

ADR 2012-17

Arent Fox LLP / Washington, DC / New York, NY / Los Angeles, CA

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Re: Advisory Opinion Request

Dear Mr. Herman:

Arent Fox seeks an Advisory Opinion from the Federal Election Commission on behalf of two political consulting firms: Red Blue T LLC, and ArmourMedia, Inc. Arent Fox seeks and Advisory Opinion from the Federal Election Commission on behalf of two political consulting firms, Red Blue T LLC, and ArmourMedia, Inc. They have asked m-Qube, Inc. to join in their request as an aggregator who would be a party to these transactions.

Red Blue T LLC is a political consulting firm whose principals have advised Republican presidential and congressional campaigns and numerous other political committees on fundraising, grassroots advocacy and messaging. ArmourMedia, Inc. is an advertising and political consulting firm whose principal specializes in representing Democratic federal and state candidates, issue groups, ballot initiatives and independent expenditure organizations advocating at the Presidential and congressional levels. m-Qube is one of the leading aggregators of business-to-consumer messaging and merchant billing for the nation's public mobile carriers.

Red Blue T LLC and ArmourMedia, Inc. work independently of each other, but both have interest in assisting political committee clients with engaging in, and advertising for, the solicitation of political contributions by text messaging.

If approved by the Commission, a Service Order ("Service Order") will be negotiated between the Requestors' clients and a mobile messaging and billing aggregator who operates direct interconnection gateways with all of the nation's major public mobile network operators. The Service Order's basic terms will be the same the aggregator offers in its ordinary course of

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business to its commercial and charitable clients. The Service Order will, however, include Special Terms ("Special Terms").

These Special Terms ensure compliance with the Federal Election Campaign Act, as recently interpreted by Advisory Opinion 2010-23. They will require that:

- All contribution funds must be segregated from all other contents and services appearing in the mobile number user's phone bill, and at the mobile operator, and through the aggregator, through to receipt by the political committee.
- Each political committee must operate one and only one short code exclusively for its contributions.
- The aggregator, as the central control point of that short code across all mobile operators, must ensure that no phone number may be billed more than \$50 to that short code per month.
- The aggregator will, for its normal and usual fee, forward a factor of the contributions being made to the political committee within 10 days of the text being made.
- Political committees must obtain certification from their contributors that they are permissible sources, in accordance with the website or text messaging methods that the FEC has previously recommended.

This approach places no additional or unique obligations on the mobile operators. The aggregator and the political committees have the full capability and responsibility to implement these provisions today, using existing FEC systems and business processes.

Accordingly, we request an advisory opinion from the Commission on whether the Requestors may negotiate and advise their clients to place such a Service Order to solicit and receive political contributions through mobile phone contributions charged to donors' mobile phone bills, subject to the Service Order's safeguards and Special Terms.¹

¹ Throughout this Advisory Opinion Request we use the phrase "solicit and receive political contributions" through text messaging. This does not mean the mobile devices, themselves, will actually initiate a solicitation to subscriber: the industry's own rules do not permit that now. Instead, the phrase is intended to encompass ways contributions are verified and the data collected for the donation.

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Background:

Most of the mechanics of the wireless industry were fully and clearly described in Advisory Opinion Request 2010-23, and correctly excerpted by the Commission in Advisory Opinion 2010-23, so they do not need to be repeated here, except there are certain material differences in that opinion describing an important portion of the system: the unique role and critical workings the messaging and billing aggregator brings into this system. This very important central element in the processing of mobile phone data and proposed handling of political contributions under the proposed Service Order distinguish this request from the facts and general conclusions of Advisory Opinion 2010-23.

In Advisory Opinion 2010-23 the Commission was not able to approve a program to enable wireless service providers and aggregators to process contributions to political committees because:

- Wireless service providers and aggregators could not comply with the ten and 30-day contribution forwarding requirements of 2 U.S.C. § 432; and
- There was no separation of corporate funds from political contributions in a separate merchant account as approved by earlier advisory opinions.

The Commission also criticized the program because it:

- Must ensure that wireless service providers and aggregators use a means to ensure that contributions are not from impermissible sources and, if in excess of \$50, are forwarded together with the requisite contributor information in a timely manner.

As described below, we believe the proposed Service Order, including its Special Terms, solves each of those obstacles, and adds additional beneficial provisions and protections. Before we can, however, advise the Requesters on the lawfulness of negotiating and recommending to its clients whether they can engage in fundraising by mobile phone contribution, we need the Commission's opinion on whether this proposed regime is distinguishable from Advisory Opinion 2010-23's facts and assumptions so their committees may lawfully enter into a contract to solicit and receive contributions.

