FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
CHIEF COMMUNICATIONS OFFICER
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: COMMISSION SECRETARY

DATE: DECEMBER 13, 2007

SUBJECT: COMMENT ON DRAFT AO 2007-27
ActBlue

Transmitted herewith is a timely submitted comment from B. Holly Schadler, Esq., and Laurence E. Gold, Esq. regarding the above-captioned matter.

Proposed Advisory Opinion 2007-27 is on the agenda for Friday, December 14, 2007.

Attachment

LAW OFFICES
LICHTMAN, TRISTER & ROSS, PLLC
1666 CONNECTICUT AVENUE, N.W., FIFTH FLOOR
WASHINGTON, D.C. 20009
PHONE: (202) 328-1666
FAX: (202) 328-9162
www.lterlaw.com

ELLIOTT C. LICHTMAN
MICHAEL B. TRISTER
GAIL E. ROSS
B. HOLLY SCHADLER

KAREN A. POST
LILAH S. ROSENBLUM[A]
ALLEN H. MATTISON[A]
[A]ADMITTED IN MARYLAND ONLY
LAURENCE E. GOLD
Of Counsel

December 13, 2007

VIA FACSIMILE AND REGULAR MAIL

Commission Secretary
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

RE: Agenda Document No. 07-87
Advisory Opinion 2007-27 (ActBlue)

Dear Commissioners:

The undersigned regularly practice before the Commission and regularly counsel membership organizations, political committees and other clients on matters arising under the Federal Election Campaign Act (the Act). We respectfully submit these comments on our own behalf, and not on behalf of any client, in order to convey our views regarding the Office of General Counsel's alternative proposed drafts of Advisory Opinion 2007-27.

We support the position taken in both drafts regarding ActBlue's proposed "Program 2," under which Act Blue would act in collaboration with and on behalf of separate segregated funds (SSFs) to solicit contributions to those SSFs from their respective restricted classes. We believe that in so acting ActBlue would stand in the same legal position as the SSFs with respect to the restricted classes, except that any unreimbursed expenses incurred by ActBlue properly would be treated as contributions to the SSFs and allocated among them by some reasonable accounting method. Because we believe this conclusion is plainly correct under the Federal Election Campaign Act (the Act), and because both drafts arrive at this conclusion, we do not address Program 2 further.

We also support the position taken in Draft A with respect to ActBlue's proposed "Program 1," under which ActBlue would solicit the general public to contribute to SSFs independently of those SSFs and in doing so serve as a conduit for earmarked contributions to them. We also believe that this conclusion is plainly correct under the Act, but because Draft B reaches the opposite conclusion, we wish to elaborate as to why the Commission should adopt the conclusion in Draft A. The Commission should do so

for the following reasons.

First, although an SSF is generally limited to *soliciting* contributions from members of its restricted class, nothing in the Act or the Commission's regulations prohibits an SSF from *receiving* contributions from outside of its restricted class. 2 U.S.C. § 441b(b)(4); 11 C.F.R. § 114.5(g). Indeed, the regulations state affirmatively that, in contrast to the restrictions on an SSF in soliciting beyond its restricted class, an SSF "may accept contributions from persons otherwise permitted by law to make contributions." 11 C.F.R. § 114.5(j). Nothing in existing law, regulations, or the Commission's previous advisory opinions prohibits an unsolicited, non-restricted class individual or another political committee from contributing to an SSF.

Second, nothing in applicable law constrains an unsolicited individual or political committee from acting in a regular and systematic manner to solicit other lawful contributors to contribute to an SSF independently from the SSF itself. ActBlue intends to do exactly that and, therefore, would not be acting as an agent for any SSF that receives contributions under Program 1. Draft A correctly concludes that because ActBlue is a nonconnected political committee and would have no contact regarding the solicitation with either the SSF benefiting from the solicitation or its connected organization, ActBlue would not be subject to the prohibition on SSFs soliciting from the general public. Draft A at 7.

Draft B, however, asserts that "ActBlue would represent to the public that contributing to an SSF through ActBlue is the functional equivalent of contributing directly to the SSF. The recipient SSF would regularly receive checks of designated contributions and contributor information from ActBlue. An SSF that continually accepts these checks and information from ActBlue, a well-known conduit of earmarked contributions, would be hard-pressed to disclaim knowing that ActBlue is soliciting contributions on its behalf." On this basis the draft concludes that ActBlue's general-public solicitations would be "impermissible." Draft B at 7 (footnote omitted). This analysis and conclusion – for which absolutely no authority is given – are contrary to the Act, the Commission's regulations and the Commission's previous guidance and policies.

Most importantly, mere knowledge of and acceptance of an unsolicited contribution does not constitute coordination or solicitation, and the notion of "functional equivalent[ce]" that the Supreme Court introduced in a different context in *McConnell, v. FEC*, 540 U.S. 93, 206 (2003), cannot be extended here. (Indeed, in that context "functional equivalent[ce]" was discerned and then considered in addressing the *constitutional* question of Congress's power to regulate conduct that was deemed to be practically the same but not in all respects the same as other, regulable conduct.) If Draft B were adopted, then the right to accept unsolicited contributions would be rendered meaningless; once an SSF received an unsolicited contribution from a contributor and the requisite contributor information, or learned of an effort to raise contributions to it, those contributions and efforts would have to cease, and perhaps would be rendered unlawful to begin with, irrespective of any conduct by the SSF. That is simply not the law, and the Commission has no authority to make it so in an advisory opinion.

