



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 *MWD*

DATE: DECEMBER 13, 2007

SUBJECT: COMMENT ON DRAFT AO 2007-31
John Edwards for President

Transmitted herewith is a timely submitted comment from Lora M. Haggard, Chief Financial Officer for John Edwards for President, regarding the above-captioned matter.

Proposed Advisory Opinion 2007-31 is on the agenda for Friday, December 14, 2007.

Attachment

**JOHN
EDWARDS08** RECEIVED
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COMMISSION
SECRETARIAT

December 13, 2007

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Mary Dove
Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Rosemary C. Smith
Associate General Counsel
Office of General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

**RE: Comment of John Edwards for President Committee
Draft Advisory Opinion 2007-31**

Dear Mms. Dove and Smith:

The following comments are submitted by John Edwards for President Committee ("Committee") on Draft Advisory Opinion 2007-31 ("Draft") prepared by the Office of General Counsel for consideration by the Federal Election Commission ("Commission") on December 14, 2007.

A. Background

The Draft concludes that contributions from individuals who donate to the Committee through ActBlue are not matchable under the Presidential Primary Matching Payment Account Act, 26 U.S.C. §9031 *et seq.* ("Matching Payment Act"). The Draft offers no explanation of the legal basis for the Commission's determination, nor does it analyze precedent that is directly on point, and apparently controlling with regard to the questions presented. If the Commission adopts this approach, the net effect will be that contributors who went to the Committee's website, clicked on "Contribute," accessed a page displaying in large letters the "John Edwards '08" logo, and made a contribution, will not have their contributions matched simply because ActBlue processed them. Other contributors who received Committee emails, clicked on "Contribute" and clicked on the page with the same logo, will have their contributions matched, simply because another vendor processed them. This is patently unfair to both the contributor and the candidate. The result is an arbitrary and meaningless distinction that is a poor policy decision. Moreover, the Draft fails to provide any rational basis for why credit card contributions made by individual contributors via ActBlue should be treated any differently from online contributions through the Committee's website for matching fund purposes.

The Draft conclusion is based on an inadequate legal analysis that: (1) relies upon inapposite authority; (2) completely ignores the Commission's precedents on the matchability of online credit card contributions; and (3) provides no analytical basis for distinguishing between individual contributions through ActBlue versus those made through the Committee's third-party merchant vendor.

The Commission should reject the Draft because it is not supported by the law or Commission precedent. As a policy matter, the Commission should encourage candidates to participate in the public financing and encourage grassroots activity that furthers individual participation, along with small contributions.

B. The Commission Should Reject The Draft And Determine That Contributions Made Through ActBlue Are Matchable.

The statutory and regulatory provisions cited in the Draft are simply inapposite to the question before the Commission. The Draft cites two statutory provisions of the Matching Payment Act, 26 U.S.C. §9034(a) and 26 U.S.C. §9032(4)(C), and a Commission regulation, 11 C.F.R. §9034.3(f). The Draft comes to the perfunctory conclusion that the contributions at issue are not matchable without providing sufficient legal analysis.

The Draft relies on 26 U.S.C. §9034(a) which states that a matchable contribution is “a gift of money made by written instrument which identifies the person making the contribution by full name and mailing address.” The Commission already issued a definitive, conclusive interpretation of this section, when it determined that credit card contributions made via the Internet are matchable. Fed. Election Comm’n, Advisory Opinion 1999-09 (June 10, 1999). The Commission noted in that Advisory Opinion that it will interpret the Act and its regulations “in a manner consistent with contemporary technological innovations . . . where the use of the technology would not compromise the intent of the Act or regulations.” *Id.* In the wake of that Advisory Opinion, §9034(a) is not a valid basis for the conclusion in the Draft. The Draft contains absolutely no discussion of that Advisory Opinion so it is not possible to determine the legal reasoning underlying the decision to depart from its application of the cited statute to Internet contributions.

