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FEDERAL ELECTION COMMISSION  
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2004 JUL 15 P 2:16

July 15, 2004

# AGENDA ITEM

For Meeting of: 7-22-04

## MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *JAP*  
Staff Director

FROM: Lawrence H. Norton *LHN*  
General Counsel

Rosemary C. Smith *RCS*  
Associate General Counsel

Mai T. Dinh *MTD*  
Assistant General Counsel

Michael Marinelli *MM* *by MTD*  
Staff Attorney

Subject: Draft AO 2004-21

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for July 22, 2004.

Attachment

2  
3  
4 Mr. Matthew L. Ginsberg  
5 Chief Executive Officer  
6 On Time Systems Inc.  
7 1850 Millrace Drive, Suite 1  
8 Eugene, Oregon 97403  
9

**DRAFT**

10  
11 Dear Mr. Ginsberg:

12           This responds to your letter dated May 13, 2004, as supplemented by subsequent  
13  
14 phone conversations and electronic mail messages, requesting an advisory opinion  
15 concerning the application of the Federal Election Campaign Act of 1971, as amended  
16 (“the Act”), and Commission regulations, to an Internet service that Give to USA, Inc.  
17 (“Give to USA”) wishes to provide.

18 ***Background***

19           You are the President of Give to USA. Give to USA has filed with the Internal  
20 Revenue Service to be recognized as a nonprofit corporation organized under section  
21 501(c)(3) of the Internal Revenue Code (“section 501(c)(3) organization”).<sup>1</sup> See 26  
22 U.S.C. 501(c)(3). It plans to introduce a website designed to transform “canceling”  
23 political contributions into charitable donations. This website would pair contributions to  
24 opposing candidates and change these matched opposing (and therefore “canceling”)  
25 contributions to donations to charitable organizations. You have established a prototype  
26 of this site at <http://www.givetousa.com>.

27           When accessing the website, a contributor is asked to choose a current Federal  
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<sup>1</sup> When you first submitted your request, Give to USA was a limited liability company (“LLC”) owned by On Time, Inc. You are also the President of On Time Inc.

1 candidate to support. The contributor also chooses a candidate in that race to oppose.  
2 The contributor then chooses the amount of the contribution and the time period in which  
3 the contribution is to be held before being forwarded to the supported candidate. Finally,  
4 the contributor chooses a “fallback” charity for the contribution. The website would then,  
5 within the specified time period, attempt to match the contribution with another  
6 contribution made through the website from a second contributor who opposes the  
7 candidate supported by the first contributor and supports the candidate opposed by the  
8 first contributor. When matched, the contributions would “cancel” each other and both  
9 contributions would be forwarded to the “fallback” charities identified by the contributors  
10 rather than to the candidates supported. Unmatched contributions would be forwarded to  
11 the supported candidates.

12 In its final form, the website will list candidates for U.S. President, U.S. House of  
13 Representatives and U.S. Senate, as well as state legislative candidates and ballot  
14 measures. Give to USA has contacted but received no response from the Democratic  
15 National Committee (“DNC”) and the Republican National Committees (“RNC”). It has  
16 no plans to contact any other Federal political committee or candidates at this time.

17 A sample webpage indicates that the website would offer a list of charities from  
18 which contributors could choose. The charities listed on the website would need to enter  
19 into a contract or listing agreement with Give to USA. A sample contract is available on  
20 the website at <http://www.givetousa.com>. This sample contract provides for a 10 percent  
21 fee per contribution to be paid to Give to USA and requires the charity to be a

1 section 501(c)(3) organization.<sup>2</sup> You also state that contributors will be permitted to  
2 designate their own charities or to work with charities that have not signed the listing  
3 agreement. In either case, however, the charity must confirm that it is a section 501(c)(3)  
4 organization before it receives any “canceling contributions.” Although you plan to  
5 charge a fee to the 501(c)(3) organizations to forward contributions to them, you do not  
6 plan at this time to charge a fee to the political committees that receive contributions  
7 through your website.

