



STATE OF MICHIGAN
TERRI LYNN LAND, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

November 21, 2007

Mr. Jonathan Zucker, Esq., COO and Counsel
ActBlue L.L.C.
Post Office Box 382110
Cambridge, Massachusetts 02138

Dear Mr. Zucker:

On July 13, 2007, you submitted to Secretary of State Terri Lynn Land a request for a declaratory ruling pursuant to the Michigan Campaign Finance Act (MCFA or Act), MCL 169.201 et seq., concerning your organization's plan to act as a conduit for individual donors who wish to make contributions to committees in Michigan. A copy of your request was published on the website of the Department of State (Department) for public comment beginning July 25, 2007. The Department subsequently received written comments concerning your ruling request from Mr. Robert LaBrant of the Michigan Chamber of Commerce.

Applicable laws, including the MCFA, corresponding administrative rules and the Administrative Procedures Act (APA), limit the circumstances in which the Department is authorized to issue a declaratory ruling. MCL 169.215(2); Mich. Admin. Code R 169.6; MCL 24.263. A person who submits a request for a declaratory ruling must be an interested party, recite a reasonably complete statement of facts, provide a succinct description of the legal question presented, and submit the request in the form of a signed writing. MCL 169.215(2); Mich. Admin. Code R 169.6(1). The APA further provides that "an agency may issue a declaratory ruling as to the applicability to an *actual state of facts* of a statute administered by the agency or of a rule or order of the agency." MCL 24.263 (emphasis added). As a set of hypothetical facts forms the foundation of your request, the Department will not issue a declaratory ruling in this matter but instead offers the following as an interpretive statement. MCL 169.215(2).

Your request indicates that ActBlue, a nonprofit limited liability company organized under Massachusetts law, intends to act as a conduit for contributions made to Michigan committees by individual donors. Under the hypothetical situation you presented, individual donors will access ActBlue's website, identify the Michigan candidates or committees they wish to support and make contributions "intended for their choice of one or more candidates or committees". ActBlue will deduct a processing fee of 3.95% from each contribution it receives, combine all contributions intended for a single committee and transmit the aggregated funds to the committee by check. ActBlue also proposes to provide recipient committees instructions on accessing its data file to obtain information about individual donors and processing fees deducted by ActBlue.

Your request presents a series of questions regarding which, if any, of these hypothetical facts trigger registration and reporting requirements under the MCFA.

The first question you pose is whether Michigan law requires ActBlue to register as a political committee.¹ The registration and periodic reporting requirements of the MCFA apply to any ‘committee’, which is defined as “a person who receives contributions or makes expenditures for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question, if contributions received total \$500.00 or more in a calendar year or expenditures made total \$500.00 or more in a calendar year.” MCL 169.203(4). The words “contribution” and “expenditure” are generally defined, in pertinent part, to include anything of ascertainable monetary value that is used to influence or assist a candidate’s nomination or election, or the qualification, passage or defeat of a ballot question. MCL 169.204(1), 169.206(1). Under the MCFA, a committee is required to file its statement of organization within 10 days of its formation. MCL 169.224(1). Thus, ActBlue’s obligation to register is triggered not more than ten days after it receives contributions or makes expenditures of at least \$500.00 in a single calendar year to influence or attempt to influence the nomination or election of a candidate, or the qualification, passage or defeat of a ballot question.

The Department must next consider whether ActBlue’s proposed conduit activities constitute contributions to or expenditures by ActBlue for purposes of section 3. You emphasize that “ActBlue exercises no direction or control over any contribution [,]” and explain the decision of whether to contribute to a particular committee is left to the individual donor. ActBlue’s function, according to the hypothetical situation described in your letter, is limited to serving as a conduit through which the individual donor’s contribution passes on its way to the recipient committee. The hypothetical facts you presented mildly resemble the operation of a bundling committee.

The MCFA authorizes the bundling of contributions, and provides that “[a] bundled contribution or a contribution that is delivered as part of a bundled contribution shall be regarded for purposes of contribution limits as both a contribution attributable to the bundling committee that delivered the contribution and a contribution attributable to the individual making the contribution.” MCL 169.231(2). Though the Act does not define “bundled contribution”, it specifically defines “bundle” as the delivery of one or more contributions from individuals to a candidate committee of a statewide candidate, “*without the money becoming money of the bundling committee.*” MCL 169.202(4) (emphasis added). A bundling committee’s expenditures for the solicitation or collection of individual contributions must be reported as in-kind expenditures for the candidate committee of a candidate for statewide elective office. MCL 169.202(5).

¹ Note that Michigan law differentiates between “political committees” and “independent committees”, and provides contribution limits for independent committees that are ten times greater than the amount that political committees are authorized to make. MCL 169.252(2), 169.269(2). An independent committee is one that registers as independent at least six months before an election in which it intends to participate and prior to contributing to any candidate committee, receives contributions from at least 25 persons, and makes expenditures for or against at least three candidates at the lower contribution limit provided for political committees in the same calendar year. MCL 169.208(3).