In addition, the Draft relies on 26 U.S.C. §9032(4)(C), which excludes from the definition of a matchable contribution “funds received by a political committee which are transferred to that committee from another committee.” This provision as used in the law simply does not apply to contributions made by individuals to the Committee through ActBlue. “Transfer” is a term of art as used in FECA that generally applies to the funds flowing between affiliated political committees or related entities. Correctly understood, contributions through ActBlue’s John Edwards 2008 “Contribute” webpage are individual contributions to the Committee, and not transfers under 26 U.S.C. § 9032(4)(C). The contributions at issue here *flow through* ActBlue; they are not, in any sense, contributions from ActBlue to the Committee.¹

The Draft’s reliance on 11 C.F.R. §9034.3(f) stems from the same misconception. That regulation defines “contributions in the form of a check drawn on the account of a committee, corporation, union or government contractor even though the funds represent personal funds earmarked by a contributing individual to a Presidential candidate” as non-matchable. Once again, the Draft provides a cursory recitation of the regulation without any rationale as to why this provision should apply to the contributions at issue. While the language of this provision is

¹ ActBlue deposits funds intended for candidate committees into a separate segregated account that solely contains candidate contributions.

directed to checks drawn on a committee account, it does not apply because the contributions the Committee seeks to match are individual contributions, rather than funds from ActBlue. The Commission should interpret section 9034.3(f) in light of the developments that have occurred in the 30 years since this regulation was adopted. This regulation was promulgated in an era when contributions were made only by check, and should be construed in light of the fact that contributions today are routinely made through Internet credit card transaction. In fact, the Commission has, outside the regulatory process, adopted procedures for matching such contributions in its Guideline for Presentation in Good Order. This Guideline specifies extensive documentation required for matching a contribution and the Committee can provide such documentation for contributions processed through ActBlue. Thus, the Commission can rely on procedures already in place to verify the ultimate source of contributions processed through ActBlue. In so doing, the Commission could fulfill the ultimate purpose of section 9034.3(f) which is to prevent the matching of contributions deriving from prohibited funds of corporations, unions or government contractors.

Similarly, Commission regulations also permit contributions received from joint fundraising activity to be matched, even though they are transmitted to a candidate committee by a check drawn on a political committee account. 11 C.F.R. §§ 9034.2(c)(7). The individual contributions at issue here are really no different and should be matched in the same way. Moreover, Commission regulations permit the matching of contributions made by checks drawn on the accounts of partnerships, unincorporated businesses or associations. 11 C.F.R. §§ 9034.2(c)(3). Given these regulations, there is no credible basis for refusing to match contributions to the Committee simply because they were made through ActBlue.

C. The Draft Ignores the Commission's Precedents on Matching Contributions, Including A.O. 1999-9

The Draft fails to make any mention of the Commission's regulations and precedents on the eligibility of online credit card contributions for matching. At the time of the issuance of Advisory Opinion 1999-9, regulations governing matchability expressly required a contribution to be made by written instrument in order to obtain matching funds. In fact, the Commission noted regulations, then in effect, 11 C.F.R. §9034.3, "which interpret 26 U.S.C. §9034(a), explicitly state that contributions made by means of credit card transactions cannot be matched. . . Therefore, under the current regulatory regime, . . . [the] proposal appears contrary to the regulations." Fed. Election Comm'n, Advisory Opinion 1999-9 (June 10, 1999).

The Commission approved the matching of contributions received over the Internet, however, by the Presidential candidate committee involved. The Commission reached this decision at a time when regulations were pending to allow the matching of Internet contributions. In taking this course of action, the Commission clearly recognized that the timing of funding for a Presidential campaign is crucial. Hence, despite a regulation to the contrary, the Commission acted immediately to allow these contributions to be matched.

With regard to the instant advisory opinion request, there is no regulation that explicitly prohibits matching contributions made through ActBlue. On the contrary, the contributions made through ActBlue comply with existing regulations for Internet contributions, and, as

outlined in AOR 2007-31, adhere to all of the safeguards and procedures required of any other online contribution to the Committee. Hence, the Commission may conclude that individual contributions made through ActBlue are matchable within the framework of the Commission's existing regulations. The Commission could then begin the regulatory process to state explicitly in the regulations that contributions raised under these circumstances are matchable and provide additional guidance to Committees and the public.

