



FEDERAL ELECTION COMMISSION
Washington, DC 20463

November 9, 2006

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2006-30

Jonathan Zucker, Esq.
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ActBlue
P.O. Box 382110
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Dear Mr. Zucker:

We are responding to your advisory opinion request on behalf of ActBlue, concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to ActBlue's proposal to receive and forward earmarked contributions to specific individuals who may become candidates for the 2008 nomination of the Democratic Party for the office of President of the United States ("Prospective Candidates"). ActBlue asks whether it may postpone forwarding those earmarked contributions to the Prospective Candidates until the Prospective Candidates register their presidential campaign committees with the Commission. ActBlue also asks if it may forward contributions to the Democratic National Committee ("DNC") if a Prospective Candidate to whom the contributions are earmarked does not register a presidential campaign committee by 11:59 p.m. EDT on the seventh day before the first day of the 2008 Democratic National Convention.

The Commission concludes that ActBlue may solicit and receive contributions from individuals earmarked for clearly identified Prospective Candidates. ActBlue must forward all earmarked contributions to these individuals within ten days of the date that the candidate registers a presidential campaign committee with the Commission.

Background

The facts presented in this advisory opinion are based on your letter received on August 28, 2006, and a September 7, 2006, telephone conversation with you.

ActBlue is a nonconnected political committee that was formed to promote the election of Democratic candidates for Federal office and is registered with the Commission. ActBlue currently serves as a conduit for contributions earmarked for Democratic candidates and party committees. *See* 2 U.S.C. 441a(a)(8); 2 U.S.C. 432(b)(1) and (2); 11 CFR 110.6 and 102.8. ActBlue solicits only on its web site, www.actblue.com, and accepts contributions made only by credit card. The recipient candidates and party committees pay all credit card transaction fees.

ActBlue proposes to solicit and receive earmarked contributions designated for the primary election campaigns of Prospective Candidates listed on ActBlue's web site.¹ ActBlue would list the names of individuals who ActBlue considers to be "serious" Prospective Candidates, based on media reports, pundit lists of possible candidates, and requests from the public. ActBlue would identify each contribution as being designated for the primary election of the Prospective Candidate in its report to the Commission for the reporting period in which the contribution is received, in accordance with 11 CFR 110.6(c)(1)(ii).

Although ActBlue would like to begin soliciting and receiving contributions earmarked for Prospective Candidates "as soon as possible," ActBlue proposes to postpone forwarding the earmarked contributions until each Prospective Candidate registers a presidential campaign committee with the Commission. At that point, ActBlue would send a check to the candidate's presidential campaign committee within ten days for the total amount of the earmarked contributions that ActBlue has received for that candidate. If a Prospective Candidate does not register a presidential campaign committee with the Commission by 11:59 p.m. EDT on the seventh day before the first day of the 2008 Democratic National Convention, then ActBlue proposes to forward the contributions earmarked for that individual to the DNC.

ActBlue proposes to provide the recipient presidential campaign committee, or the DNC, with a report containing all of the required information with respect to the source of each earmarked contribution as required in 2 U.S.C. 441a(a)(8) or 2 U.S.C. 432(b)(2) and 11 CFR 110.6(c)(1)(iv) or 11 CFR 102.8, respectively. ActBlue also proposes to disclose the forwarded contributions on ActBlue's next regular report filed with the Commission.

ActBlue's proposed solicitations would inform prospective contributors that, among other things: 1) contributions are being "earmarked" within the meaning of 11 CFR 110.6(b)(1); 2) contributions must be within the amount limitations for contributions to candidates in accordance with 11 CFR 110.1(b)(1) as indexed for inflation; 3) contributions earmarked to Prospective Candidates will be forwarded to the DNC under certain circumstances, and the circumstances under which the forwarding will occur; and 4) contributions, when aggregated with any other contributions the individual makes to the Prospective Candidate or the DNC, must be within the appropriate amount limitations for contributions in accordance with 11 CFR 110.1 and

¹ ActBlue intends to undertake these activities independently of any Prospective Candidates or political committees or agents of either of them.