8 The prototype website offers a period as long as 12 weeks to permit the matching  
9 and processing of the contributions. However, you state that the proposal will not use a  
10 period that goes past an election or straddles two tax years. Further, Give to USA would  
11 be willing to adjust the period to be shorter or longer, as may be required by law.

12 Your request also offers some details as to the screening efforts Give to USA will  
13 take to ensure that no potential contributor exceeds the individual contribution limits in  
14 any given election. These steps include use of a comprehensive contributor database to  
15 check whether an individual’s contributions exceed permissible limits. The prototype  
16 website also requires that a contributor make several affirmations that the contribution is  
17 not prohibited under the Act.

18 When contributions are designated for the general election campaigns of  
19 presidential candidates that are publicly financed, these contributions, if “unmatched,”  
20 would be forwarded to the General Election Legal and Accounting Compliance Fund of

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<sup>2</sup> The sample contract states that the contracting charity be “recognized by the Internal Revenue Service as exempt from federal income tax under Internal Revenue Code section 501(c)(3), as amended.” It requires that the charity “not violate any restriction imposed by applicable law on Internal Revenue Code section 501(c)(3) entities, including but not limited to those proscribing the use of your income or assets for a political purpose.”

1 the candidates, or to the DNC or the RNC as indicated by the contributor. Give to USA  
2 also intends to use a separate bank account for the depositing and forwarding of any funds  
3 that might be contributions, and would establish a separate merchant account for the  
4 credit card processing of contributions.

5 ***Question Presented***

6 *Would the proposed program of pairing contributions be permissible under the*  
7 *Act and Commission regulations?*

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9 ***Legal Analysis and Conclusions***

10 No, Give to USA's proposed program as currently proposed is not permissible  
11 under the Act and Commission regulations for the reasons stated below.

12 Corporations are prohibited from making any "contribution or expenditure" in  
13 connection with a Federal election. 2 U.S.C. 441b(a); 11 CFR 114.2(b)(1). Section 441b  
14 applies to "any corporation whatever." Therefore, Give to USA is still subject to the  
15 prohibitions of section 441b even if it is a non-profit 501(c)(3) corporation. *See* 2 U.S.C.  
16 441b(a) and 11 CFR 114.12(a); *see also Federal Election Commission v. Beaumont*, 539  
17 U.S. 146 (2003)(holding that 2 U.S.C. 441b(a) applied to a nonprofit advocacy  
18 corporation organized under section 501(c)(4) of the Internal Revenue Code, 26 U.S.C.  
19 501(c)(4)). *See* 11 CFR 110.1(g) and 110.1(e)(2)(ii). Consequently, your proposal would  
20 be impermissible if it constitutes a "contribution or expenditure."

21 Under 2 U.S.C. 441b(b)(2), the definition of "contribution or expenditure"  
22 incorporates the definitions of "contribution" and "expenditure" in 2 U.S.C. 431(8) and  
23 (9) which include "anything of value made by any person for the purpose of influencing

1 any election for Federal office.” 2 U.S.C. 441b(b)(2), 431(8)(A)(i) and 431(9)(A)(i); *see*  
2 *also* 11 CFR 100.52(a). Commission regulations further define “anything of value” to  
3 include “the provision of any goods or services without charge or at a charge that is less  
4 than the usual and normal charge for such goods or services.” 11 CFR 100.52(d)(1).

5 The Commission has examined a variety of business proposals by corporations  
6 that provided customers the opportunity to make contributions to Federal political  
7 committees and candidates. *See* Advisory Opinions 2003-16, 2002-7, 1999-22, 1995-34,  
8 1994-33, and 1990-14. In these advisory opinions, the Commission concluded that the  
9 corporations were providing a service to the political committees that was something of  
10 value in itself and, therefore, a potential contribution. To avoid the making of a  
11 prohibited corporate contribution, the Commission required that the corporations provide  
12 political committees with services in the ordinary course of business for the usual and  
13 normal charge. *E.g.* AO 2004-6.