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The Proposed Service Order:

To ensure compliance with the Federal Election Campaign Act, and to overcome the objections of Advisory Opinion 2010-23, the consultants' political committee clients will be given (or stated differently, will require their aggregator to put in place) an agreement substantially similar to the attached Service Order, including specific additional terms tailored for political contributions requiring:

- No phone number may incur more than \$50 in pledges to any one political committee or candidate during any one billing cycle;
- Each campaign will operate only one premium short code (mobile billing account), so aggregators and carriers can easily observe the \$50 limit is never exceeded for any one political recipient;
- The one-short-code-per-political-committee rule also ensures that at all times political contributions are absolutely segregated from all other mobile content and services on a subscriber's phone bill, and throughout the payment process, through to the political committee's receipt of funds.
- Each contributor will certify that his/her contributions are in compliance with the Act; and
- Require political committees to use a "factoring" service aggregators normally offer as an option to clients. This service gives recipients a factor of their transaction revenue, typically within 10 days of a consumer's text or web-based opt-in for a mobile-billed transaction.

Enclosed please find sections of the proposed special Service Order form being negotiated for political committee customers. This Service Order contains all the standard terms and conditions that aggregators require all of their merchant and charitable organization customers to execute. The Service Order is entitled "Special Service Order for Political Committee Services Complying with the Federal Election Campaign Act."

We believe that the attached Special Terms for Complying with the Federal Election Campaign Act (Service Order pages 2-3) and the Terms of Forwarding of Factored donations (Service Order Section 7, page 6) bring the texting of political contributions under this program into compliance with the Federal Election Campaign Act. The important provisions are:

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- *Special Term 1* requires the political customer ("Customer") to be a registered political committee with the Federal Election Commission.
- *Special Term 4* limits political committees to only one single short code per election. Although this was not discussed in Advisory Opinion 2010-23, this additional provision ensures the aggregator and the mobile network operators have easy visibility into the fundraising, so they can be sure to observe and enforce a \$50-per-phone-number-per-political-committee contribution limit.
- *Special Term 5* states any phone number cannot contribute to, or be billed for more than \$50 each month by any one political committee. This condition requires an aggregator to engage a regularly-used setting in its carrier gateway that literally blocks a phone number from attempting to contribute more than \$50 in one billing cycle and thereby alleviates two of the major obstacles in Advisory Opinion 2010-23.
- *Special Term 6: Aggregator Controlled Opt-In.* All of the nation's mobile operators require mobile subscribers only be charged for third party content or services when they have securely confirmed their transaction with two-factor authentication. For example, when making a purchase on the World Wide Web for mobile content, a user must enter their phone number onto a web page detailing the nature of their purchase in clear Terms (the phone number being the first factor), wait to receive a text message with a one time ("PIN") number at that mobile handset, then enter that PIN back onto the transaction web page (the unique mobile handset itself being the second factor.) To be sure that there is concentrated responsibility and transparency that all political contributions are surely made only by individual donors on a fully-informed basis, counsel recommends that the aggregator of each short code directly operate and control all consumer opt-ins for political contributions.
- *Special Term 8* informs the political committee that it is required to provide the means by which each contributor certifies that they are making the contribution in compliance with FECA. Mobile contributions can generally be made through two different means of solicitation-Web pages and by texting to short codes advertised in traditional non-interactive media.²

² When solicitations are made through a web page, political committees can place a check box on the contribution page requiring contributors to affirmatively state their contributions will be in compliance with the Act. As a safeguard, contributors will not be able to complete their contribution until they have checked the box. See Advisory Opinion 2011-13 and opinions cited therein.

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- *Pricing -- Normal Commercial Rates.* An aggregator's and mobile phone carrier's operation of political contribution short codes will not themselves comprise political contributions so long as they charge their normal and usual commercial rates. The aggregator does not publish its or the mobile operators' rates. But depending on volume, price point, merchant type, and promotional method, mobile billing merchants typically expect to see Outpayments of between 50% and 70% of retail revenue.

Questions Presented:

1. Does the proposal described above satisfy the recordkeeping and reporting requirements of 2 U.S.C. § 432(c)?
2. Does the proposal described above satisfy the segregation requirements the Commission has placed on commercial vendors who process political contributions?
3. Does the proposed commercial transaction of factoring of political contributions, when it is performed by an aggregator in its ordinary course of business, conform with the requirements of 2 U.S.C. § 441b?
4. If yes, does the proposed method of factoring comply with the forwarding requirements of 2 U.S.C. § 432(b)?

Legal Analysis:

We believe these Special Terms bring mobile-operator-billed contributions into compliance with the Act.

Advisory Opinion 2010-23's Concern About Multiple Contributions Aggregating to Exceed the \$50 Per-Month Limit on Anonymous Contributions. In Advisory Opinion 2010-23, the Commission posited that a subscriber could make multiple \$10 donations in any single billing cycle that would, if totaling over \$50 to a single committee, trigger recordkeeping and reporting requirements the wireless industry or political committees apparently could not meet.