D. Act Blue Processing Is Substantially Similar To Credit Card Vendor Processing

Contributions made through the Committee website are processed in virtually the same way that contributions made through ActBlue are processed. When a contributor makes a credit card contribution through either the Committee website or ActBlue, the following steps occur:

- Charge goes to a "processing gateway," which verifies the number entered, the address and the credit availability for that contributor, either granting or declining approval.
- Approvals are gathered and then "settled" once per day with a transmittal to a "clearinghouse" for the appropriate financial institution.
- Sum of all charges are then deposited with the Committee, either by direct deposit into a the Committee's account, in the case of contributions raised through its third-party merchant vendor, or by check written to the Committee, in the case of contributions raised via ActBlue.

Should the Commission wish to impose the same requirements as were imposed in A.O. 1999-9 where the Commission procedures called for the functional equivalent of a written instrument in the form of printouts of a credit card transaction, such requirements can be met. In A.O. 1999-9, the Commission stated:

In such circumstances, the electronic contributor form with the "checking off" of the appropriate boxes could be the functional equivalent of a written instrument described in 26 U.S.C. §9034(a). These procedures will produce the electronic signature uniquely identified with each contributor form and would be tantamount to a written signature on that form. An important aspect of this approach would be retaining the electronic records in a form which would allow the electronic record to be printed in hard paper form as needed."

The Committee could easily meet the above requirements and retain the appropriate records in whatever format is specified by the Commission. Further, with regard to contributions made through ActBlue, the Committee is able to provide the last four digits of the credit card number for the individual contributor, the same information that the Committee "processing gateway" provides for contributions made through the Committee website. Hence, the Commission would be able to track contributions in the same way to ensure that the funds used

for the contributions were the contributor's funds and that one contributor's card was not used to make multiple contributions.

E. The Commission Should Use This Advisory Opinion As An Opportunity To Further Important Policy Goals

The Commission should use this advisory opinion as an opportunity to further important policy goals: Encouraging grassroots participation in the political process and encouraging candidate participation in public financing.

The Commission's determination in Advisory Opinion 1999-9 recognized the important public policy interests that could be advanced by expanding the original universe of permissible methods for receipt of matchable contributions to include Internet credit card contributions. Indeed, this method of commerce quickly became a preferred method for campaigns to engage in fundraising from a large number of supporters. The Matching Payment Act exists to encourage candidates to accept public financing and to encourage participation and contributions from small donors. The Commission should not erect arbitrary barriers to protect form over function.

This month, the Commission determined that a presidential campaign committee that has been certified to receive primary matching funds may use credit card contributions made over the Internet as eligible funds where the credit card processor uses the credit card's security code and either the contributor's street address or zip code. Fed. Election Comm'n, Advisory Opinion 2007-30 (Dec. 3, 2007).

The Commission said in that opinion that it "has not mandated specific procedures to verify the identity of an individual making a credit card contribution over the Internet." *Id.* (internal citation omitted). The determinative factors would be whether a contribution was a "written instrument" and that the contributor's act of submitting credit card information would be akin to a signature, or legal act. The Commission has not mandated specific procedures which would allow Internet contributions to be matchable. There must be a level of security sufficient to "allay concerns over the receipt of prohibited contributions," to allow the Commission flexibility to ensure the regulated community can use new technologies, and that contributions are permissible under the Act. *Id.* (internal citation omitted).

Steps taken to ensure that a credit card is owned by the person purporting to make a contribution would satisfy the requirements of the Matching Payment Act. The Committee believes that the permissible methods of contributions processed through ActBlue comply with this requirement.

F. Conclusion

The Committee urges the Commission to reject the Draft and determine that contributions made through ActBlue are matchable.

Sincerely,



Lora M. Haggard
Chief Financial Officer
John Edwards for President