The Commission's regulations regarding coordinated communications require not just mere knowledge of another party's activity, but some affirmative conduct, such as a request or suggestion, assent to a suggestion, material involvement, or some level of coordination via a common vendor or former employee. *See* 11 C.F.R. § 109.21(d). None of those conduct standards embraces passive acceptance of contributions or passive benefiting of another's unsolicited fundraising efforts. By the same token, Draft B's logic would mean that, once a candidate learned of an independent expenditure on his behalf, or of an individual's or political committee's plan to undertake a series of such expenditures, the candidate would be considered to have coordinated with the group. Obviously, however, possessing knowledge and passively benefiting does not render independent activity somehow coordinated. Under ActBlue's Program 1, it would have no contact with the SSF or its connected organization regarding its solicitations and transmissions of contributions, and that is legally sufficient both to remove them from the realm of coordination and to relieve the SSF of legal responsibility for their solicitation. Rather, the Commission's regulations impose duties on the treasurer of the SSF only to determine the lawfulness of the source and amount of the contribution. *See* 11 C.F.R. § 103.3.

Basic principles of agency law and the Commission's previous consideration of their interaction with federal campaign finance law and regulations also support the conclusion that ActBlue may solicit members of the general public and serve as a conduit for contributions to an SSF. In AO 2003-10 (Reid), Rory Reid, a local elected official and former chairman of the Nevada State Democratic Party, asked a number of questions regarding whether he could raise non-federal funds in light of the fact that his father was U.S. Senator Harry Reid. The Commission concluded that 1) the younger Reid was not an agent of Senator Reid merely because of their familial relationship, 2) any past actions by Mr. Reid as a fundraising agent of Senator Reid's would not, by themselves, bar Mr. Reid from assisting the Nevada state party in raising funds in the future, and 3) Mr.Reid could "wear multiple hats" and have dual explicit agency relationships with both Senator Reid and the state party simultaneously.

In reaching these conclusions, the Commission noted that Congress did not define the term "agent" in the Bipartisan Campaign Reform Act of 2002 (BCRA), and that the Commission had promulgated regulations to define "agent" to mean "any person who has actual authority, either express or implied," "to solicit, receive, direct, transfer or spend funds in connection with any election." AO 2003-10 at 3; 11 C.F.R. § 300.2(b)(3). The Explanation and Justification for the regulation notes that "a principal cannot be held liable for the actions of an agent unless (1) the agent has actual authority, (2) the agent is acting on behalf of his or her principal, and (3) the agent is engaged in one of the specific activities described." AO 2003-10; 67 Fed. Reg. at 49064, 49083 (July 29, 2002). Further, "a principal may not be held liable, under an implied actual authority theory, unless the principal's own conduct reasonably causes the agent to believe that he or she had authority." *Id.*; 67 Fed. Reg. at 49082.

Here, ActBlue would not be acting as an agent of any SSF under its proposed program of independently soliciting contributions from the general public to certain

SSFs. As its request states, ActBlue would have "no contact regarding the solicitation with the SSF benefiting form the solicitation or its connected organization." The *absence* of conduct by any SSF could not lead ActBlue to reasonably believe that it has authority to act on the SSF's behalf, and in fact the very premise of Program 1 is that ActBlue neither has any such authority nor needs it as a matter of law or contract. In order to carry out Program 1. As such, no agency relationship can be imputed to ActBlue and any SSF under Program 1.

The conclusion that ActBlue would not be acting as an agent of any SSF under its proposed program of soliciting the general public independently of SSFs is further supported by the fact that its request clearly anticipates a separate category of activity in which it *would* be acting as an agent of SSFs. As part of that separate program, the requestor would coordinate with SSFs to solicit members of their restricted classes, while at the same time acting in a different role when soliciting the general public, as reflected in AO 2003-10, where the Commission stated that a person may "wear multiple hats" and "at different times act in his capacity as an agent on behalf of [one party] and act as agent on behalf of [another party]," *Id.* at 5. In explaining its agency regulations, the Commission explicitly observed that individual members of national party committees could raise non-federal funds for their state party organizations despite the prohibition against non-federal fundraising by national parties, see 67 Fed. Reg. at 49083, a conclusion that followed from the Court's statement in *McConnell v. FEC*, 540 U.S. at 157, that "officers of national political parties are free to solicit soft money in their individual capacities...." ActBlue's request makes clear that it would not be acting as an agent of any SSF while independently soliciting contributions, and the fact that it would be acting as an agent of such SSFs in another capacity does not render it an agent of those SSFs in all situations.

Accordingly, for these reasons at least, we believe that the Commission should adopt the conclusion of proposed Draft A with respect to ActBlue's Program 1.

Thank you for your consideration of our comments on this matter.

Yours truly,

B. Holly Schadler Laurence E. Gold

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