When solicitations are made by non-interactive media, such as TV, radio or print, the user initiates the contribution process by texting a keyword to a short code. In that scenario, the FECA certification language must be sent, through the aggregator, to the contributor's handset. In order to complete a contribution, the aggregator will only bill once it has observed that the contributor has texted the word "YES" back to that short code confirming the FECA certification and her donation.

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The simple solution is for the aggregator, the single point of control for each short code, to block any contributions to any single short code above this limit, and to limit each political committee to only one short code. Aggregators routinely impose such spending caps on other mobile content merchants for their own business reasons. The technique is an industry standard and common feature at many aggregators. Accordingly, any given telephone number will be blocked from texting more than \$50 to any single committee in any single billing cycle.³ By doing so, the contributions received will remain categorized as anonymous contributions pursuant to 2 U.S.C. § 432(c)(2).

In Advisory Opinion 2010-23, the Commission did not say a \$10 texted contribution exceeded the anonymous contribution limit. Instead, the opinion said the possibility that contributions from one source could total more than \$50 to one committee in one billing cycle meant the requestor could not rely on the recordkeeping exemptions from 2 U.S.C. § 432(c)(2). Accordingly, if the aggregator places a cap on the allowed mobile contributions per month that each phone number may contribute to a political committee, then the political committee can reliably consider the contributions anonymous.

As stated thoroughly in Advisory Opinion Request 2010-23, small contributions from anonymous sources could encourage participation by some citizens in the political process who may be sensitive to recording or disclosure of their political preferences. AOR 2010-23 at page 8 citing *Buckley v. Valeo*, 424 U.S. 1, 83 (1976). Moreover, the Supreme Court noted that "contributions can only be regulated if they pose a threat or appearance of corruption through quid pro quo arrangements. Of course there can be no 'quid pro quo' arrangements if the identity of the contribution is unknown to the recipient of the contribution, especially a contributor who makes a small donation." AOR 2010-23 at 8 citing *Buckley v. Valeo* at 27.

The Service Order Satisfies the Advisory Opinion's Certification Requirement. The proposed Service Order (Special Term 8) would require the political committee to obtain certification, either on its web page, or by text message, before accepting a wireless user's contribution. That certification is to be obtained in the manner previously advised by the Commission. Advisory Opinion 2011-13 (DSCC).

³ In our discussions we have found that political committees will not be able to go to other aggregators to operate other short codes. The CTIA Wireless Association's U.S. Common Short Code Authority requires detailed application forms for short codes that identify the merchant (or political committee). The operators vet each and every third party program and they will not allow more than one short code per political committee (assuming that is what is necessary to meet the Commission's requirements.)

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The Commission noted in Advisory Opinion 2010-23 that, in many circumstances, the contributor's certification that her contribution is not from an impermissible source may satisfy the FECA requirements for political committees to ensure that contributions are from permissible sources (Advisory Opinion 2010-23 at 9.)

When texting contributions from solicitations over the internet (such as on the website of a candidate's campaign committee) the certification language will be identical to those previously approved by the commission. The only difference is that the language will be just prior to the contributor entering his phone number rather than his credit card. As with other solicitations, the contributor will have to check a box to accept the conditions before his contribution can be made. When a contribution is made from a contributor texting a keyword to a short code in response to an advertisement, the political committee will send the certification language to the contributor's handset via the aggregator, and the contributor must accept the language (by replying "yes" to a prompt) as a prerequisite for completing the pledge.

We believe that these small, anonymous mobile contributions address all the circumstances: that if a contribution is legally entitled to be considered anonymous and cannot later be increased to be above that anonymous amount, has been pre-certified by the contributor to be lawful, and physically cannot be made without so certifying; then no further examination of these contributions are necessary.

Contributions of less than \$50 are permitted to be anonymous. If a contribution is \$50 or less, the Treasurer is relieved of her reporting *and recordkeeping* requirements. 2 U.S.C. § 432(c)(2) This exemption from record keeping should be interpreted to mean exactly that; there is no requirement to create a record of the identity of any contributor who has contributed \$50 or less. The FECA does not make an exception to require record keeping for some \$50 contributions and not for others. And the Commission should not suppress an entire, exciting and new channel for making political contributions on the premise the law should be interpreted that way.

The Commission's regulations state "contributions that present genuine questions" as to whether they are in compliance with the Federal Election Campaign Act require the Treasurer "to make at least one written or oral request for evidence of the legality of the contributions. Such evidence includes a written statement by the contributor explaining why the contribution is legal . . .". 11 C.F.R. §103.3(b)(1). In Advisory Opinion 2010-23, the Commission states a concern that because a mobile operator becomes aware of a phone account's corporate or foreign address it might have such a duty to investigate.

