



STATE OF HAWAII
CAMPAIGN SPENDING COMMISSION
235 SOUTH BERETANIA STREET, SUITE 300
HONOLULU, HAWAII 96813

May 11, 2011

Steven Gold, Esq.
General Counsel
ActBlue
14 Arrow Street
Cambridge, MA 02138

Re: Advisory Opinion 11-01

Dear Mr. Gold,

This is in response to ActBlue's request for an advisory opinion dated March 8, 2011. You informed the Hawaii Campaign Spending Commission ("Commission") that ActBlue is a political organization registered as a political committee with the Federal Election Commission, as well as a number of states around the country. ActBlue accepts contributions from individuals only that are earmarked for candidate committees and noncandidate committees, via ActBlue's website. ActBlue lists all Democratic committees with or without those committees' involvement on its website. Contributors make contributions on the ActBlue website using a credit or debit card. ActBlue's software processes the earmarked contributions and the funds are deposited into ActBlue's bank account. The cost of processing the contributions is deducted from the total amount of contributions to a candidate and the remainder is forwarded to the candidate on a check drawn on ActBlue's bank account. Contributions are forwarded on a regular basis, at least weekly. Information about the individual contributors and the amount of the processing fee is provided to the candidates.

ActBlue intends on registering as a noncandidate committee in Hawaii. As an entity that accepts earmarked contributions, ActBlue seeks an advisory opinion on three questions related to earmarked contributions. The Commission's responses are noted below.

1. Once ActBlue has registered as a political committee with the Campaign Spending Commission, may ActBlue accept and disburse contributions made by individuals which are earmarked by the contributor for candidate committees and other noncandidate committees?

ActBlue may accept and disburse earmarked contributions. As you are probably aware, under HRS §11-358, contributions to noncandidate committees are limited to an aggregate amount of \$1,000 per person per election.

2. If ActBlue may receive earmarked contributions, do such contributions received and forwarded count against ActBlue's contribution limits to other committees or only against the contribution limits of the original contributors?

The earmarked contributions count only against the individual contributors' contribution limits and not ActBlue's contribution limits. Currently, under HRS §§11-360(c) and 11-361(d), only earmarked contributions made to political parties are counted against both the party's and the contributor's contribution limits to candidates.

3. If ActBlue may receive earmarked contributions, how should those earmarked contributions received and disbursed by ActBlue be reported to the Commission?

As a registered noncandidate committee, ActBlue would report the earmarked contributions received via the ActBlue website on Schedule A (Contributions Received) and the disbursement to the candidates on Schedule B1 (Contributions to Candidates).

Under HRS §11-351(c), ActBlue must disclose the original source of the earmarked contribution, the ultimate recipient of the contribution, and the fact that the contribution was earmarked. Currently, the Noncandidate Committee Filing System ("NCFS") provides no method for ActBlue to mark a contribution received as an earmarked contribution and no method to link the earmarked contribution to the candidate committee as the ultimate recipient of the earmarked funds. Until the NCFS can be modified, ActBlue can mark an earmarked contribution on the "Schedule A (Contributions Received)" - "Add/Edit Name" screen, by adding the words "(Earmark - [Candidate's Name])" after entering the contributor's first name in the "First Name" field. Adding these words will also create the link to the disbursement to the candidate entered on Schedule B1 (Contributions to Candidates).

The candidate committee that receives the earmarked contribution from ActBlue would report the entire contribution on Schedule A (Contributions Received) identifying the original contributor as the contributor, not ActBlue. The candidate committee would report the transaction fee on Schedule B (Expenditures Made) as an expenditure.

The Commission provides this Advisory Opinion as a means of stating its current interpretation of the Hawaii Campaign Finance law in HRS §11-301, *et seq.*, and the Commission's rules in chapter 3-160, Hawaii Administrative Rules. The Commission

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may adopt, revise, or revoke this Advisory Opinion if provisions of the Campaign Finance Law or the Commission's administrative rules are amended or repealed.

CAMPAIGN SPENDING COMMISSION



By: PAUL KURAMOTO
Its Chairperson

March 8, 2011

CAMPAIGN SPENDING *90 days*
COMMISSION

Campaign Spending Commission
Attn: Advisory Opinion Request
235 S. Beretania St., Rm. 300
Honolulu, HI 96813

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RECEIVED

Dear Sir or Madam,

This letter is a request for an advisory opinion pursuant to HRS § 11-315 seeking clarification of a point of Hawai'i campaign finance law. ActBlue is a political organization which is registered as a political committee with the Federal Election Commission, as well as in a number of states around the country. Currently, ActBlue is not a political committee active in Hawai'i.

ActBlue would like to become an active political committee in Hawai'i and accept contributions made by individuals (ActBlue does not accept contributions made by non-individuals) which are earmarked for candidate committees and other noncandidate committees, as that term is defined in HRS § 11-302. Such contributions would be made by members of the public using ActBlue's website, www.ActBlue.com, where ActBlue would list all Democratic candidate and noncandidate committees as eligible to receive contributions. ActBlue would list all Democratic committees with or without those committees' involvement. Any member of the public would be able to solicit contributions for those committees using the tools found on the website, and contributors could make their contributions for Hawai'i candidates and committees on the site using a personal credit card. ActBlue's software would process those contributions – in conjunction with ActBlue's credit card processor – and the funds would be deposited into a bank account established and controlled by ActBlue. The cost of processing the contributions would then be deducted from the total amount of contributions made to each recipient committee, and the remainder would be forwarded to the recipients by means of checks drawn on ActBlue's bank account. Contributions would be forwarded on a regular basis, at least weekly.

