



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**DISSENT OF VICE CHAIRMAN DAVID M. MASON
IN ADVISORY OPINION 2006-30**

In this advisory opinion ("AO"), the Commission confronts a question of first impression and concludes that Act Blue may engage in the activity it proposes. AO 2006-30, 2006 WL 3390749, at *2-4 (F.E.C. Nov. 9, 2006).¹ This is a close call, *see infra* at 3, 5, and I respectfully dissent.

I. BACKGROUND

Act Blue, a non-connected political committee registered with the Commission, asks whether it may solicit and receive contributions earmarked for the primary campaigns of particular prospective presidential candidates but wait to forward the contributions to each candidate until that candidate has registered a presidential-campaign committee with the Commission. If a particular prospective candidate does not become a candidate by a specified time shortly before the Democratic National Convention, then Act Blue would forward contributions earmarked for the prospective candidate to the Democratic National Committee ("DNC"). The Commission concludes that the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 *et seq.*, does not prohibit what Act Blue proposes.

II. DISCUSSION

A. Sections 441a(a)(8) and 432(b)

FECA provides that for purposes of the contribution² limits in 2 U.S.C. § 441a, all contributions – including earmarked³ contributions, and contributions otherwise directed, through a conduit or intermediary⁴ – that a person⁵ makes on behalf of a particular candidate⁶ are contributions from the person to the candidate, *id.* § 441a(a)(8) (2002), and by extension, to the

¹ Available at <http://ao.nictusa.com/ao/no/060030.html> (all Internet sites visited Nov. 15, 2006). Voting affirmatively were Chairman Toner, Vice Chairman Lenhard, and Commissioners von Spakovsky and Walther. Commissioners Mason and Weintraub dissented.

² Defined in 2 U.S.C. § 431(8) (2002); *see generally* *FEC v. Survival Education Fund*, 65 F.3d 285, 295 (2d Cir. 1995).

³ Defined in 11 C.F.R. § 110.6(b)(1) (1996).

⁴ Defined in *id.* § (b)(2).

⁵ Defined in 2 U.S.C. § 431(11).

⁶ Defined in *id.* § 431(2).

candidate's authorized committee.⁷ *See id.* § 432(e)(2) (2004). In other words, contributions to candidates count toward FECA contribution limits, *see, e.g., id.* § 441a(a)(1)-(3), regardless of whether contributors give contributions directly to candidates or whether contributors earmark, or otherwise direct, the contributions to candidates through a conduit or intermediary. This principle is about contribution limits, a point emphasized by its placement in Section 441a, which establishes contribution limits.

A separate FECA section then requires, with exceptions not relevant here, *see* 11 C.F.R. § 110.6(b)(2)(iii), that every person receiving a contribution for a political committee⁸ forward the contribution to the committee treasurer within:

- 10 days, in the case of a contribution for an authorized committee, 2 U.S.C. § 432(b)(1),
- 30 days, in the case of a contribution of \$50 or less for an unauthorized committee, *id.* § (b)(2)(A), and
- 10 days, in the case of a contribution of more than \$50 for an unauthorized committee. *Id.* § (b)(2)(B).

These deadlines apply to “earmarked contributions transmitted by an intermediary or conduit” to a committee. 11 C.F.R. § 102.8(c) (1980). Although Section 432(b) does not expressly require that recipient political committees be “clearly identified”⁹ by contributors or by conduits or intermediaries, and although recipient political committees need not be “clearly identified” for earmarking itself to occur, *see, e.g., infra* at 6 & nn.20, 23, it is impossible to forward earmarked contributions without recipient political committees being clearly identified.

The difficulty in this AO is that neither FECA nor Commission regulations contemplate what Act Blue proposes. If Act Blue sought to solicit and receive contributions for candidates, then those contributions would be for their authorized committees, *see* 2 U.S.C. § 432(e)(2), and FECA by its terms would require Act Blue to forward the contributions within 10 days. *See id.* § (b)(1). However, Act Blue seeks to solicit and receive contributions not for candidates or committees but for *prospective* candidates, who need not even establish authorized committees until 15 days after they become candidates. *See id.* § (e)(1). Authorized committees then have 10 more days to register with the Commission. *Id.* § 433(a) (1980). And prospective candidates become candidates in the first place only if:

- They receive more than \$5,000 in contributions, *id.* § 431(2)(A),
- They make more than \$5,000 in expenditures,¹⁰ *id.*,

⁷ Defined in *id.* § 431(6).

⁸ Defined in *id.* § 431(4).

⁹ Defined in 2 U.S.C. 431(18); 11 C.F.R. § 100.17 (1995).

