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To SERS@fec.gov, sersnotify,
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Subject New comment on REG 2013-01 submitted by Gold, Steven

1 attachment



REG_2013_01_Gold_Steven_06_03_2013_16_06_50_Technological Modernization - Comments of ActBlue.pdf

Please find attached the contents for the new comment submitted on Mon Jun 03 16:06:50 EDT 2013.

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June 3, 2013

Via Electronic Comment Submission System
Federal Election Commission
Attn: Amy L. Rothstein, Assistant General Counsel
999 E Street NW
Washington, DC 20463

Re: Technological Modernization, Notice 2013-07, 87 Fed. Reg. 25635

Dear Ms. Rothstein,

ActBlue wishes to submit the following comments for the Commission's consideration in response to the Advance Notice of Proposed Rulemaking regarding technological modernization of the Commission's regulations. We appreciate the opportunity to offer our comments, and we applaud the Commission for undertaking this effort to bring its regulations up to date with the substantial recent advancements in technology.

About ActBlue

ActBlue is a non-connected committee which has been providing tools for raising political contributions online since 2004. To date, over 5.5 million contributions have been made through ActBlue's website, totaling nearly \$400 million. Small dollar contributions make up the vast majority of the funds raised on our site. Currently, our average contribution size is under \$50. All ActBlue contributions are made online using a credit or debit card.

Processing such an enormous volume of online contributions has required that our staff develop a great deal of expertise in the technical aspects of online giving and credit card processing. Our focus on maximizing small-dollar giving through the Internet has led us to spend countless hours and substantial funds testing and improving the infrastructure and techniques that make online contributions possible. Even small technical changes can have an outsized positive (or negative) impact on participation in the political process. That is why we believe ensuring that the Commission's regulations keep pace with technology is critically important.

Successfully operating an online contribution platform is neither simple nor inexpensive. By utilizing Commission regulations which allow us to act as an intermediary for contributions to other political committees and take advantage of economies of scale, ActBlue has been able to offer sophisticated tools for online credit card contributions to the supporters of even the smallest campaigns, who do not have the resources to assemble such a platform for themselves. Overall, ActBlue has sent

contributions to more than 2,500 federal committees earmarked by individual online contributors.

How political committees receive online contributions

There is nothing particularly different about how political committees receive contributions made online when compared with any other online purchases. Political contributions make up a very small fraction of the online share of credit card payment processing and do not receive special attention. Processing fees are often higher for political committees than for other merchants, however, because the industry views committees — even permanent committees like ActBlue — to be an increased credit risk. This is due in large part to the difficulty of establishing a credit profile as a political committee. It is doubly important, therefore, to ensure that Commission regulations not unnecessarily increase the cost to committees of accepting contributions online.

An online contribution begins when a contributor visits a web page with a contribution form on it, usually in response to a solicitation. The contributor provides basic identifying information — name, address, etc. — as well as credit card information. Most of the data which the FECA requires a political committee to collect is also required to complete the transaction. In some cases, the contributor will have this information saved on the site in his or her account, much as consumers save their information on retailer sites like Amazon.com, saving the contributor from have to retype the data for each contribution.

In order to accept credit card contributions, the committee must have a merchant account with the payment processor which is connected to the website on the contribution end and to a specific bank account on the processing end. This bank account would be registered with the Commission as a depository of the committee. Payments are processed for political committees just as they are for any other merchant: The transaction data is transmitted to the processor, the processor charges the card, and the funds flow through the merchant account to the committee's bank account. As the money flows, fees are deducted by the processor for its services, and interchange fees are deducted for the payment card issuers, but otherwise the merchant account is purely a pass-through mechanism. The payment card industry sets a number of rules concerning transactional security and fraud prevention which political committees must also abide by. Incidentally, some of these rules apply to the handling and storage of credit card numbers, and except in the most secure of circumstances (which only the most sophisticated political committees could comply with), the rules prohibit keeping card numbers.

Presumably, many of the concerns which the Commission may wish to address through changes to the regulations overlap with concerns already addressed by the payment card industry through its rules. It would behoove the Commission to pay close attention to the rules already in place to ensure that its regulations are not duplicative, resulting in extra cost to political committees. More importantly, it is essential that any

regulations adopted by the Commission not contradict payment card industry rules which apply to political committees. Because so little payment activity is related to campaign contributions, the industry is extremely unlikely to make changes to its rules to accommodate political giving. Conflicting rules could have the unintended consequence of making online giving unnecessarily difficult or impossible.

