

October 26, 2006

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2006-30 is available for public comments under this procedure. It was requested by Jonathan Zucker on behalf of ActBlue.

Proposed Advisory Opinion 2006-30 is scheduled to be on the Commission's agenda for its public meeting of Thursday, November 2, 2006.

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 12:00 noon (Eastern Time) on November 1, 2006.

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 2006-30, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

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

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FEDERAL ELECTION COMMISSION
COMMISSION
SECRETARIAT



FEDERAL ELECTION COMMISSION
Washington, DC 20463

2006 OCT 26 P 2:47

October 26, 2006

MEMORANDUM

AGENDA ITEM

For Meeting of: 11-02-06

TO: The Commission

FROM: Lawrence H. Norton *LHN*
General Counsel

Rosemary C. Smith *RC5*
Associate General Counsel

Amy L. Rothstein *ALR*
Acting Assistant General Counsel

Cheryl A.F. Hemsley *CAH*
Attorney

Subject: Draft AO 2006-30

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for November 2, 2006.

Attachment

1 **ADVISORY OPINION 2006-30**

2

3 **Jonathan Zucker, Esq.**
4 **Senior Strategist and Counsel**
5 **ActBlue**

DRAFT

6 **P.O. Box 382110**

7 **Cambridge, MA 02138**

8

9 **Dear Mr. Zucker:**

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

22 **The Commission concludes that ActBlue may solicit and receive contributions**
23 **from individuals earmarked for clearly identified Prospective Candidates. ActBlue must**
24 **forward all earmarked contributions to the Prospective Candidates within ten days of**
25 **receipt.**

1 ***Background***

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

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

11 ActBlue proposes to solicit and receive earmarked contributions designated for
12 the primary election campaigns of Prospective Candidates listed on ActBlue's web site.¹
13 ActBlue would list the names of individuals who ActBlue considers to be "serious"
14 Prospective Candidates, based on media reports, pundit lists of possible candidates, and
15 requests from the public. ActBlue would identify each contribution as being designated
16 for the primary election of the Prospective Candidate in its report to the Commission for
17 the reporting period in which the contribution is received, in accordance with 11 CFR
18 110.6(c)(1)(ii).

19 Although ActBlue would like to begin soliciting and receiving contributions
20 earmarked for Prospective Candidates "as soon as possible," ActBlue proposes to
21 postpone forwarding the earmarked contributions until each Prospective Candidate
22 registers a presidential campaign committee with the Commission. At that point,

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

1 ActBlue would send a check to the candidate's presidential campaign committee within
2 ten days for the total amount of the earmarked contributions that ActBlue has received for
3 that candidate. If a Prospective Candidate does not register a presidential campaign
4 committee with the Commission by 11:59 p.m. EDT on the seventh day before the first
5 day of the 2008 Democratic National Convention, then ActBlue proposes to forward the
6 contributions earmarked for that individual to the DNC.

7 ActBlue proposes to provide the recipient presidential campaign committee, or
8 the DNC, with a report containing all of the required information with respect to the
9 source of each earmarked contribution as required in 2 U.S.C. 441a(a)(8) or 2 U.S.C.
10 432(b)(2) and 11 CFR 110.6(c)(1)(iv) or 11 CFR 102.8, respectively. ActBlue also
11 proposes to disclose the forwarded contributions on ActBlue's next regular report filed
12 with the Commission.

13 ActBlue's proposed solicitations would inform prospective contributors that,
14 among other things: 1) contributions are being "earmarked" within the meaning of
15 11 CFR 110.6(b)(1); 2) contributions must be within the amount limitations for
16 contributions to candidates in accordance with 11 CFR 110.1(b)(1) as indexed for
17 inflation; 3) contributions earmarked to Prospective Candidates will be forwarded to the
18 DNC under certain circumstances, and the circumstances under which the forwarding
19 will occur; and 4) contributions, when aggregated with any other contributions the
20 individual makes to the Prospective Candidate or the DNC, must be within the
21 appropriate amount limitations for contributions in accordance with 11 CFR 110.1 and
22 110.5. You state that ActBlue's solicitations would also include "[a]ll disclaimers
23 required by the Commission's regulations, including 11 CFR 110.11."

1 ***Questions Presented***

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

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

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

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

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

14 ***Legal Analysis and Conclusions***

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

19 ActBlue may solicit and receive contributions from individuals earmarked for
20 Prospective Candidates. However, ActBlue must forward the earmarked contributions to
21 the Prospective Candidates within ten days after receiving them.

22 Nonconnected committees may solicit earmarked contributions from the general
23 public and then forward the contributions to a Federal Candidate. *See* Advisory Opinion

1 2003-23 (WE LEAD). Such solicitations, however, must comply with the source
2 prohibitions and the contribution limitations in the Act and Commission regulations. For
3 example, nonconnected committees may not solicit or receive contributions from foreign
4 nationals, corporations, or labor organizations. *See* 2 U.S.C. 441b and 441e; 11 CFR
5 110.20 and 114.2.

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

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

17 Accordingly, ActBlue may act as a conduit or intermediary for contributions
18 earmarked for Prospective Candidates. ActBlue must forward earmarked contributions to
19 the Prospective Candidates within ten days of receipt. *See* 2 U.S.C. 432(b)(1); 11 CFR
20 110.6(b)(2)(iii). The date of receipt is the date that ActBlue receives authorization from a

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).

1 contributor to charge the contributor's credit card. *See* Advisory Opinion 1990-4
2 (American Veterinary Medical Association).