110.5. You state that ActBlue's solicitations would also include "[a]ll disclaimers required by the Commission's regulations, including 11 CFR 110.11."

Questions Presented

1. *May ActBlue solicit and receive contributions earmarked for a Prospective Candidate, and then postpone forwarding the earmarked contributions to the designated candidate until after the designated candidate registers a presidential campaign committee with the Commission?*

2. *If a Prospective Candidate does not register a presidential campaign committee with the Commission before 11:59 p.m. EDT on the seventh day before the first day of the 2008 Democratic National Convention, may ActBlue forward the contributions earmarked for that individual to the DNC?*

You then ask, if Questions 1 and 2 are answered in the affirmative:

3. *How must ActBlue report the receipt of the earmarked contributions?*

4. *What information should ActBlue provide to contributors, Prospective Candidates, and the DNC?*

Legal Analysis and Conclusions

1. *May ActBlue solicit and receive contributions earmarked for a Prospective Candidate, and then postpone forwarding the earmarked contributions to the designated candidate until after the designated candidate registers a presidential campaign committee with the Commission?*

ActBlue may solicit and receive contributions from individuals earmarked for Prospective Candidates. ActBlue must forward the earmarked contributions to the candidates within ten days after the date that the candidate registers a presidential campaign committee with the Commission pursuant to 2 USC § 433(a) and 11 CFR 102.1(a).

Nonconnected committees may solicit earmarked contributions from the general public and then forward the contributions to a Federal candidate. *See* Advisory Opinion 2003-23 (WE LEAD). Such solicitations, however, must comply with the source prohibitions and the contribution limitations in the Act and Commission regulations. For example, nonconnected committees may not solicit or receive contributions from foreign nationals, corporations, or labor organizations. *See* 2 U.S.C. 441b and 441e; 11 CFR 110.20 and 114.2.

The Act and Commission regulations provide for the earmarking of contributions “made by a person, either directly or indirectly, on behalf of a particular candidate.”² 2 U.S.C. 441a(a)(8) and 11 CFR 110.6. A conduit or intermediary for earmarked contributions is “any person who receives and forwards an earmarked contribution to a candidate or a candidate’s authorized committee.” 11 CFR 110.6(b)(2). None of the exceptions to this definition would apply to ActBlue. *See* 11 CFR 110.6(b)(2)(i) and (ii).

Although the earmarking provisions speak in terms of contributions made on behalf of a “candidate,” Commission regulations recognize that an individual may receive contributions before becoming a candidate. In such cases, when the individual qualifies as a “candidate,” the funds are deemed to have been received by the candidate as an agent of his or her authorized committee. *See* 2 U.S.C. 432(e)(2); 11 CFR 101.2(b) and 101.3.

Accordingly, ActBlue may act as a conduit or intermediary for contributions earmarked for Prospective Candidates. ActBlue must forward earmarked contributions to the candidates within ten days of the date that the candidate registers a presidential campaign committee with the Commission. *See* 2 U.S.C. 432(b)(1); 11 CFR 110.6(b)(2)(iii).

The situation presented here does not differ materially from that presented in Advisory Opinion 2003-23 (WE LEAD). In that advisory opinion, the Commission determined that the ten-day forwarding requirement in 2 U.S.C. 432(b)(2) and 11 CFR 102.8(a) did not begin to run for earmarked contributions collected by WE LEAD, a nonconnected committee, for the “presumptive nominee” of the Democratic Party, until DNC certifications showed that a candidate had secured enough pledged delegates to win nomination on the first ballot at the 2004 Democratic National Convention. As the Commission noted, “WE LEAD will not know, and has no way of knowing, the identity of the Democratic Party’s nominee when it solicits and receives earmarked contributions until the DNC certifications show that a candidate has become the party’s presumptive nominee.” Advisory Opinion 2003-23.