The regulations clearly state the duty to investigate only begins when a "contribution" presents a question of illegality. In Advisory Opinion 2010-23, the Commission stated that a subscriber's "bill" may indicate the subscriber is a corporation or has a foreign address, thereby triggering a

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duty to investigate. This is an incorrect application of law. A subscriber's bill is not the subscriber's contribution. The subscriber's contribution is the actual payment he makes, such as by check, after the bill has been sent. 11 C.F.R. § 200.51(a)(b). If the contributor's check, itself, presents a genuine question of legality, *then* there is a duty to investigate. As the Commission clearly stated in Advisory Opinion 2010-23, the contribution is made at the time the wireless subscriber pays a bill that includes a charge resulting from a Short Code-initiated pledge, and not when the wireless carrier initiates the bill.⁴

The regulation further states it is the "Treasurer's responsibility to make at least one request for evidence of legality." This has already been satisfied: A Treasurer will not enter into this special program unless the provider requires the donor to affirmatively state their upcoming donation will be lawful. It is hard to imagine any better request for evidence than requiring a recorded "yes" by the texter, or checking a tick box next to conspicuous advisory language on a website.

Importantly, this pre-contribution certification is not a requirement of the FECA, it is advisable as "an appropriate safeguard" against receiving prohibited contributions. Advisory Opinion 2011-12 at page 4 citing Advisory Opinion 1995-35 (Alexander for President). It is not understandable that the Commission would endorse political committees creating a system the Commission itself calls a safeguard or safe-harbor, but then not allow that system to actually be relied upon by committees that created it.

Moreover, as the Commission's stated in Advisory Opinion 2011-13, Treasurers must examine contributions for evidence of illegality. But the Advisory Opinion went on to state, "This requirement applies to contribution once they have been *received* by the Committee." Advisory Opinion 2011-13 (emphasis in original). Accordingly, any examination requirement of a mobile-billed contribution is only required after a contribution is received, not before a bill is sent.

Reviewing recent Advisory Opinions, it appears the Commission also does not consider the certification or inspection requirements apply to anonymous donations that will never exceed \$50 in one billing cycle. None of the Advisory Opinions routinely cited in the area of certification or inspection even address anonymous contributions, or analyze the question of whether certification and inspection requirements apply to those small anonymous donations. Advisory Opinions 2007-04 (Atlatl), 2004-19 (Dollar Vote) and 2002-7 (Careau). And in Advisory Opinion 2010-23, although the issue of anonymity arose, the Commission stated that if

⁴ Neither the Treasurer, nor the aggregator, nor the mobile operator has access to phone account information (like whether the account is corporate or foreign) at the time that a phone number makes a mobile contribution. The relationship only occurs later, in a mobile operator's billing system, when charges are collected into the phone subscriber's bill. So at the time of the contribution, there is no reason for a Treasurer to suspect that a contribution is prohibited, especially if it is accompanied by an authentic certification as we are recommending here.

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"despite the certifications, however, a subscriber makes pledges in excess of \$50 in one billing cycle . . . the wireless service providers would need to take additional measures." Advisory Opinion 2010-23 at 8.

The aggregator-based protections in the attached Service Order provide the ultimate form of belt-and-suspenders. Not only does it render contributions by any phone number of more than \$50 per month impossible, just to avoid all doubts, it ensures that every mobile-contributor actively certifies FECA compliance in advance of completing each and every donation.

The Service Order's "Factoring" Provision Satisfies the Advisory Opinion's Concern Regarding FECA Forwarding Requirements. Factoring is the key component of this Service Order to ensure compliance with the forwarding requirements of FECA. Political customers will be required to elect to have a "factor" of their pledged donations sent to them immediately, instead of waiting until the entire contribution is processed through the wireless carrier, billed to the consumer, paid to the mobile operator, and in turn shared with the aggregator.

Factoring is a service that aggregators currently offer as a popular option to merchants or charitable organizations, especially those who are in need of receiving a portion of any texted donations as quickly as possible. As the Commission saw from Advisory Opinion Request 2010-23, even though an aggregator knows within days what telephone number has texted a contribution to which advertiser, it can take over 60 days for the net proceeds of that pledge to actually be received by the aggregator and then passed onto the customer. This length of time has proven to be too long for many digital content merchants, charities or relief efforts who wish to receive as much of their net pledges as quickly as possible.

To accelerate the distribution process, the aggregator, for a fee, typically takes all the transaction data it receives on a daily basis and calculates the net amount of funds that will eventually be collected from the mobile carriers, and then forwards a factor of the net total to the customer on a weekly basis. We are informed that typical forwarded amounts are between 60% and 80% of the "Outpayment" to which digital merchants are entitled after the network operator and the aggregator have deducted their own service fees.

Importantly, the aggregator only forwards a conservative factor (or percentage) of the anticipated net funds it expects to receive from the mobile carrier, preventing any overpayment, and it also charges a fee for the factoring service. Generally, overpayments can result from unexpected numbers of consumers disputing charges for third party content (such as political contributions) that they may see on their mobile phone bills. Network operators typically offer consumers liberal repudiation and refund policies. Overpayments can also result, although rarely, from technical inconsistencies arising between mobile operator and aggregator systems.

