

**ActBlue**

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actblue.com

August 4, 2014

Federal Election Commission  
999 E St. NW  
Washington, DC 20463

**Re: Advisory Opinion Request**

Dear Sir or Madam,

Pursuant to 2 U.S.C. § 437f, ActBlue requests an advisory opinion concerning the application of the Federal Election Campaign Act of 1971 ("the Act"), as amended, and the Commission's implementing regulations to the activities outlined below.

**I. Factual Background**

ActBlue is a non-connected federal political committee registered with the Commission which acts as an intermediary, within the meaning of 2 U.S.C. § 441a(a)(8), for individual contributions to other Democratic committees. Contributions are made using a credit or debit card on ActBlue's website, [www.actblue.com](http://www.actblue.com). Users of the site make their contributions by entering certain information into one of many webpages hosted on the site referred to as contribution forms.<sup>1</sup> A contribution form exists for every committee eligible to receive contributions through ActBlue's website. Commonly, using the template provided by ActBlue, a committee and its supporters will create customized contribution forms with distinct solicitations on each, such that any single committee may have an unlimited number of contribution forms associated with it. Also, any single contribution form may include multiple committees to which the user can contribute simultaneously.

Someone wishing to make a contribution on the site will designate a dollar amount to contribute to her chosen recipient committee by typing that amount into the box which appears on the contribution form next to the name of that committee. A contribution form that includes more than one committee displays the name of each one with a separate dollar amount box next to each for the contributor to indicate the amount of each contribution. As a convenience for contributors who have decided how much they would like to contribute overall, but who do not have a preference for one committee listed on the contribution form over another, the contribution form also

<sup>1</sup> ActBlue has created a sample contribution form for purposes of this request. A printout of the page is included as Exhibit A. Anyone may interact with the sample page at the following URL: <https://www.actblue.com/contribute/page/splititao>.

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includes a box at the top which will split the total amount into equal contributions to all of the committees listed.

This box is labeled "Split It!" (the "Split It Box"). As soon as the contributor types a dollar figure into this box, it is equally divided among the committees on the form and the resulting amount is displayed in each of the boxes next to the listed committees. This convenience allows the contributor to quickly calculate how much she could contribute equally to each committee given the total amount she wishes to contribute. Even after using the Split It Box, the contributor retains the ability to change the amount contributed to any given committee on the form. To complete the transaction, the contributor must click on a separate button at the bottom of the form.

Once a contributor completes the transaction, ActBlue charges the contributor's credit card, receives the funds from the credit card processor, and transmits the funds to the designated committee(s) in accordance with the rules and regulations regarding earmarked contributions promulgated by the FEC. See 11 C.F.R. § 110.6. In accordance with past FEC Advisory Opinions, the fees withheld from contributed funds in the course of processing the credit card transaction are attributed to the recipient committees and reported by the committee as a committee expense. See AO 2007-04 (Atlatl).

## **II. Questions Presented**

1. If a user makes a contribution on the ActBlue website using the Split It Box, does use of the Split It Box result in ActBlue exercising "direction or control" over that contribution within the meaning of 11 C.F.R. § 110.6(d)?
2. If a user makes a contribution on the ActBlue website using the Split It Box, do the joint fundraising rules apply to that contribution?

## **III. Legal Discussion**

### **A. ActBlue does not exercise any direction or control over contributions made using the Split It Box.**

A contribution which is earmarked through an intermediary is considered to be a contribution from the original contributor to the ultimate recipient of the contribution. See 2 U.S.C. § 441a(a)(8), 11 C.F.R. § 110.6(a). Earmarked contributions are not applied against the intermediary's limit on contributions to the ultimate recipient unless the intermediary has exercised "direction or control" over the choice of the recipient. 11 C.F.R. § 110.6(d)(1). If an intermediary exercises direction or control, the contribution is attributed to both the original contributor and the intermediary. See 11 C.F.R. § 110.6(d)(2). Should the Commission determine that ActBlue exercises direction or control over contributions made using the Split It Box, and such contributions totaling

more than \$2,600 are made to a candidate for one election, ActBlue will have exceeded its contribution limit to that candidate.<sup>2</sup> See 2 U.S.C. § 441a(1); 11 C.F.R. § 110.1(b).