3 The situation presented here differs in this respect from the situation in Advisory
4 Opinion 2003-23 (WE LEAD), in which the Commission determined that the ten-day
5 forwarding requirement in 2 U.S.C. 432(b)(2) and 11 CFR 102.8(a) did not begin to run
6 for contributions earmarked to the Democratic Party's "presumptive nominee" for
7 President until the nominee had been chosen and his or her name became known. Here,
8 by contrast, all of the Prospective Candidates on whose behalf ActBlue proposes to solicit
9 contributions would be identified by name at the time of the solicitation. Accordingly,
10 there would be no basis for tolling the ten-day forwarding requirement with respect to
11 ActBlue.

12 Upon receiving earmarked contributions from ActBlue, a Prospective Candidate
13 must either deposit the contributions or return them to ActBlue within ten days of receipt.
14 *See* 11 CFR 103.3(a). If the Prospective Candidate deposits the contributions, then the
15 Prospective Candidate must deposit them in an account that is separate from any accounts
16 containing the Prospective Candidate's personal funds, to avoid commingling funds. *See*
17 2 U.S.C. 432(b)(3) and 11 CFR 102.15. Any Prospective Candidate who receives
18 contributions aggregating in excess of \$5,000 becomes a candidate under the Act and
19 Commission regulations and must register a principal campaign committee with the
20 Commission. *See* 2 U.S.C. 431(2)(A); 11 CFR 100.3(a)(1); 11 CFR 101.1(a); 11 CFR
21 102.12.

22 If, on the other hand, the Prospective Candidate returns the earmarked
23 contributions to ActBlue, then ActBlue may either refund the contributions to the original

1 contributors or forward the contributions to a political party committee, such as the DNC.
2 In Advisory Opinion 2003-23 (WE LEAD), the Commission concluded that a
3 nonconnected committee could forward contributions to the DNC that had been
4 earmarked to the Democratic Party's "presumptive nominee" for President, in the event
5 that the "presumptive nominee" could not be determined by a date certain, subject to the
6 requirements of 2 U.S.C. 432(b)(2) and 11 CFR 102.8(b). Similarly, here, ActBlue may
7 designate a "default recipient" for the earmarked contributions in the event that the
8 contributions are returned by one or more of the Prospective Candidates, subject to the
9 requirements of 11 CFR 102.8. ActBlue must clearly state in its solicitations what it will
10 do with the earmarked contributions if a Prospective Candidate returns them to ActBlue.

11 *2. If a Prospective Candidate does not register a presidential campaign committee*
12 *with the Commission before 11:59 p.m. EDT on the seventh day before the first day of the*
13 *2008 Democratic National Convention, may ActBlue forward the contributions*
14 *earmarked for that individual to the DNC?*

15 This question is moot, given the answer to Question 1, above.

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

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

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

10 Accordingly, the earmarked contributions would be contributions from the
11 original contributor to the Prospective Candidate or third party political committee.
12 Thus, on its regular report to the Commission for any period in which it receives
13 earmarked contributions, ActBlue must report the original contributions and their
14 sources, and the Prospective Candidate for whom each contribution is earmarked. *See*
15 2 U.S.C. 441a(a)(8); 11 CFR 110.6(c)(1)(i) and (ii). On its regular report for any period
16 in which ActBlue forwards earmarked contributions, ActBlue must report the
17 disbursement in accordance with 2 U.S.C. 441a(a)(8) and 11 CFR 110.6(c)(1).³

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

20 ActBlue would have to conform the information that it provides to potential
21 contributors in its solicitations to the terms of this advisory opinion, including the

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).

1 requirement that ActBlue forward earmarked contributions to Prospective Candidates
2 within 10 days of receipt. ActBlue would also have to include in its solicitations the
3 information required in 2 U.S.C. 441d(a)(3) and 11 CFR 110.11(b)(3) and (c)(1). In
4 addition, although not required by the Act or Commission regulations, ActBlue should
5 inform each contributor of the identity of the actual recipient of the contributor's funds.
6 For example, if ActBlue forwards a contribution to the DNC because the Prospective
7 Candidate for whom the contribution was earmarked rejected the contribution, then
8 ActBlue should notify the contributor of that fact. This information will help contributors
9 keep track of their contributions for purposes of their bi-annual contribution limits.⁴

10 Upon forwarding each earmarked contribution to a Prospective Candidate,
11 ActBlue would have to provide a report to the Prospective Candidate containing the
12 contributor's name and mailing address; the amount of the contribution; the date the
13 contribution was received by ActBlue; the name of the designated recipient; the date the
14 contribution was forwarded; and whether the earmarked contribution was forwarded in
15 cash, by contributor's check, or by ActBlue's check. *See* 2 U.S.C. 441a(a)(8); 11 CFR
16 110.6(c)(iv). For each earmarked contribution in excess of \$200, ActBlue would also
17 have to provide the contributor's occupation and the name of the contributor's employer.
18 *Id.*

19 In addition, ActBlue would have to provide contributor information to the DNC
20 when it forwards a contribution to the DNC in excess of \$50. *See* 2 U.S.C. 432(b)(2)(B);

⁴ 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).

1 11 CFR 102.8(b)(2). The information would have to include the name and address of the
2 contributor, and the date of receipt of the contribution. *Id.* If the contribution exceeds
3 \$200, then ActBlue would also have to provide the contributor's occupation and
4 employer. *See* 11 CFR 102.8(b)(2).

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

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Sincerely,

Michael E. Toner
Chairman

Enclosures (Advisory Opinions 2003-23, 1990-4, and 1980-46)