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But by offering the factoring option, the aggregator calculates a percentage to hold back and protect itself while allowing the customer to receive as much of its revenue as it can, as quickly as possible.

Interestingly, factoring -- the very same business method offered as an *option* to ordinary merchants to accelerate their payments -- can be made a *requirement* for political committees to comply with the forwarding requirements of the FECA. As the attached draft Service Order shows, political customers will be required to "tick" the "Factoring" option offered to ordinary merchants: not because they *need* the money quickly, but because they *must have the money* within the forwarding requirements of the Act.

As the attached Service Order demonstrates, a political committee must agree to pay a charge for the factoring of its mobile carrier billing contributions. For this fee, the committee will receive its share of its mobile phone contributions on a weekly basis of those texts being made. Simply put: the political committee will be receiving a factor of its contributions within days of the contribution being made, instead of waiting over a month after a phone bill is generated and paid. Importantly, this is not a new or free service being created for political committees. It is an existing optional service that is being made mandatory for political committees to ensure compliance with the Act.

In addition to the information presented above, there are more specific facts the Requestors have developed from their discussions with aggregators. For example, as reflected in the AO Request and the draft Service Order, aggregators typically offer to make factored payments on either a weekly or monthly basis. Political committee treasurers will likely wish to receive factored payments within 10 days of a pledge being made. We believe that typically they will opt to receive weekly payments and could therefore expect to receive payment within one to ten days of mobile pledges being made. For example, if a week of transactions runs from Saturday to Friday, normally an aggregator would make the factored payment for that week on the following Monday. So in that scenario, on Monday, January 10, the aggregator would make the factored payment for the pledge opt-ins that occurred from Saturday January 1 through Friday January 7.

Further, we have been informed that, depending on risk, volume, and the aggregator's capability, merchants can expect aggregators to factor anywhere between 50% and 90% of their full "outpayment" (amount finally paid to merchants after deducting the aggregator's and the operators' charges). The draft Service Order attached to this request uses a factor of 70%. These are examples and estimates demonstrating how factoring can be performed.

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In terms of the outpayments themselves, we are informed that they can range from 50% to 70% of the actual consumer charges, including all of the operators' fees, the aggregator's carriage rates, and the 3% factoring fee and the 5% managed opt-in fee reflected in the draft Service Order.

We have also found that the operators charge, generally speaking, more than the aggregators for processing the marketing campaigns and handling the transactions and communications. Those transaction percentages vary from operator to operator. They also vary with price point and volume. Some operators offer lower transaction fees for programs with low refund rates, or high measurements of customer satisfaction. Some operators also offer lower rates for certain merchants of services that they deem to be of high value to consumers, and use newer, less expensive direct billing connections rather than premium messaging.

It may help to look at the actual flow of funds, using a high and a low scenario, for an actual political campaign contribution program. If operators and aggregators view a political committee as presenting a high level of effort and customer support (like some premium text-alert programs) a committee could expect to receive 50 cents for every dollar donated. The aggregator would factor only 70%. So of that 50 cents, 35 cents would be paid immediately as the factored payment and (assuming full billability and no refunds or chargebacks) 15 cents would be paid after the aggregator receives payment from the operator.

In a best case scenario where carriers would view a political committees as a low-risk merchant who requires a low level of effort (analogous, for example, to large well-reputed software brands like Amazon or Google) that committee could receive as much as 70 cents on the dollar (including the aggregator's factoring, gateway and managed opt-in fees, and the carrier's transaction fees.) In that example, the aggregator may be able to factor 90% of the outpayment. So the political committee would actually receive 63 cents as a factored payment immediately with its weekly payments, and (assuming full billability and no refunds or chargebacks) the seven remaining cents once the aggregator receives payment from the operator.

Importantly, the carriers do not need to agree to the terms of the aggregators' factoring program. The operators have no role, and no privileges or powers over the aggregators regarding their factoring programs.

Third, we have found that there will be a reconciliation of the amount that has been factored, and the actual amount that the aggregator eventually receives from the operators. Merchants receive trailing payments on a monthly basis, typically within 30 days of when the aggregator receives

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payments from the operators.⁵ Political committees could expect the same treatment in the ordinary course of business.

Factoring is a financial transaction in which an entity sells its accounts receivable, in this case contribution pledges, to a third party, called a factor, at a discount in exchange for receiving the bulk of the funds on an expedited basis. Factoring is not a loan — it is the purchase of an asset. The Commission has historically allowed political committees to sell committee assets under certain circumstances. See Advisory Opinions 2003-19 (DCCC), 2002-14 (Libertarian National Committee), 1992-24 (Pilzer Committee), 1990-26 (Smith Committee), 1989-4 (Californians for Pate Wilson), 1986-14 (Dan Burton for Congress Committee), 1985-1 (Ratchford for Congress Committee) and 1979-24 (Friends of Senator Otterbacher).

