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FEDERAL ELECTION COMMISSION
Washington, DC 20463

2008 SEP -8 P 4: 33

AGENDA ITEM
For Meeting of: 9-11-08

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *ACS*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Anthony Buckley *AB*
Attorney

Subject: Draft AO 2008-08

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for September 11, 2008.

Attachment

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

DRAFT ADVISORY OPINION 2008-08 is available for public comments under this procedure. It was requested by Jonathan Zucker.

Draft Advisory Opinion 2008-08 is scheduled to be on the Commission's agenda for its public meeting of Thursday, September 11, 2008.

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 12:00pm noon (Eastern Time) on September 10, 2008.

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 2008-08, contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission's website at www.fec.gov.

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

MAILING ADDRESSES

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Associate General Counsel
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Federal Election Commission
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1 ADVISORY OPINION 2008-08

2 Mr. Jonathan Zucker
3 36 A Street #5B
4 Boston, MA 02127

DRAFT

5 Dear Mr. Zucker:

6 We are responding to your advisory opinion request concerning the application of
7 contribution limits of the Federal Election Campaign Act of 1971, as amended (the
8 “Act”), 2 U.S.C. 431 et seq., and Commission regulations to a contribution you have sent
9 through ActBlue to either the 2010 Democratic candidate for the U.S. Senate in Arizona
10 or the Democratic Senatorial Campaign Committee (“DSCC”). The Commission
11 concludes that your contribution is considered to be “made” in 2008, and therefore counts
12 toward your 2007-2008 biennial contribution limits and your 2008 calendar year
13 contribution limit.

14 ***Background***

15 The facts presented in this advisory opinion are based on your letter received on
16 July 30, 2008.

17 On June 25, 2008, you sent, via the Internet, a credit card contribution to ActBlue,
18 earmarked for the 2010 Democratic nominee for the United States Senate in Arizona. In
19 the event there is no such Democratic nominee, Act Blue will forward your contribution
20 to the DSCC.

21 ActBlue is a nonconnected political committee that was formed to promote the
22 election of Democratic candidates for Federal office and is registered with the
23 Commission. *See* Advisory Opinion 2006-30 (ActBlue). ActBlue solicits contributions
24 for Democratic candidates and party committees only on its website, www.actblue.com,

1 and accepts contributions made only by credit card. *Id.* ActBlue forwards contributions
2 it collects to the intended recipient via a check. *Id.*

3 **Question Presented**

4 *Which biennial and annual contribution limits will your contribution count*
5 *against, the ones in effect when the contribution was received by ActBlue or the ones that*
6 *will be in effect when the contribution is forwarded to the recipient candidate or political*
7 *party committee?*

8 **Legal Analysis and Conclusions**

9 Your contribution will count against the contribution limits in effect when the
10 contribution was received by ActBlue.

11 *Biennial Limits:* The Act and Commission regulations state that from January 1
12 of an odd-numbered year through December 31 of the following even-numbered year, no
13 individual shall make contributions aggregating more than an inflation-adjusted amount
14 that for 2007-2008 is \$108,200. *See* 2 U.S.C. 441a(a)(3) and (c)(1); 11 CFR 110.5(b)(1);
15 and 72 FR 5294 (February 5, 2007). Within this overall limit, an individual may make
16 contributions to candidates and their authorized committees totaling no more than an
17 inflation-adjusted limit that for 2007-2008 is \$42,700. 2 U.S.C. 441a(a)(3)(A) and (c)(1);
18 11 CFR 110.5(b)(1)(i); and 72 FR 5294 (February 5, 2007). During that same period, an
19 individual may make other contributions totaling an inflation-adjusted amount of \$65,500
20 in 2007-2008, of which not more than \$42,700 (inflation-adjusted for 2007-2008) may be
21 attributable to contributions to political committees that are not political committees of

1 national political parties. 2 U.S.C. 441a(a)(3)(B) and (c)(1); 11 CFR 110.5(b)(1)(ii); and
2 72 FR 5294 (February 5, 2007).

3 *Annual Limits:* The Act and Commission regulations also state that no person
4 shall make contributions to the political committees established and maintained by a
5 national party committee in any calendar year which, in the aggregate, exceed an
6 inflation-adjusted amount that for 2007-2008 is \$28,500. *See* 2 U.S.C. 441a(a)(1)(B) and
7 (c)(1); 11 CFR 110.1(c)(1); and 72 FR 5294 (February 5, 2007). Inflation adjustments
8 beyond 2008 cannot be determined at this point.