Similarly, here, ActBlue will not know, and will have no way of knowing, whether a Prospective Candidate will in fact become a candidate for the office of President of the United States when it solicits and receives earmarked solicitations. In Advisory Opinion 2003-23, the recipient’s status (presumptive nominee) was known, but the individual’s name was yet to be determined, while in the instant situation, the recipient’s name is known, but the recipient’s status (candidate for the office of President of the United States) is yet to be determined. In both cases, the Commission concludes that the requirement in 2 U.S.C. 432(b) and 11 CFR 102.8(a) that earmarked contributions be forwarded within ten days of receipt is tolled until *both* the recipient’s identity and candidacy status are known. Additionally, both certification by the DNC and registration with the Commission are easily verifiable acts that do not require the conduit

² “Earmarked” means a designation, instruction, or encumbrance, which results in all or any part of a contribution being made to, or expended on behalf of, a clearly identified candidate or a candidate’s authorized committee. *See* 11 CFR 110.6(b)(1).

to make determinations about when a person technically satisfies the Act's definition of "candidate."

Upon receiving earmarked contributions from ActBlue, a candidate must either deposit the contributions or return them to ActBlue within ten days of receipt. *See* 11 CFR 103.3(a). If the candidate deposits the contributions, the candidate must deposit them in an account maintained by the candidate's presidential campaign committee. *See* 2 U.S.C. 432(b)(3); 11 CFR 102.15; 11 CFR 103.3(a). In the event that ActBlue forwards contributions to a Prospective Candidate before that person registers a presidential campaign committee with the Commission, both ActBlue and the Prospective Candidate should recognize that a Prospective Candidate who receives contributions aggregating in excess of \$5,000 becomes a candidate under the Act and Commission regulations and must register a principal campaign committee with the Commission. *See* 2 U.S.C. 431(2)(A); 11 CFR 100.3(a)(1); 11 CFR 101.1(a); 11 CFR 102.12.

If the Prospective Candidate returns the earmarked contributions to ActBlue, then ActBlue may either refund the contributions to the original contributors or forward the contributions to a political party committee, such as the DNC (see below). ActBlue may designate a "default recipient" for the earmarked contributions in the event that the contributions are returned by one or more of the Prospective Candidates, subject to the requirements of 11 CFR 102.8. *See* Advisory Opinion 2003-23 (WE LEAD). ActBlue must clearly state in its solicitations what it will do with earmarked contributions that a Prospective Candidate returns to ActBlue.

2. *If a Prospective Candidate does not register a presidential campaign committee with the Commission before 11:59 p.m. EDT on the seventh day before the first day of the 2008 Democratic National Convention, may ActBlue forward the contributions earmarked for that individual to the DNC?*

Yes, if a Prospective Candidate does not register a presidential (principal) campaign committee with the Commission before 11:59 p.m. EDT on the seventh day before the first day of the 2008 Democratic National Convention, ActBlue may forward the contributions earmarked for that individual to the DNC. In Advisory Opinion 2003-23 (WE LEAD), the Commission concluded that a nonconnected committee could forward contributions to the DNC that had been earmarked to the Democratic Party's "presumptive nominee" for President, in the event that the "presumptive nominee" could not be determined by a date certain, subject to the requirements of 2 U.S.C. 432(b)(2) and 11 CFR 102.8(b). Similarly, here, ActBlue may designate a "default recipient" for the earmarked contributions in the event that a Prospective Candidate does not register a presidential campaign committee with the Commission before the aforementioned time, subject to the requirements of 11 CFR 102.8. ActBlue must clearly state in its solicitations how it will distribute the earmarked contributions under such circumstances.

3. *How must ActBlue report the receipt of the earmarked contributions?*³

Contributions earmarked for a candidate through a conduit or intermediary are contributions from the original contributor to that candidate, and are reportable as such. *See* 2 U.S.C. 441a(a)(8); 11 CFR 110.6(a). If, however, the conduit or intermediary exercises direction or control over the choice of the recipient candidate, then the contributions are treated as contributions from both the original contributor and from the conduit or intermediary to the recipient candidate. *See* 11 CFR 110.6(d).