¹⁰ Defined in 2 U.S.C. § 431(9); *see generally* *McConnell v. FEC*, 540 U.S. 93, 191-92 (2003), *cited in* *Anderson v. Spear*, 356 F.3d 651, 663-66 (6th Cir.), *cert. denied*, 543 U.S. 956 (2004); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 248-49 (1986) (citing *Buckley v. Valeo*, 424 U.S. 1, 42, 44 n.52, 80 (1976)).

- They give consent to another person to receive contributions or make expenditures, and that person on their behalf receives more than \$5,000 in contributions or makes more than \$5,000 in expenditures, *id.* § (B),
- They decline, within 30 days of written notification from the Commission, to disavow in writing such contributions raised or expenditures made by another person, 11 C.F.R. § 100.3(a)(3) (1980), or
- The foregoing contributions or expenditures total more than \$5,000, *id.* § (a)(4),

within a single election cycle. *Id.* § (b). Thus, in many cases there likely will not be a committee to which Act Blue may forward contributions within the time that Section 432(b) specifies.

Notwithstanding this difficulty, FECA still requires – again, with exceptions not relevant here, *see* 11 C.F.R. § 110.6(b)(2)(iii) – that every person receiving a contribution for a political committee forward it to the committee treasurer within a specified time. *See* 2 U.S.C. § 432(b). Even though Act Blue seeks contributions only for *prospective* candidates, the forwarding requirements apply. *Cf. id.* Act Blue cannot have it both ways. It cannot on the one hand contend that the contributions are contributions for prospective candidates under Sections 431(8) and 441a(a)(8), rather than contributions to Act Blue, and on the other hand contend that it need not forward the contributions within the Section 432(b) deadlines. If the contributions are for prospective candidates, then the forwarding deadlines apply.

While this creates a dilemma for an organization such as Act Blue, the answer to this dilemma is *not* to allow Act Blue to keep earmarked contributions beyond the specified time. Rather, the answer is to hold that Act Blue may not do what it proposes. Under FECA, the proper political committee must receive earmarked contributions within the specified time, *see id.*, and if there is no such committee within the specified time, then Act Blue may, for example, refund the particular contributions, *see* 11 C.F.R. § 103.3(a) (1987), forward them to the DNC with contributors' consent, *see* 2 U.S.C. § 432(b), or treat the contributions as contributions to Act Blue. *See id.* § 431(8). Under the latter course, Act Blue may still contribute its own money to candidates, as long as that is consistent with FECA limits, *see id.* § 441a(a), (c), (f) – including the \$5,000 per candidate per calendar year limit for contributions from a multicandidate political committee to another political committee, *id.* § 441a(a)(2)(C) – and prohibitions. *See id.* § 441b(a) (2002).¹¹

Because a candidate may accept contributions before becoming a candidate, *see* 2 U.S.C. § 431(2), before establishing an authorized committee, *see id.* § 432(e)(1), or before registering with the Commission, *see id.* § 433(a), Act Blue could also immediately forward contributions to the prospective candidate for whom they are earmarked. Indeed, leaving the technical requirements of FECA aside, *see id.* § 432(b), this would appear to be the most natural treatment of this money.¹²

¹¹ If an organization such as Act Blue is not a prohibited source of contributions, then the Section 441a(a)(2)(C) limit on what a multicandidate committee may contribute might lead the organization to conclude that such an endeavor is not worthwhile. However, this does not affect the statutory analysis.

¹² This would, of course, create a dilemma for the prospective candidate who may wish, for any number of reasons, not to receive contributions right away. However, that does not affect the statutory analysis either.

If the Commission instead wishes to allow what Act Blue proposes, it should amend its regulations, if it can do so consistently with FECA, *cf. Shays v. FEC*, 414 F.3d 76, 96 (D.C. Cir. 2005) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)), or urge Congress to amend FECA. *Cf. Legislative Recommendations 2005* (F.E.C. March 25, 2005).¹³

B. Purposes of Section 432(b)

In the meantime, holding that Section 432(b) applies to Act Blue in these circumstances is consistent with the purposes of Section 432(b), namely to prevent “committees from hiding both controversial contributions and large war chests” AO 2000-11 (F.E.C. July 14, 2000) (Comm’r Mason, concurring) (referring to contributions escaping pre-*election* scrutiny).¹⁴ The “forwarding rule is designed to prevent individuals and entities from being able to influence or manipulate cash-on-hand figures by holding [on to] contributions for designated candidates.” AO 2003-23, 2003 WL 22827476, at *4 (F.E.C. Nov. 7, 2003).¹⁵ Here, Act Blue would be such an entity. Act Blue’s “holding [on to] contributions for designated candidates” would mean prospective candidates would not receive contributions as quickly as they otherwise would. Thus, they would not become full-fledged candidates, and establish and register authorized committees, as quickly as they otherwise would. *See* 2 U.S.C. §§ 431(2), 432(e)(1), 433(a). They may not even become full-fledged candidates at all, in which case they would not have to establish and register authorized committees. The ensuing delay or absence of candidate reports filed with the Commission, *see id.* § 434 (2004), could facilitate “hiding both controversial contributions and large war chests.”