14 In Advisory Opinion 2002-7, an Internet company provided subscribers the  
15 ability to use its Internet site either to make a donation to a section 501(c)(3) organization  
16 or to make a contribution to Federal political committees and candidates. The  
17 Commission concluded that although the requestor was providing something of value to  
18 the political committee, its proposal was permissible, in part, because the political  
19 committees would compensate the requestor “for arranging these processing services and  
20 creating a website that facilitates contributions to the individual Federal political  
21 committees.”

22 As evidenced by the listing agreement, Give to USA would be providing a service  
23 when it lists a charity and forwards donations to it. The listing agreement establishes a

1 monetary value for the service by requiring that the charities pay a 10% processing fee per  
2 contribution. The same service is provided to candidates that are listed on the website;  
3 however, your proposal would not charge political committees and candidates any fee.  
4 Because Give to USA would be providing the service free of charge to political  
5 committees and candidates, it would make a prohibited corporate contribution every time  
6 it processes and forwards a contribution to a political committee or candidate.

7 Under Commission regulations, except for commercial fundraising firms retained  
8 by candidates and their authorized committees to assist in fundraising, a corporation is  
9 prohibited from acting as a conduit or intermediary for contributions earmarked to  
10 candidates. *See* 11 CFR 110.6(b)(2)(i)(D) and (2)(ii). Because Give to USA is a  
11 corporation that is prohibited from making contributions, it may not act as a conduit or  
12 intermediary under 11 CFR 110.6. Additionally, Give to USA is not a commercial  
13 fundraising firm under 11 CFR 110.6(b)(2)(i)(D) because it would not charge Federal  
14 candidates or their authorized committees for its services.

15 An additional problem lies in the processing time for matching of contributions.  
16 Under the Act and Commission regulations every person who receives a contribution for  
17 an authorized committee shall, no later than 10 days after receipt, forward the  
18 contribution to the committee's treasurer. 2 U.S.C. 432(b)(1) and 11 CFR 102.8. While  
19 you state that Give to USA is willing to adjust the holding period to be shorter or longer  
20 as may be required by law, the initial proposal to hold contributions for as long as 12  
21 weeks before forwarding them would violate these statutory and regulatory provisions.

22 Therefore, Give to USA's proposal to transform matching "cancelled"  
23 contributions into charitable donations as currently constructed would violate the Act and

1 Commission regulations. However, the Commission notes that it has approved proposals  
2 where the requestor is a commercial vendor that charges Federal political committees and  
3 candidates for its services at the usual and normal charges and establishes a merchant  
4 account to ensure that corporate funds are not mingled with contributions. *See* Advisory  
5 Opinions 2003-16 and 2002-7. Additionally, commercial vendors must forward the  
6 contributions within the time period required by 2 U.S.C. 432(b)(1) and 11 CFR 102.8.

7 Give to USA's status as a section 501(c)(3) organization may present an  
8 additional concern. The advisory opinions approving commercial transactions with  
9 Federal political committees and candidates have involved for-profit entities. The  
10 Commission expresses no opinion concerning the application of the tax law on your  
11 proposal, or whether Give to USA's proposed activities may or may not be consistent  
12 with its status as a non-profit corporation or the requirement that section 501(c)(3)  
13 organizations refrain from participating or intervening in campaigns. *See* 26 U.S.C.  
14 501(c)(3).

15 This response constitutes an advisory opinion concerning the application of the  
16 Act and Commission regulations to the specific transaction or activity set forth in your  
17 request. *See* 2 U.S.C. 437f. The Commission emphasizes that if there is a change in any  
18 of the facts or assumptions presented, and such facts or assumptions are material to a  
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1 conclusion presented in this advisory opinion, then the requestor may not rely on that  
2 conclusion as support for its proposed activity.

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Sincerely,

Bradley A. Smith  
Chairman

Enclosures (AOs 2004-6, 2003-16, 2002-7, 1999-22, 1995-34, 1994-33, and 1990-14)