ActBlue respectfully requests that the Commission provide answers the following questions:

- 1. Once ActBlue has registered as a political committee with the Campaign Spending Commission, may ActBlue accept and disburse contributions made by individuals which are earmarked by the contributor for candidate committees and other noncandidate committees?*
- 2. If ActBlue may receive earmarked contributions, do such contributions received and forwarded count against ActBlue's contribution limits to other committees or only against the contribution limits of the original contributors?*

3. *If ActBlue may receive earmarked contributions, how should these earmarked contributions received and disbursed by ActBlue be reported to the Commission?*

Discussion

1. *Once ActBlue has registered as a political committee with the Campaign Spending Commission, may ActBlue accept and disburse contributions made by individuals which are earmarked by the contributor for candidate committees and other noncandidate committees?*

ActBlue may be permitted to accept and forward contributions from individuals which are earmarked for candidate committees and other noncandidate committees of all types. An earmarked contribution is defined as one which is "received by a candidate committee or noncandidate committee on the condition that the funds be contributed to... certain candidates, issues or questions." HRS § 11-302. By selecting a candidate committee or noncandidate committee to make a contribution to through ActBlue's website, contributors are making a contribution to ActBlue on the condition that the funds be contributed to their selected committee. Therefore, earmarked contributions made through ActBlue's website are clearly permitted under Hawai'i law.

2. *If ActBlue may receive earmarked contributions, do such contributions received and forwarded count against ActBlue's contribution limits to other committees or only against the contribution limits of the original contributors?*

Earmarked contributions made to ActBlue intended for a candidate committee or another noncandidate committee count only against the limits on the original contributor's contributions to the ultimate recipient of the contribution. When a contributor makes an earmarked contribution to a party intended for a candidate, in that case the contribution counts against both the original contributor's contribution limits as well as the party's contribution limits to that candidate. See HRS §§ 11-360(c), 11-361(d). Following the canon of statutory interpretation *expressio unius*, the absence of a similar provision suggesting that earmarked contributions to noncandidate committees *other than parties* count not only against the contributor's contribution limits, but also the committee's limits indicates that earmarked contributions to non-party noncandidate committees such as ActBlue count only against the individual contributor's contribution limits. Therefore, earmarked contributions received by ActBlue do not count against ActBlue's contribution limits.

3. *If ActBlue may receive earmarked contributions, how should these earmarked contributions received and disbursed by ActBlue be reported to the Commission?*

When receiving an earmarked contribution, a committee must report to the Commission: 1. the original source of the funds, 2. the ultimate recipient, and 3. that the contribution was earmarked. See 11-351(c). This requirement suggests that all earmarked contributions made to ActBlue, regardless of dollar amount, must be itemized

on ActBlue's Contribution and Expenditure Reports. The law is silent as to how the three required items must be disclosed. It is reasonable to assume that ActBlue must report the contribution from the original contributor with a notation that it is an earmarked contribution for the ultimate recipient and report the disbursement of the contribution to the ultimate recipient with a notation that it was earmarked by the original contributor. However, this approach to disclosure presents some challenges.

It does not appear that the electronic reporting system which the Campaign Spending Commission requires all filers to use includes any method for indicating that a contribution has been earmarked, or any method for inserting text which might provide explanation for a contribution or expenditure. Without the availability of one or both of these features, it is difficult to imagine how ActBlue might comply with the statutory requirement.

Assuming that there is a means to identify and/or provide an explanation for earmarked contributions in the reporting system, additional uncertainty surrounds how ActBlue should report expenditures to the ultimate recipients of earmarked contributions. For practical purposes, all such contributions made within a certain period (in most cases weekly) will be aggregated into one check per recipient; each earmarked contribution could not be disbursed separately. The question arises, then, whether ActBlue should report a single expenditure to each recipient committee with an explanation stating that the check represents the aggregation of contributions earmarked for the recipient, or whether expenditures must be reported as if each contribution was disbursed separately with an explanation identifying the specific original contributor who earmarked the contribution. Presumably, either approach would be sufficient under the law, but it is unclear which – if any – approach is supported by the reporting system.

A final point of ambiguity remains with regard to ActBlue's expenditures. Fees for the processing of contributions are deducted from the contribution amount before a check is sent to the ultimate recipient. These fees would need to be disclosed to the Commission. Despite the fact that the fees are deducted before the funds reach the ultimate recipient, these fees are actually paid on behalf of the recipient since it is the recipient who receives the benefit of the credit card transaction. Therefore, it would be most appropriate for ActBlue to report disbursing the gross amount of the earmarked contributions and for the ultimate recipient to report paying the fees to ActBlue's credit card processor.

Conclusion

Clearly under Hawai'i law, ActBlue may receive and disburse contributions made by individuals which are earmarked for candidate committees and other noncandidate committees of all types. Such contributions would count against the original contributor's contribution limits, but not against ActBlue's limits. Although ActBlue must report the original source of the contributions, the ultimate recipient, and the fact

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that the contributions were earmarked, significant questions remain as to how ActBlue would report earmarked contributions to the Commission.

ActBlue respectfully requests an advisory opinion answering the questions posed above. Should any additional information be required, please do not hesitate to contact me by email at steve@actblue.com or by phone at (617) 517-7636. Thank you for your consideration of this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Gold", written in a cursive style.

Steven Gold, Esq.
General Counsel