C. The Commission’s Approach

1. Testing the Waters

To its credit, the Commission recognizes that this AO does not involve “testing the waters.” *See* Open Meeting Agenda (Audio File) (F.E.C. Nov. 9, 2006);¹⁶ 11 C.F.R. §§ 100.72 (2003) (contributions), 100.131 (2003) (expenditures). Although Act Blue cites 11 C.F.R. § 100.72 and maintains its proposal is similar to testing the waters, this is not persuasive.

The testing-the-waters exemption allows raising federal money¹⁷ to determine whether prospective candidates should become candidates. Permissible activities include, *inter alia*, polls, telephone calls, and travel, *see* 11 C.F.R. § 100.72(a), but not activities indicating that prospective candidates have become candidates. *See id.* § (b); *see also id.* § (b)(1)-(5)

¹³ Available at http://www.fec.gov/law/legislative_recommendations_2005.shtml.

¹⁴ Available at <http://ao.nictusa.com/ao/no/200011A.html>.

¹⁵ Available at <http://ao.nictusa.com/ao/no/030023.html>.

¹⁶ Available at <http://www.fec.gov/agenda/2006/agenda20061109.shtml>.

¹⁷ Defined in 11 C.F.R. § 300.2(g) (2006); *cf. id.* § 300.2(k) (defining non-federal money).

(examples). Money raised counts as contributions only if the individuals become candidates. *See id.* § 100.72(a). The same is true for expenditures. *See id.* § 100.131.

Under Act Blue's proposal, prospective candidates would receive money only *after* becoming candidates, by which time formerly prospective candidates would use money for activities indicating they had become full-fledged candidates.

2. Commission's Reasoning

The Commission reaches its result in this AO for multiple reasons. *See, e.g.,* Open Meeting Agenda (Audio File) (F.E.C. Nov. 2, 2006);¹⁸ Open Meeting Agenda (Audio File) (F.E.C. Nov. 9, 2006). They are addressed in three groups here.

a. Candidates vs. Prospective Candidates

One reason focuses on the word "candidate" in FECA. The Commission appears to assert, along with Act Blue, that since prospective candidates are not yet candidates, and may never become candidates, FECA does not prohibit what Act Blue proposes.

However, to the extent that the Commission and Act Blue may be focusing on the word "candidate" in Section 441a(a)(8), it is worth recalling that this section is about contribution limits. *Supra* at 1-2. It does not trump Section 432(b), which is enforceable independently of Section 441a(a)(8) and which addresses forwarding of contributions received for political committees.

And to the extent that Act Blue may have asserted, and the Commission may have concluded, that contributions to candidates are contributions to their authorized committees under Section 432(e)(2), but that contributions to *prospective* candidates are *not* contributions to authorized committees, and therefore that the forwarding deadlines of Section 432(b) do not apply to contributions to *prospective* candidates, the Commission has reached an incorrect conclusion. Even though prospective candidates are not yet candidates, *see* 2 U.S.C. § 431(2)(A)-(B); 11 C.F.R. § 103.3(a)(3)-(4), Section 432(b) still applies. *Supra* at 3.

b. Additional Factors

A set of reasons notes that Act Blue's approach involves federal money, claims Act Blue's approach will involve small donors and grassroots activity, calls this approach "innovative," focuses on "disclosure," and emphasizes that Act Blue will file its own disclosure reports and thereby reveal, to the extent FECA requires, where money is coming from and where it is going. *See, e.g.,* 2 U.S.C. § 434(b).

However, it is not clear that Act Blue's approach will involve only, or even predominantly, small donors and grassroots activity. Yet even if it does and even if the rest of these reasons are accurate, the ultimate question is what Section 432(b) requires. The fact that a

¹⁸ Available at <http://www.fec.gov/agenda/2006/agenda20061102.shtml>.

particular activity involves federal money, small donors, and grassroots activity; is innovative; and is disclosed does not trump Section 432(b).

c. Precedent

An additional reason is that the Commission's result follows AO 2003-23, which allowed the requestor to forward earmarked contributions beyond the Section 432(b) deadlines. In so doing, AO 2003-23 cited AOs 1977-16 and 1982-23. *See* 2003 WL 22827476, at *3-4.

