Supplemental Brief Opposing Plaintiff's Motion for Preliminary Injunction, at 3-4, *Ready for Ron v. FEC*, No. 22-3282 (RDM) (D.D.C. Mar. 14, 2023) (emphasis added).

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B. BFP and ActBlue Engaged in a Commercially Reasonable Transaction that Included the Transfer of Contributor Information.

BFP paid ActBlue for contribution processing services. Similar to the advisory opinions discussed above, ActBlue then provided contributor information to the campaign as part of those commercial services. As discussed above, the FEC has consistently concluded that such commercial transactions do not result in an in-kind contribution.

BFP engaged ActBlue to provide a number of services for BFP during the 2020 election cycle, including (i) setting up its contribution page; (ii) processing credit card contributions from donors; (iii) answering BFP's inquiries through a support team; and (iv) providing fundraising analytics.¹⁵ ActBlue charges a standard 3.95% fee for each contribution received via ActBlue.¹⁶ BFP paid that standard fee on transactions. Therefore, ActBlue's provision of contributor information to BFP, including phone and email addresses, was part of the general commercial services provided by ActBlue and paid for by BFP via this fee applied to each contribution transaction.¹⁷

Despite the arguments in the Complaint, nothing in Advisory Opinion 2022-12 (Ready for Ron) alters the conclusion that there is no contribution from ActBlue to BFP. Ready for Ron sought an advisory opinion on whether it could provide Florida Governor Ron DeSantis — *without charge* — a petition containing the names, phone numbers, email addresses, and zip

¹⁵ ActBlue, "Getting to Know Your ActBlue Account" (last visited June 12, 2023), <https://support.actblue.com/campaigns/getting-started/getting-to-know-your-actblue-account/>; ActBlue, "Features" (last visited June 12, 2023), <https://secure.actblue.com/features>.

¹⁶ ActBlue, "Do you charge a fee for contributions?" (last visited June 12, 2023), <https://support.actblue.com/donors/contributions/do-you-charge-a-fee-for-contributions/> ("We pass along a 3.95% processing fee on contributions to the groups using our platform" because ActBlue is "legally required to pass along processing costs to the campaign so that [ActBlue does] not make in-kind contributions to them."). Similar statements to this effect are included on other ActBlue webpages. *See e.g.*, ActBlue, "What happens to my money when I donate?" (last visited June 12, 2023), <https://support.actblue.com/donors/contributions/what-happens-to-my-money-when-i-donate/>; ActBlue, "How much does it cost campaigns and organizations to use your tools?" (last visited June 12, 2023), <https://support.actblue.com/donors/about-actblue/how-much-does-it-cost-campaigns-and-organizations-to-use-your-tools/>.

¹⁷ Contributor emails and phone numbers were used for a number of compliance purposes tied to the contributions made through ActBlue's services, such as: resolving issues related to excessive contributions; clarifying or requesting missing information (*e.g.*, requesting employer/occupation information if the donor did not provide a permissible response or provided none at all); alerting donors to refunds; and confirming citizenship of donors with foreign addresses. Further, this contact information was used to reduce duplicate entries in database, which in turn helps to report accurate aggregate contribution amounts and avoid accepting excessive contributions.

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codes of thousands of individuals who wanted him to run for President in the 2024 election.¹⁸ The Commission concluded that sharing the contact information from the petition was an impermissible in-kind contribution of a contact list because neither Governor DeSantis nor his authorized committee would pay for the information.¹⁹

In recent litigation stemming from the Ready for Ron advisory opinion, the FEC distinguished between that opinion, where contact information was offered for free, and ActBlue's arrangement of providing services to its paying customers: "ActBlue charges a ~3.95% processing fee to the campaigns receiving contributions To the extent that the Court has concerns . . . regarding ActBlue, a more comprehensive view of such information shows that ActBlue operates in ways that are distinguishable from what [Ready for Ron] proposes."²⁰ Here, too, BFP's receipt of contributor information from ActBlue pursuant to a permissible commercial transaction does not amount to an in-kind contribution.

II. Conclusion

The Complaint's arguments fail because the Complaint ignores a key fact and the necessary legal consequences of that fact. BFP pays ActBlue a commercially reasonable rate for contribution processing services, including the collection and provision of certain contributor information. The law is clear that the commercial aspect of the arrangement means there is no in-kind contribution and no unreported contribution. The Commission should find no reason to believe a violation occurred and dismiss the Complaint.

Respectfully submitted,



Derek Lawlor
 Andrew D. Garrahan
 Kareem D. Carryl
 Covington & Burling LLP
 One CityCenter
 850 Tenth Street, NW
 Washington, DC 20001
 (202) 662-6000

¹⁸ Advisory Opinion 2022-12 (Ready for Ron) at 2.

¹⁹ *Id.* at 1.

²⁰ FEC's Supplemental Brief Opposing Plaintiff's Motion for Preliminary Injunction, at 6, *Ready for Ron v. FEC*, No. 22-3282 (RDM) (D.D.C. Mar. 14, 2023).