The collection and forwarding of earmarked contributions by ActBlue only for those Prospective Candidates that ActBlue deems to be “serious” would not, by itself, result in ActBlue exercising direction or control over an individual’s choice about whether to make a contribution to a specific candidate, because “the individual contributor, not [ActBlue], makes the choice whether to make a contribution to the specified candidate.” *See* Advisory Opinion 1980-46 (National Conservative Political Action Committee) (a mailing containing a “clear suggestion that the individual receiving the communication make a contribution to a specific candidate through [the PAC] as an intermediary” did not constitute direction or control by the PAC).

Accordingly, the earmarked contributions would be contributions from the original contributor to the Prospective Candidate or DNC. Thus, on its regular report to the Commission for any reporting period in which it receives earmarked contributions, ActBlue must report the original contributions and their sources, and the Prospective Candidate for whom each contribution is earmarked. *See* 2 U.S.C. 441a(a)(8); 11 CFR 110.6(c)(1)(i) and (ii). On its regular report for any reporting period in which ActBlue forwards earmarked contributions, ActBlue must report the disbursement in accordance with 2 U.S.C. 441a(a)(8) and 11 CFR 110.6(c)(1).⁴

4. *What information should ActBlue provide to contributors, Prospective Candidates, and the DNC?*

ActBlue must conform the information that it provides to potential contributors in its solicitations to the terms of this advisory opinion. ActBlue would also have to include in its solicitations the information required in 2 U.S.C. 441d(a)(3) and 11 CFR 110.11(b)(3) and (c)(1). Upon forwarding each earmarked contribution to a candidate, ActBlue would have to provide a report to the candidate containing the contributor’s name and mailing address; the amount of the contribution; the date the contribution was received by ActBlue; the name of the designated recipient; the date the contribution was forwarded; and whether the earmarked contribution was forwarded in cash, by

³ You also ask about the reporting requirements of the recipient committees. Because ActBlue does not represent the recipient committees in this request, reporting by those committees constitutes third party activity, which is not appropriately addressed in an advisory opinion. *See* 11 CFR 112.1(b).

⁴ The Commission considers the fact that ActBlue is a political committee subject to the reporting requirements of the Act to be significant to the determinations made in this advisory opinion.

contributor's check, or by ActBlue's check. *See* 2 U.S.C. 441a(a)(8); 11 CFR 110.6(c)(iv). For each earmarked contribution in excess of \$200, ActBlue would also have to provide the contributor's occupation and the name of the contributor's employer. *Id.*

In addition, ActBlue would have to provide contributor information to the DNC when it forwards a contribution to the DNC in excess of \$50.⁵ *See* 2 U.S.C. 432(b)(2)(B); 11 CFR 102.8(b)(2). The information would have to include the name and address of the contributor, and the date of receipt of the contribution. *Id.* If the contribution exceeds \$200, then ActBlue would also have to provide the contributor's occupation and employer. *See* 11 CFR 102.8(b)(2).

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* 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.

Sincerely,

(signed)

Michael E. Toner
Chairman

Enclosures (Advisory Opinions 2003-23 and 1980-46)

⁵ Although not required by the Act or Commission regulations, ActBlue should consider informing each contributor of the identity of the actual recipient of the contributor's funds. For example, if ActBlue forwards a contribution to the DNC because the candidate for whom the contribution was earmarked rejected the contribution or the individual did not register a principal campaign committee with the Commission before 11:59 p.m. EDT on the seventh day before the first day of the 2008 Democratic National Convention, then ActBlue should notify the contributor of that fact. This information will help contributors keep track of their contributions for purposes of their bi-annual contribution limits. Contributions aggregate towards the contributor's bi-annual limits based on the calendar year in which they are made, not the calendar year of the election. *See* 2 U.S.C. 441a(a)(3); 2 U.S.C. 441a(a)(1)(B); 11 CFR 110.5(c)(1) and 110.1(c)(1). A contribution is "made" when the contributor relinquishes control of the funds. *See* 11 CFR 110.1(b)(6).