The term "direction or control" has not been defined by the Commission. Indicia of direction or control were established by the Commission, however, in AO 1980-46 (National Conservative PAC). These indicia include the contributor's ability to decide whether to contribute, when to contribute, how much to contribute, and to whom to contribute. See AO 1980-46 at p. 3. It is clear that a contributor using the Split It Box retains complete control over all of these factors. At any point before completing the transaction, even after using the Split It Box, a contributor may decide not to make any contribution. Likewise, she may decide to alter the amounts designated by the Split It Box for any particular committee, or even decide not to contribute at all to one or more committees. Finally, nothing about using the Split It Box affects the timing of any contribution which a contributor chooses to make.

The Commission reached the same conclusion when it reviewed a different website feature that functioned in a manner very similar to the Split It Box. In MUR 6390 (Senate Conservatives Fund), the Commission was asked whether use of a button appearing on the website of a committee acting as an intermediary constituted direction or control when the button split a total contribution amount among a list of candidates. The button operated in the same manner as the Split It Box with one key difference: Rather than splitting the total contribution amount evenly, it was split disproportionately among the candidates according to a formula devised by and known only to the committee.

The Commission concluded that even this degree of control over an earmarked contribution does not result in a contribution by the intermediary. Because the contributor could make changes to the contributions designated for the various candidates after clicking on this button, the apportionment presented was only a suggestion, and the committee did not exercise direction or control over the contribution. See MUR 6390 at p. 6. Since the same can be said of the Split It Box, ActBlue exercises no direction or control over a contribution when it is made using the Split It Box.

**B. Contributions made using the Split It Box are not subject to the Joint Fundraising Rules**

Any user of the ActBlue website can create a contribution form featuring multiple recipient committees which includes a Split It Box. Users of the site frequently use such forms to make solicitations for contributions while acting entirely independent of the recipient committees, which clearly is not joint fundraising activity. However, a

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<sup>2</sup> ActBlue has not qualified as a multi-candidate committee and therefore is subject to the lower \$2,600 per election contribution limit for PACs.

contribution made using the Split It Box bears some superficial resemblance to a contribution made to a joint fundraising committee. In a single transaction, a supporter contributes funds which are distributed to multiple committees. As explained below, despite this similarity, contributions made with the Split It Box are not subject to the joint fundraising rules.

The joint fundraising provision provides "general permission allowing political committees to engage in joint fundraising with other political committees . . . ." Transfer of Funds; Collecting Agents, Joint Fundraising, 48 Fed. Reg. 26296, 26298 (Jun 7, 1983); See 11 C.F.R. 102.17(a)(1). It is a permissive rather than restrictive regulation, but it imposes certain requirements on joint activity to address the potential limits violations that could result from the complex accounting involved. Specifically, the regulation addresses the risk of "prohibited or excessive contributions, and . . . ensure[s] that receipts and disbursements related to the event are properly allocated and reported." First General Counsel's Report, MUR 6039 (Lincoln Diaz-Balart), pp. 4-5 (2009). The requirement that the committees designate a joint fundraising representative who is tasked with paying for joint expenses "assures that no one participating committee advances more than its proportionate share of costs, or that no one committee advances funds that would be considered an excessive contribution to another participating committee." *Id.* at pp. 5-6.

Over the course of the thirty-plus years that committees have been engaging in joint fundraising, it has been the rare occasion when the Commission invoked the joint fundraising regulation as an enforcement tool for anything more than a potential reporting violation. By and large, committees engaging in joint fundraising activity have voluntarily recognized it as such, and so the Commission has not had occasion to closely define what constitutes joint fundraising. However, in those few cases where the Commission has considered whether activity not thought by the participating committees to be joint fundraising was subject to the requirements, the Commission searched the record for evidence of shared revenues and expenses which might create a risk of improper allocation of individual contributions or excessive contributions from one committee to the other. See, e.g., MUR 5780 (Santorum), MUR 6039 (Lincoln Diaz-Balart), MUR 6654 (Roraback). Essentially, where the safeguards of the regulation are needed, joint fundraising is found.