Online contributions should not be treated differently

In most respects, a credit card contribution made over the Internet differs very little from any other credit card transaction. It is much more relevant to the Commission's concerns that the contribution is made using the credit card as opposed to a check than it is that the contribution was made over the Internet. In fact, where they differ the characteristics of an online contribution make these contributions less of a regulatory concern, not more.

A full paper trail — which will satisfy the needs of both disclosure and auditing — results every time someone makes an online contribution, though it is somewhat different from the traditional paper trail. A contribution made with a check is a paper record of the transaction in and of itself. And when a customer makes a purchase in person using a credit card, the merchant will produce a paper receipt of the transaction. An online contribution produces neither of these paper records, but the use of Internet technology offers comparable electronic documentation and even more sophisticated auditing tools.

Universally, merchants offering online sales require an email address to which an electronic receipt can be sent. Political committees accepting online contributions are no different. Given the highly logged nature of the Internet, online contributions create the potential for even more documentation. If a contributor makes a contribution using an online account, which many do, the website likely offers her the ability to review and verify her contribution activity at any time. And the political committee accepting the contribution and transmitting payment information electronically to the payment processor very likely can access from the processor on-demand reports detailing all of its contribution activity. These additional reporting sources can be compared with bank statements to ensure a proper accounting of funds.

The Commission's regulations should focus on the *sufficiency* of records kept by committees to accomplish the required disclosure reporting and to serve as the basis for an audit, not their form or format. Precisely what documentation is required to accomplish this will change over time as payment systems develop, so Commission regulations should employ broad language focused on the purposes of the records and their contents. Official guidance from the professional staff to the regulated community will surely prove to be a more efficient vehicle for addressing specific requirements related to any particular payment type that may arise over time.

Merchant accounts are not depositories

As has been recently reconfirmed in high-profile scandals, it is essential that campaign funds flow through registered depository accounts so that embezzlement and other corrupt practices are detectable. It is possible that the Commission could expand the scope of the type of permissible accounts for holding or investing committee funds without limiting detectability. But it is certain that there is no need to treat merchant accounts as campaign depositories which must be registered with the Commission.

Credit card payment processing is an established industry with comprehensive business standards and a long history of successful operation. The merchant account structure employed to accomplish a payment transfer is nothing but an accounting tool which operates purely as a pass-through. The money “deposited” into the merchant account is transferred directly into the campaign’s registered depository. Because campaigns have no ability to make purchases through the merchant account before the funds have been deposited into a bank account, there is no risk of malfeasance associated with the merchant account. Adding merchant accounts to the list of depositories required to be registered with the Commission would only serve to increase paperwork with no enforcement benefit.

The Commission’s notice also made reference to funds deposited into a single merchant account which are designated for multiple committees. This is something which ActBlue has significant experience with, but which most other committees have little or no experience with. In general, merchant accounts are not shared between committees. For most committees, there is a single merchant account, and for most merchant accounts, a single committee. Even when funds designated for multiple committees are deposited into one merchant account, they are still transferred into a single bank account. It is only at this point that funds are allocated between committees. The merchant account is not involved in the process of designating or dividing funds. All of this is handled by the responsible political committee before and after the funds are in the merchant account.

Earmarked contributions (as in the case of ActBlue) and contributions to a joint committee are two typical examples of circumstances under which funds designated for multiple committees flow through a single merchant account. In those instances, the contributor designates the intended recipient of the contribution on the website at the time the contribution is made, long before the money reaches the merchant account. And it is the receiving committee’s obligation to disburse the funds to the committee(s) intended as the ultimate recipient(s) after the contribution has passed through the merchant account and into the receiving committee’s bank account. The process is no different when a contribution is made online using a credit card than it is when a contribution is made by check. The merchant account plays no role in this process, and all of the responsibility for documenting the ultimate intended recipient of the contribution, as well as disbursing the contribution, rests with the receiving committee. The current regulations address these situations more than adequately.

Companies processing contributions for political committees are not intermediaries

Recent advisory opinions referenced in the notice have addressed the question of whether companies providing services to process contributions, either at the behest of the committees receiving the contributions or the individuals making the contributions, should be treated as intermediaries under 11 C.F.R. 110.6. For the most part, those opinions concluded that the companies are not intermediaries. We believe that is the proper conclusion.