In Advisory Opinion 2002-14, the Commission found that the Libertarian National Committee could rent its mailing list to an incorporated list broker on a commercial, arm's length basis without the lease of the mailing list resulting in a contribution by the list broker to the committee. The Commission found four factors to be important in determining that this commercial transaction was not an impermissible corporate contribution: (1) the list had been developed by the committee in the course of its political activities over a period of time and primarily for its own political or campaign purposes, (2) the leasing of the list constituted only a small percentage of the committee's use of the list, (3) the list had an ascertainable fair market value, and (4) the list was leased at the usual and normal charge in a bona fide arm's length transaction and was used in a commercially reasonable manner consistent with an arm's length transaction. See also Advisory Opinion 2003-19.

Three of those factors are present here. The contribution pledges will be obtained by political committees in the course of their political activities for campaign purposes, (2) the contribution pledges have an ascertainable fair market value determined by a contract between a political committee and an aggregator and (3) the contribution pledges will be sold to the aggregator at the normal and usual charge in a bona fide arm's length transaction and will be used in a commercially reasonable manner consistent with that transaction.

⁵ As with the initial factoring payments, these monies will be forwarded to the political committee customers within 10 days of receipt.

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Conclusion:

The mobile communications industry is advancing rapidly. If it is to be used to make political contributions, these new communications and billing channels must still, of course, fully comply with the regulatory requirements of many federal agencies, such as the FEC which is designed to ensure reporting of contributions over \$200 and protect the public from the potentially corrupting influence of large political donations.

And with all due respect for the Commission's 38-year-old statute: the FECA should be interpreted to keep pace with modern telecommunications technology, rather than trying to fit the digital mobile wireless industry into the time of rotary phones.

We believe mobile political contributions could have a dramatic democratizing effect on campaign finance. The mobile wireless industry has the ability to put political candidates and their supporters in nearly instant touch with each other. It can also process contributions quickly and accurately, using messaging – a communication that is transparent to the donor, the political committee, the aggregator, and mobile operator. And it includes straightforward means to place an absolute hard dollar cap of \$10 to \$50 dollars on what can be contributed by any mobile handset to any one campaign at any time.

A number of state election regulators, such as those in California and Maryland, have reviewed these new methods and issued advisory opinions permitting and even encouraging them. Further, the Commission's decision in Advisory Opinion 2010-23 may have been based on a limited number of facts or hypotheticals. In this case, the Requestors will be negotiating or implementing an actual pro forma Service Order with a nationwide messaging and billing aggregator for their political clients.

We are also now living in an era where much of our campaign finance system is coming under increasing criticism. The advent of multi-million dollar contributions to Super PACs have raised fears of the appearance of corruption. Amazingly, the future can take us back to the past: through modern day texting we can return to the days when candidates could receive a large number of small contributions rather than trying to raise a small number of large contributions.

The Commission should believe \$10 anonymous contributions do not pose a threat of corruption. The Commission should believe \$10 donations do not need to be investigated because each is inextricably linked to a single user's mobile phone number. The Commission should believe donors when they certify their contributions are lawful. If the Commission cannot believe these things, then it calls into question whether the Commission can believe *any* donation is lawful.

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Political committees and consulting firms today see the wireless industry bringing speed, information, entertainment, communications and even banking and bill paying into the hands of all businesses and consumers. The Commission should allow political committees, too, to have access to this amazing system that our nation has so enthusiastically embraced.

Sincerely,



Craig Engle

Brett G. Kappel
by CE

Brett G. Kappel



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**Special Service Order For Political Committees Complying with the
Federal Election Campaign Act [DRAFT ONLY]**

Customer			
Business Name:		State of Incorporation:	
Billing Address:			
City:		State:	Postal Code:
Contact:	Title:	Name:	
Business Phone:		Business Fax:	
Contact E-mail:		Mobile Number:	
Web Address:			
m-Qube Account Manager:			

Technical Contact	
Name:	E-mail:
Phone:	Mobile:
Notify of Outage: <input type="checkbox"/>	

Bank Payment Details	
Bank	
Bank Address:	
Account Name:	Contact Name for Remittance Address:
Account #:	Routing #/ Swift:

Service Details	
Service Name:	
Territory:	United States
Short Code:	
Number Type:	<input type="checkbox"/> Random Number <input type="checkbox"/> Vanity Number
Service Overview: (Provide a detailed overview of the service. The more detail supplied will help facilitate the connection.)	
Service Type / Product:	<input checked="" type="checkbox"/> m-Q gateway <input checked="" type="checkbox"/> mTrust



m-Qube

"POLITICAL CONTRIBUTION TO [NAME OF COMMITTEE]"		
Text to appear on bill:	This allows consumers to reference the charge against their purchase	
State Date:	End Date:	
Expected Monthly Volume:		
Additional Information:	Please provide any additional information that may assist in the connection of your premium SMS number across each Network Operator. Each service must be approved by each Network Operator and a detailed description assists in the speed of number set-up.	
Customer Support Phone:	Support E-mail:	Hrs of Operation:
Only applicable if you will be providing your own customer support service.		
Advertising:	<input checked="" type="checkbox"/> Web	<input checked="" type="checkbox"/> TV <input checked="" type="checkbox"/> Print