9 Typically, every person who receives a contribution of any amount for an
10 authorized political committee, or a contribution of more than \$50 for a political
11 committee that is not an authorized political committee, must forward that contribution to
12 the treasurer of the political committee no later than ten days after receiving it. *See*
13 2 U.S.C. 432(b)(1) and (2)(B); 11 CFR 102.8(a) and (b)(1), and 110.6(c)(1)(iii) and (iv).
14 A person who receives a contribution of \$50 or less for a political committee that is not
15 an authorized political committee must forward that contribution to the treasurer of the
16 political committee no later than thirty days after its receipt. *See* 2 U.S.C. 432(b)(2)(A)
17 and 11 CFR 102.8(b)(1).

18 In Advisory Opinion 2006-30, the Commission determined that ActBlue could
19 solicit and receive contributions earmarked for a prospective 2008 Democratic
20 presidential candidate, and then delay forwarding the contribution until no later than ten
21 days after the candidate had registered a presidential campaign committee with the
22 Commission, rather than within ten days after ActBlue's receipt. The Commission also

1 determined that ActBlue could forward the contribution to the Democratic National
2 Committee in the event the intended candidate did not register with the Commission by a
3 date certain.¹ Similarly, in Advisory Opinion 2003-23 (WE LEAD), the Commission
4 determined that WE LEAD could accept contributions earmarked for the as-yet unnamed
5 presumptive nominee of the Democratic Party for President of the United States,
6 provided that WE LEAD forwarded such contributions within ten days from when that
7 nominee became known.

8 The answer to your question turns on when the contribution was “made.” A
9 contribution is considered “made” when the contributor relinquishes control over it.
10 11 CFR 110.1(b)(6). A credit card contribution is “made” when the credit card or credit
11 card number is presented, because at that point “[t]he contributor is strictly obligated by
12 the card agreement to make payment of the credit card bill and incurs substantial
13 penalties with possible collection fees and cancellation of future credit privileges for
14 nonpayment.” Advisory Opinion 1990-14 (AT&T) (addressing when a credit card
15 contribution made by phone is “made”). *See also* Advisory Opinion 1995-09
16 (NewtWatch PAC) (concluding that, where the requestor intended to use a financial
17 services company to enable online contributions, the date the contributor sent an
18 electronic confirmation to the financial services company would be the date the
19 contribution was made); Advisory Opinion 1991-01 (Deloitte) (concluding that the
20 contribution would be considered “made” when the credit card was charged where a

¹ The Commission further concluded that the lack of direction or control by ActBlue over who would be the contribution’s eventual recipient meant that the contribution would be from the contributor to the eventual recipient only, and would not also be treated as a contribution from ActBlue.

1 contributor deferred a charge to his or her account until a specific time after the
2 contributor's authorization was presented).

3 Here, your credit card has already been charged for your contribution, and you are
4 obligated to pay the amount of your contribution to your credit card company. Thus,
5 your contribution has already been "made." Moreover, Commission regulations provide
6 that a contribution to a candidate or a candidate's authorized committee with respect to a
7 particular election, *including an earmarked contribution*, shall be considered to be made
8 during the election cycle in which the contribution is actually made, regardless of the
9 year in which the particular election is held. 11 CFR 110.5(c)(1).

10 Accordingly, if there is a 2010 Democratic nominee for the United States Senate
11 in Arizona, and your contribution is forwarded to that nominee, your contribution will
12 count against your biennial contribution limits for the 2007-2008 election cycle. If there
13 is no 2010 Democratic nominee for the United States Senate in Arizona, and ActBlue
14 forwards your contribution to the DSCC, that contribution also counts against your
15 biennial contribution limits for the 2007-2008 election cycle. Further, if there is no 2010
16 Democratic nominee for the United States Senate in Arizona and your contribution is
17 forwarded to the DSCC in 2010, that contribution will count against your calendar year
18 contribution limit for 2008.

19 The Commission recognizes that you do not know now, and may not know until
20 2010, whether your contribution ultimately will be forwarded to the 2010 Democratic
21 Senate nominee or the DSCC. In light of this, the only way to ensure that you do not