Contributions made using the Split It Box do not create any additional risk of improper allocation of shared revenue or shared expenses. There are in fact no shared revenues. The Split It Box is a tool of convenience used by the contributor simply to determine how much she might wish to contribute in separate contributions to each committee. It is the precise opposite of a joint contribution formula which allows *the committees* to determine how much will be contributed to each participating committee and to divide the money amongst themselves after the fact. Nor are there any shared expenses of a Split It Box contribution, as the processing fees collected by ActBlue are calculated according to a standard percentage based on the amount of each separate

contribution and are withheld from each independently. There are no funds advanced to cover the cost of the processing, and there is absolutely no risk that one committee could make an in-kind contribution to another by paying more than its fair share of the fees.

The rules pertaining to earmarked contributions further mitigate any possible risk of improper allocations. For any contribution made using the Split It Box, the earmarking rules already obligate ActBlue to forward the contributed amount to the recipient committee, *see* 11 C.F.R. 110.6(b)(2)(iii), report to the Commission and to the committee that ActBlue received and forwarded the contribution, *see* 11 C.F.R. 110.6(c)(1), and attribute the processing fee to the receiving committee, *see* AO 2007-04 (Atlatl), AO 1991-01 (Deloitte & Touche PAC). And the Commission clearly intended for any single fundraising activity to be subject to either the earmarking rules or the joint fundraising rules, but not both. *See* 11 C.F.R. 110.6(b)(2)(i)(B) and (iii)(A); *see also* *Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution Limitations and Earmarked Contributions*, 54 Fed. Reg. 34098, 34106 (1989) ("Fundraising representatives have been excluded [from the definition of intermediary] because their activities are already covered by the joint fundraising regulations at 11 C.F.R. § 102.17. . . ."). When the earmarking rules are sufficient to protect against any risk of prohibited activity, it is clear that the joint fundraising rules have no constructive role to play. Therefore, they should not be applied here.

#### **IV. Conclusion**

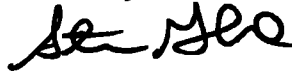
Contributions made on the ActBlue website to two or more committees using the Split It Box do not result in ActBlue exercising "direction or control" over those contributions. The Split It Box does not determine whether a contributor makes a contribution, when a contributor contributes, how much a contributor contributes, or to whom a contributor contributes. The Commission has previously concluded that a website function of this sort is merely a suggested allocation of earmarked contributions and does not constitute direction or control.

Likewise, these contributions do not constitute joint fundraising activity. The Commission has found joint fundraising activity where there is an increased risk of misallocated contributions or expenditures. Use of the Split It Box does not create such an increased risk. Furthermore, the earmarking procedures which apply to these contributions offer sufficient protection against any potential prohibited activity. Therefore, contributions made using the Split It Box are not subject to the rules governing joint fundraising.

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I very much appreciate your consideration of this advisory opinion request. Should you require any further information, please do not hesitate to reach me by phone at (617) 500-4175 or by email at [steve@actblue.com](mailto:steve@actblue.com). We look forward to your response.

Sincerely,

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

Steven Gold  
General Counsel

# EXHIBIT A

## Split It Sample

1 Amount

This is a sample.

### Your Contribution

Split it! \$

ActBlue	\$	
Democratic National Committee (DNC)	\$	
<b>Total</b>		<b>\$0.00</b>

### Make it monthly

No  Yes, each month for 12 months



#### Contribution Rules

1. This contribution is made from my own funds, and funds are not being provided to me by another person or entity for the purpose of making this contribution.
2. I am making this contribution with my own personal credit card and not with a corporate or business credit card or a card issued to another person.
3. I am not a federal contractor.
4. I am at least eighteen years old.
5. I am a U.S. citizen or lawfully admitted permanent resident (i.e., green card holder).
6. This contribution is not made from the funds of an individual registered as a federal lobbyist or a foreign agent, or an entity that is a federally registered lobbying firm or foreign agent.
7. I am not a registered federal lobbyist or registered foreign agent.