Terms and Conditions of Sale
m-Qube Standard Terms and Conditions
The m-Qube Standard Terms and Conditions form an integral part of this Service Order. The latest version is available from Customer's account representative.
Special Terms for Compliance with the Federal Election Campaign Act
<ol style="list-style-type: none"> Customer represents and warrants that it is registered as a political committee and in good standing with the Federal Election Commission or any other federal or similar state authority for all political campaigns that it serves. Customer acknowledges and agrees that Network Operators do and may place special restrictions and make special requirements of Programs promoting charitable giving or political giving. Those restrictions and requirements, as of this writing, are not published as part of the Mobile Marketing Association's Cross-Carrier Consumer Best Practices Guidelines. Nevertheless, as between Customer and m-Q, Customer is solely responsible for complying with them, and will indemnify, defend and hold m-Q harmless against any costs or damages relating to their violation. m-Q will use commercially reasonable efforts to apprise Customer of those restrictions and guidelines as the Network Operators provide them in writing to m-Q. Network Operators, or m-Q in its reasonable discretion, may require that m-Q pay Subscriber contributions directly to the intended, registered, political candidate or campaign organization. If Customer is not that intended recipient with respect to any Program, Customer will cooperate in good faith with m-Q, in each such event, to cause those organizations to reach an agreement with m-Q taking responsibility for Network Operator requirements, or assigning Customer's rights under this Agreement, in whole or in part, to the qualified contribution recipient. Each political committee can only receive donations through a single Short Code. M-Q is the exclusive provider of all Services with respect to each Short Code referenced in this Service Order. Each MSISDN may be billed up to no more than \$50 each month for each political committee. Customer is required to use the m-Trust platform exclusively for generating all PINs, composing and transmitting all PIN messages, confirming all PINs received from donors, and for administering all opt-ins by all other means including but not limited to mobile-handset-originated keyword messages received from donors. Customer is solely responsible for its compliance with all applicable federal laws including without limitation those regarding the solicitation, acceptance, record-keeping, reporting, contribution limits or prohibitions,



m-Qube

and donor certification requirements of the Federal Election Campaign Act.

- 8. Customer will seek the certification of a donor that his or her pledge is in compliance with the Federal Election Campaign Act.

Dispute Resolution

Note: Per the m-Qube Standard Terms and Conditions, all disputes relating to this Service Order will be resolved exclusively by private confidential arbitration in Los Angeles, CA, with attorneys fees and costs awarded to the prevailing party. m-Q and Customer waive their right to a trial by jury of any dispute.

CUSTOMER ACCEPTANCE (to be signed by a person authorized to bind Customer to obligations)

The m-Qube Standard Terms and Conditions govern this Service Order and the provision of all Services, except as expressly stated. The Customer agrees to comply with all relevant industry legislation, regulations and best practices codes including but not limited to the Mobile Marketing Association Consumer Best Practices Guidelines and Mobile Operator Guidelines and the rules of CTIA relating to the promotion of Short Codes and Services.

m-Qube, Inc.

By: _____
 Name: _____
 Title: _____
 Date: _____

[Customer Full Legal Name] ("Customer")

By: _____
 Name: _____
 Title: _____
 Date: _____



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SCHEDULE 1 - FEES SCHEDULE

SET UP AND MONTHLY FEES

Product	Set-up Fee	Monthly Fee
Account Service	xxx	xxx
Random	xxx	xxx
Vanity	xxx	xxx
Service Change	xxx	xxx

Set-up fees (if applicable) will be due upon receipt of Service Order.

Monthly fees will be due monthly from receipt of Service Order.

Random Short Codes are those that are randomly allocated.

Vanity Short Codes are those that are specifically requested. There is no guarantee a particular vanity code is available.

SERVICE FEES AND CHARGES (CHARGED ON PREMIUM PRICE POINT)

Product	Charge (%) per msg*	Charge (\$) per msg	Description
mTrust (opt-in control service)	7%	\$0.00	mTrust Engine
customer care	2%	\$0.00	m-Q Customer Care Center

* "Charge (%) per msg" and "Charge (\$) per msg" are aggregated.

"Charge (%) per msg" in the table above refers to the service fee that will be deducted from the Outpayment based on the specific percentage of Retail Revenue.

"Charge (\$) per msg" in the table above refers to the additional flat fee charged per message.