In AO 1977-16, a "principal campaign committee" sought to establish itself and begin gathering support for a Senate candidate two years before the candidate was selected. It foresaw eventually becoming the candidate's authorized committee and allowing the candidate to assume control over money the committee had raised. The Commission observed that there would be no transfer, *i.e.*, no forwarding, of money to another committee. AO 1977-16 (F.E.C. July 29, 1977).¹⁹ Thus, Section 432(b) did not prevent the committee's plan from proceeding.

In AO 1982-23, a political committee sought to give money to a local-party committee, with the money earmarked for an upcoming congressional campaign, the candidate for which was not yet known. The local-party committee was to forward the money beyond the Section 432(b) deadlines. In allowing this to proceed, the Commission stated that in AO 1977-16 it had "allowed a contribution to be earmarked²⁰ for an undetermined [f]ederal candidate where ... the candidate was identifiable as to specific office, party affiliation, and election cycle." AO 1982-23 (F.E.C. April 23, 1982) (footnote added).²¹ The Commission then "suspended" the Section 432(b) deadlines "until the name of the candidate [was] known." AO 1982-23 at n.2 (citing 11 C.F.R. § 102.8).²²

Relying on AOs 1977-16 and 1982-23, AO 2003-23 then stated:

the Commission's regulations define an earmarked contribution, in part, as one that is made to a "clearly identified candidate or a candidate's authorized committee." 11 CFR [§] 110.6(b)(1). The Commission has interpreted this regulation²³ to allow contributions to be earmarked for an undetermined [f]ederal candidate in certain circumstances. In [AO] 1982-23, the Commission concluded that it was permissible for a local committee to earmark \$1,000 through a local party committee to the as-yet unknown Republican

¹⁹ Available at <http://ao.nictusa.com/ao/no/770016.html>.

²⁰ There were earmarks, *see* 11 C.F.R. § 110.6(b)(1) (defining "earmarked" for purposes of Section 441a contribution limits), without there being transfers to another political committee. *See* AO 1977-16.

²¹ Available at <http://ao.nictusa.com/ao/no/820023.html>.

²² In AO 1982-23, the contributor requested the AO. Here, Act Blue, a conduit or intermediary, is the requestor. The same principles apply. *Cf.* 2 U.S.C. § 432(b).

²³ Actually, "this regulation" – 11 CFR § 110.6(b)(1) – implements Section 441a(a)(8), which clarifies that earmarked contributions count toward Section 441a contribution limits. *Supra* at 1-2. It does not speak to whether contributions may be earmarked for undetermined candidates. *See* 11 C.F.R. § 110.6(a)-(b).

nominee for New York's 24th [c]ongressional [d]istrict. In [AO] 1977-16, the Commission concluded that it was permissible for a local committee to accept contributions and make expenditures on behalf of an undetermined [f]ederal candidate. In both instances, the Commission concluded that it was permissible²⁴ to earmark contributions to undetermined [f]ederal candidates *because the candidates were identifiable as to specific office, party affiliation, and election cycle, although the names of the eventual nominees were not known.*

2003 WL 22827476, at *3 (emphasis and footnotes added).

As previously noted, it is impossible to forward earmarked contributions without candidates' being clearly identified. *Supra* at 2. For this reason, it would have made no sense to require forwarding of earmarked contributions in AOs 1982-23 and 2003-23, where the candidates were not clearly identified. *See* 2 U.S.C. § 431(18); 11 C.F.R. § 100.17.²⁵ Although they were "identified" by the offices they sought, they were not personally identified.

By contrast, Act Blue not only "identifies" prospective candidates by the office they seek but also clearly identifies the prospective candidates themselves. *See* 2 U.S.C. § 431(18)(A). Thus, nothing prevents Act Blue from complying with the Section 432(b) requirement that every person receiving a contribution for a political committee forward it to the committee treasurer within particular deadlines. *Supra* at 2. Nothing, that is, except perhaps the desire of a prospective candidate or a prospective candidate's campaign to avoid establishing a political committee just yet, *see supra* at 3 & n.12, and then appointing a treasurer to whom contributions may be forwarded. *See* 2 U.S.C. § 432(a). That, however, does not suffice.

III. CONCLUSION

For the foregoing reasons, FECA proscribes what Act Blue proposes.

May 23, 2007



David M. Mason
Vice Chairman

²⁴ Regarding the words "allow" and "permissible," it is important to recall that the presumption regarding political speech is liberty: Persons are free to engage in political speech except when government constitutionally limits it. The presumption is not that political speech is proscribed except when government permits it. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). In general, those engaging in political speech do not need government permission. *See* U.S. CONST. amend. I (1791). So when the Commission states that it "allows" or "permits," or concludes that FECA "allows" or "permits," political speech, it almost always means that FECA does not proscribe it.

²⁵ AO 1977-16 also had no clearly identified candidate, but that AO did not concern forwarding. *Supra* at 6.