What distinguishes a company providing services as a vendor from an individual or a committee accepting earmarked contributions can be subtle. In some cases, these vendors never take possession of the contributed funds, in which case it is clear that these are not earmarked contributions made through an intermediary. In cases where the vendor does control the funds, what distinguishes it from an intermediary is primarily the manner in which the vendor holds itself out to its clients and the public. A vendor is engaged in a business enterprise, often extending beyond the political market, and seeks to attract clients rather than independently advocating the election or defeat of a candidate. Generally, a vendor is motivated by profit. Contributors understand that they are not making a contribution to a vendor.

Without vendors providing processing services, committees would not be able to raise campaign funds on the Internet or by credit card at all. Treating those companies providing these services as intermediaries under section 110.6 would instantly prohibit them from providing these services, since corporations are not permitted to act as intermediaries. This would deal a devastating blow to online contributions and upset fundraising practices immensely.

Define “money” broadly

Just as record keeping requirements are best described in general terms, so too should the term “money” be defined in the broadest possible manner to encompass all forms of payment without requiring frequent updates to the regulations. Currently, the definition doesn’t even make reference to credit cards and other payment cards, much less ACH transfers, SMS payments, and other more recent developments in money transmission. Where the regulations refer to money, it should be understood to refer to any method by which funds are transferred. To date, the Commission has employed phrases such as, “other negotiable instruments” and “similar drafts” as catch-alls. These phrases are probably sufficient, but an even more broad reference to any transfer of funds would provide additional clarity.

Prepaid debit cards should not be regulated separately

Prepaid debit cards and gift cards do pose a unique threat of evasion of the contribution limits by a particularly motivated actor. Since they are not linked to the

identity of the purchaser, these cards could be utilized to make prohibited straw donor contributions, something the Commission has taken action against on a number of occasions recently, mostly involving reimbursement of the contributions after the fact.

Treating prepaid cards the same as cash and limiting the amount one could contribute using such a card to \$100 has some practical limitations, however. The most significant impediment is that the committee to whom the card number is presented online for payment is unlikely to know that it is a prepaid card. In the process of making the contribution, a prepaid card is treated the same as any other payment card. There is likely no way around this limitation. It would not be practical to expect that the payment industry would limit all transactions using these cards to \$100 to accommodate campaign finance regulations.

Such straw donor contributions are rare, however, and the Commission has done an admirable job of enforcement. In truth, prepaid cards likely present less of a risk of evading the limits than cash does, since they are marginally more traceable. No online contribution is ever made without the contributor providing identifying information such as a name and address, and prepaid cards generally have to be registered with this information before they may be used online. Each card has a unique identifying number, so it would theoretically be possible in the course of an investigation to trace where and when the cards were purchased. These features make it unlikely that an enterprising evader of contribution limits would opt for prepaid cards to accomplish his task rather than simply using cash or reimbursing the straw donor.

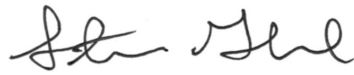
Rulemaking may only be necessary for limited purposes

While there may be some discrete regulations that would benefit from updating through a rulemaking, such as broadening record keeping requirements and definitions, most of the changes to the law brought about by advancements in technology have been dealt with reasonably well through advisory opinions and other guidance. Furthermore, the members of the regulated community affected by these changes tend to be more sophisticated parties for whom advisory opinions are a sufficient source of guidance.

To the extent that the Commission decides to engage in a rulemaking, the changes sought should be limited to making the regulations more broad and less susceptible to becoming stale as new technologies develop. Beyond that, the Commission should rely primarily on opinions or official guidance documents to keep the regulated community informed of the rules.

We would like to thank the Commission for the opportunity to weigh in on these very important matters. We look forward to the Commission's consideration of these questions and would be happy to share additional thoughts with the Commission, in writing or in person, at the appropriate time.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Steven Gold". The signature is fluid and cursive, with the first name "Steven" and last name "Gold" clearly distinguishable.

Steven Gold
General Counsel

A handwritten signature in black ink, appearing to read "Daniel Ruben". The signature is fluid and cursive, with the first name "Daniel" and last name "Ruben" clearly distinguishable.

Daniel Ruben
Director of Compliance