According to your letter, ActBlue intends to solicit contributions for candidate committees belonging to candidates for the offices of Governor, Attorney General, Secretary of State, Treasurer², state legislator, and political committees registered with this Department. However, the statutory scheme governing bundling contemplates that such activity will be undertaken solely to benefit candidates for statewide elective offices, which necessarily excludes the state lawmakers and political committees for whom ActBlue proposes to solicit contributions. MCL 169.212(4). More importantly, section 2(4) of the MCFA excludes from the definition of “bundled” any contributions that “becom[e] money of the bundling committee.” Under the scenario you describe, individual contributions intended for Michigan committees will be aggregated and periodically transmitted to the recipient committees using a check drawn on ActBlue’s account after a processing fee of 3.95% is deducted from each contribution. The remittance of accumulated contributions from an account controlled by ActBlue (less the processing fee it incurs), coupled with the solicitation of contributions for committees other than those belonging to candidates for statewide offices, bars application of the Act’s bundling provisions. It is worth noting that even if the Department concluded that ActBlue was qualified to operate as a bundling committee under the Act, any bundled contributions it delivered to the candidate committee of a candidate for statewide office would be attributed both to the individual donor and to ActBlue, and costs incurred by ActBlue in the solicitation or collection of individual contributions would constitute in-kind expenditures for the candidate committee. MCL 169.231(2), 169.202(5). Further, bundled contributions are subject to the limitations prescribed by the Act. MCL 169.252(11), (12); 169.269(10), (11).

Instead, the Department has concluded that the funds ActBlue obtains from individual donors constitute contributions to ActBlue, as the MCFA defines “contribution” as the “donation of money or anything of ascertainable monetary value . . . made for the purpose of influencing the nomination or election of a candidate [.]” MCL 169.204(1). ActBlue proposes to solicit contributions for certain Michigan committees on its website, accept credit card donations intended for those committees from individual donors, aggregate the donor’s funds in an account controlled by ActBlue, and transfer these funds (less a 3.95% processing fee) to the intended recipient committee by check drawn on ActBlue’s account.

ActBlue’s exercise of control over these funds is demonstrated by the periodic payment of accumulated funds from multiple contributors using a single check on an account maintained by ActBlue, and ActBlue’s ability to deduct processing fees from individual donors’ credit card contributions. By contrast, bundled contributions retain their character as contributions from individual donors because they are not deposited into an account controlled by the bundling committee, are payable directly from the individual donor’s own funds, and are not subject to the deduction of processing fees or other surcharges. ActBlue’s proposed activities do not comport with that of a bundling committee operating under Michigan law. The word “bundled”, as it is defined in the MCFA, demands that bundled contributions obtained from individual donors remain segregated from the bundling committee’s own funds. MCL 169.202(4). Money raised in the manner you describe must be treated as contributions to ActBlue, and the organization’s statutory obligation to register as a committee in Michigan is triggered when it receives at least \$500.00 in contributions in a single calendar year. MCL 169.203(4), 169.224(1).

² In Michigan, the state Treasurer is a gubernatorial appointee. Const. 1963, Art. V., Sec. 3.

Federal law explicitly authorizes the transfer of an earmarked contribution through a conduit or intermediary provided that the conduit or intermediary does not direct or control the individual donor's selection of the recipient candidate. 2 USC 441a(a)(8), 11 CFR 110.6(a), (d)(1). The MCFA differs in at least two critical respects from the federal law.

To begin with, the MCFA authorizes intermediaries to transmit contributions, but on a far more limited scope than provided under federal law. Under the Michigan Act, "[a] person who accepts a contribution, *other than by written instrument*, on behalf of another and acts as the intermediary or agent of the person from whom the contribution was accepted shall disclose to the recipient of the contribution the intermediary's own name and address and the name and address of the actual source of the contribution." MCL 169.242(1) (emphasis added). The statute facilitates the collection and delivery of cash contributions of \$20.00 or less to Michigan committees. MCL 169.241(1). Since ActBlue intends to limit its receipt of contributions to credit card payments, its proposal does not conform to the requirements of section 42(1) of the MCFA. Thus, ActBlue cannot operate as an intermediary consistent with Michigan law.

Moreover, the Michigan Act distinctly prohibits the transmittal of a contribution from one person to another "with the agreement or arrangement that the person receiving the contribution will then transfer that contribution to a particular candidate committee." MCL 169.244(1), 169.271(1). This provision stands in marked contrast with federal law, which specifically permits the making of "contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to [a candidate committee.]" 2 USC 441a(a)(8). Your letter suggests that ActBlue intends to allow individual donors to select from its Michigan candidate or committee directories one or more "intended recipients", for whom ActBlue will solicit and collect contributions. ActBlue will honor the requests of individual donors and make contributions from its own funds (minus the processing fee) to the donors' intended recipients. ActBlue's proposal for operating in Michigan, which may be consistent with federal law, conflicts with the anti-earmarking provision of the MCFA. As similar provision granting the express statutory authority found in federal law for the receipt and delivery of earmarked contributions does not exist in Michigan, ActBlue must not take possession of a non-bundled contribution "with the agreement or arrangement ... [to] transfer that contribution to a particular candidate committee." MCL 169.244(1), 169.271(1).