#### The Organization

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#### The Tools

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FAQ  
Recurring Contributions  
Help  
API

**Paid for by ActBlue ([actblue.com](http://actblue.com)) and not authorized by any candidate or candidate's committee.**

**Contributions or gifts to ActBlue are not deductible as charitable contributions for Federal income tax purposes.**





Re: Advisory Opinion Request  
Steve Gold  
to:  
NStipanovic  
08/25/2014 04:27 PM  
Cc:  
ARothstein, ABell  
Hide Details  
From: Steve Gold <steve@actblue.com>  
To: NStipanovic@fec.gov,  
Cc: ARothstein@fec.gov, ABell@fec.gov

Mr. Stipanovic,

Thank you for following up with me. Your summary of those parts of our conversations is generally accurate. There are some minor details that I would like to clear up.

The fundamental question we presented about the Split It Box intends to ask whether a contribution made under circumstances presumed not to constitute joint fundraising would nevertheless become joint fundraising merely because of the use of the Split It Box.

As such, we believe it is appropriate for the Commission to assume that the contributions are solicited by one committee using a customized contribution form which is created and/or edited only by representatives of that committee (though possibly by more than one person). The contribution form includes more than one recipient committee, one of which might be the soliciting committee, but ActBlue is not one of the recipient committees. The soliciting committee is acting independent of all other recipient committees. ActBlue does not solicit contributions for other committees, so ActBlue would not be the soliciting committee in this scenario. This most accurately describes the situation we are inquiring about.

All else that you wrote in your email is accurate. I hope that clears up any remaining confusion. If you have any further questions, please do not hesitate to contact me again. We look forward to the Commission's consideration of our request.

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Steven Gold  
General Counsel  
ActBlue  
[steve@actblue.com](mailto:steve@actblue.com)  
617.500.4175  
[www.actblue.com](http://www.actblue.com)

On Mon, Aug 25, 2014 at 11:11 AM, <[NStipanovic@fec.gov](mailto:NStipanovic@fec.gov)> wrote:  
Dear Mr. Gold:

In our telephone conversations on August 8 and 20, 2014, you provided us with additional information about ActBlue's advisory opinion request. We have set out below our understanding of some of that information. Please confirm the accuracy of these statements or correct them if they are not accurate as written.

1. Any person with an account on ActBlue may customize a contribution form to solicit contributions to candidates and political committees listed on ActBlue's website. Candidates may customize forms to solicit contributions to their own authorized committees, to other candidates or political committees, or to both their own committees and others. Supporters of candidates and committees may customize forms to solicit contributions to favored candidates or committees.
2. Although account holders have some discretion in how they customize their contribution forms — such as by including a solicitation or brand, and the language or image used — account holders cannot change or remove the "split-it box." The split-it box is part of the template designed by ActBlue for contribution forms for multiple recipients.
3. The account holder who customizes a contribution form and ActBlue are the only persons who can change the contribution form. A designated recipient cannot change the contribution form unless it also created the form.
4. For purposes of this advisory opinion request, the Commission should assume that any account holder who

customizes a contribution form to solicit contributions to another candidate or political committee is acting independently of the other candidate or political committee.

5. The Commission should also assume that each customized contribution form will be created by only one person, rather than by multiple persons acting together.

6. Although ActBlue creates template contribution forms for others to use, ActBlue itself does not solicit funds for other political committees through these forms. Nor do other political committees solicit contributions for ActBlue through their customized contribution forms.

7. Once a contributor "completes the transaction" by authorizing a contribution to multiple recipients on a contribution form, the contributor's credit card is charged for the total amount of the contribution. ActBlue transmits the money that it receives from the credit card processor to the designated recipients according to the information on the form entered by the contributor.

We would appreciate your response by email. Your response may be considered to be part of your advisory opinion request; if so, it will be posted as such on the Commission's website.

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Neven F. Stipanovic  
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Office of General Counsel  
U.S. Federal Election Commission  
Tel: 202-694-1650