Considering the hypothetical facts described in your letter, the Department has concluded that ActBlue (1) cannot operate in Michigan as a bundling committee, as the money it receives from individual donors belongs to ActBlue; (2) cannot act as an intermediary for the collection and delivery of contributions, because it accepts contributions made by written instrument; and (3) cannot accept contributions earmarked for specific candidates, since Michigan law prohibits the use of such agreements or arrangements. ActBlue must register as a committee if it receives contributions or makes expenditures in excess of \$500.00 in any calendar year.

The Department also wishes to address your argument that ActBlue will not exert direction or control over contributed funds, an apparent reference to federal law, which permits the transfer of a contribution through a conduit or intermediary – to a specific candidate committee – so long

as the party acting as a conduit or intermediary does not direct or control the individual donor's choice in selecting the intended recipient. 2 USC 441a(a)(8), 11 CFR 110.6(a), (d)(1). In Michigan, however, the concepts of direction and control are applied when distinguishing direct and independent expenditures. Under the MCFA, an expenditure will be treated as independent if it is "not made at the direction of, or under the control of, another person and if the expenditure is not a contribution to a committee." MCL 169.209(2). By remitting aggregated contributions from an account it controls "for the purpose of influencing the nomination or election of a candidate", ActBlue makes a contribution to the recipient committees. The definition of "independent expenditure" specifically excludes contributions to another committee, and consequently, ActBlue's remittance of contributions to Michigan committees in the manner you describe cannot be considered as independent expenditures.³

You also ask how the Act's contribution limits apply to a contribution made using ActBlue's website. An individual's contribution to a political or independent committee is not subject to limitation under the MCFA, and ActBlue may accept contributions from individual donors in any amount. Like other political or independent committees operating in Michigan, ActBlue's contributions to the candidate committees identified in your letter are subject to the contribution limits provided in sections 52 and 69 of the MCFA. Campaign statements filed by ActBlue must disclose each contributor's name, street address, amount contributed (including cumulative total), date of contribution, and if the cumulative total of contributions received from an individual exceeds \$100.00, ActBlue must also disclose that contributor's occupation, employer and principal place of business. MCL 169.226(1)(e), (1)(f).

Finally you ask whether the MCFA requires Act Blue to establish a separate bank account to be utilized exclusively for its Michigan operations, and if so, whether such an account must be held at a Michigan bank. Since the Act's inception, the Department's consistent position has been that funds used to influence Michigan elections must be raised in conformity with the requirements of the MCFA. Interpretive Statement to Mr. John Pirich and Mr. Timothy Knowlton (November 4, 1997). The use of a separate account for its Michigan activities would facilitate compliance by ensuring that every dollar entering Michigan meets the MCFA's requirements. While maintenance of a separate bank account is encouraged, the Department acknowledges that it is possible to commingle funds while ensuring that only Michigan-specific contributions are spent to support or oppose Michigan candidates. This determination can only be made on a case by case basis. The account ActBlue uses does not have to be maintained at a financial institution located in Michigan. MCL 169.221(7).

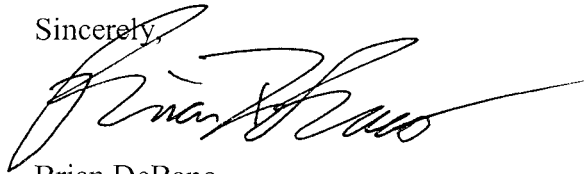
In closing, the MCFA requires ActBlue to register as a committee if and when it receives contributions or makes expenditures in excess of \$500.00 in a calendar year. It must establish an official depository at a financial institution of its choosing at the time that it receives its first contribution or makes its first expenditure. As with any other political or independent committee

³ The Department has previously stated that an independent or political committee may solicit contributions for Michigan candidates by urging individual donors to send their own contributions directly to the candidate committee. Interpretive Statement to Ms. Judith Corley, June 14, 2002. Costs incurred in the solicitation of direct contributions to a candidate committee must be reported as independent expenditures by the independent or political committee. *Id.*

registered in Michigan, ActBlue is required to adhere to the contribution limits prescribed by sections 52 and 69 of the MCFA, and must provide identifying information for each contributor consistent with section 26 of the MCFA. Further, the MCFA prohibits ActBlue from operating in the manner described in your request, as it does not qualify as a bundling committee or intermediary under Michigan law, and state law clearly prohibits the acceptance of contributions that are earmarked for specific candidates.

The foregoing statement constitutes an interpretive statement concerning application of the MCFA to the hypothetical facts described in your letter of July 31, 2007.

Sincerely,

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

Brian DeBano
Chief of Staff / Chief Operating Officer