PASS-THROUGH FEES

In the event that there are other Short Code set-up or leasing charges levied on m-Q by Network Operators or Short Code service providers which are associated with the Customer's messaging traffic, then such charges, if any, will be passed through to Customer at the same rate charged to m-Q by the service provider, and Customer agrees to pay such charges. Pass-through Fees may change from time to time and may include interest or exchange rate differential, if applicable.

Item	Amount	Description
Mobile Operator X	XXX	XXX
Mobile Operator X	XXX	XXX
Mobile Operator X	XXX	XXX



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FORWARDING OF FACTORED DONATIONS

% of Outpayment	Days After Calendar Week in Which Payment is Due	Forwarding Fee
70%	20	3.0%
ELECTION FOR FACTORING		<input checked="" type="checkbox"/> FACTORING SERVICE IS MANDATORY FOR ALL POLITICAL COMMITTEE PROGRAMS.

For the avoidance of doubt, as of this writing, the m-Q standard terms state, in pertinent part:

1.26. "Forwarding Fees" means the fees or reduction in Outpayment charged Customer for being paid a factor of Outpayments.

8. Factoring

- 8.1 If set forth in the Service Order, m-Q may pay Customer a monthly amount out of expected Outpayments (a "Factor"). The amount of the Factor will be expensed as a percentage of the Outpayment amount, and will entail reducing Outpayments by the amount of a Forwarding Fee, which m-Q will deduct from each factored amount made to Customer. The Forwarding Fee is stated in the Service Order, and if it is not stated there, then it will be m-Q's then current Forwarding Fee for programs of the type that customer operates by means of the services.
- 8.2 Customer will receive the balance of any Outpayment due to it (after deduction of forwarded amounts) in accordance with the terms of the Service Order.
- 8.3 m-Q decides upon the factored amount based on a number of factors in its ordinary course of business that may be outside the control of the Customer including perceived risks on liabilities associated with the programs, and the availability of funds to provide the factored donations. All amounts are made in the sole discretion of m-Q and may be suspended or terminated at any time in m-Q's sole and absolute discretion, with or without notice to customer. If m-Q stops providing customers with factored donations, it may require customer to provide a security deposit to m-Q to guard against overpayments before the program is re-started. The amount and terms of any security deposit is in the sole and absolute discretion of m-Q.
- 8.4 In the event that Customer's outstanding Factors ever exceed the Outpayments due to Customer, then Customer is not permitted to terminate the Agreement, or transfer the Services, Programs or any Short Codes, away from M-Q until such time as the unpaid Outpayments exceed those forwarded Factors, or Customer has otherwise repaid the full amount to m-Q.
- 8.5 If, after m-Q has forwarded Factors, m-Q is subsequently charged an Adjustment by a Network Operator that exceeds the total amount then owed by m-Q to Customer, m-Q may require a replacement of the Factor, and Customer will make such replacement to m-Q within 30 days.



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*Outpayments***

[OUTPAYMENT TABLE IS INSERTED HERE]

** The figures in this section are based entirely on currently existing Network Operator revenue share levels, and costs and fees at the time of this writing. All of those variable costs are outside m-Q's control and are subjected to change. Upon 30 days' written notice to Customer, m-Q may change these figures in direct proportion to changes that Network Operators make in the revenue share levels that they commit to m-Q. Those changes will only be retroactive to the extent that Network Operators make their changes on m-Q retroactively.

m-Qube CONFIDENTIAL
Service Order US



"Engle, Craig"
 <Engle.Craig@ARENTFOX.COM>

04/11/2012 09:31 AM

To "TLutz@fec.gov" <TLutz@fec.gov>

cc

bcc

Subject Re: Advisory Opinion Request

History: This message has been forwarded.

Who	Date	Time	Subject
engle.craig	04/10/2012	07:24 PM	Advisory Opinibn Request

Yes you are correct

Thank you

From: TLutz@fec.gov [mailto:TLutz@fec.gov]

Sent: Tuesday, April 10, 2012 07:24 PM

To: Engle, Craig

Cc: Kappel, Brett

Subject: Advisory Opinion Request

Dear Mr. Engle:

In our recent telephone conversations, you provided us with additional information regarding the advisory opinion request submitted on behalf of Red Blue T, LLC and ArmourMedia, Inc. We have set out below our understanding of certain issues covered during the conversation. Please either confirm the accuracy of these statements or correct any misperceptions.

1. m-Qube, Inc. is now also a party to the request.

2. Under the proposal, m-Qube will provide services to political committees to enable the use of mobile phone text messaging to process contributions. The proposal envisions the use of text messaging in two ways. Both methods require a mobile phone user to make a "two-factor authorization," as required in the wireless service industry, and to certify his or her eligibility to make a contribution under the Act. In the first method, the user will text a pre-determined message to a common short code. m-Qube, the connection aggregator, will respond to the user via text message and require that the user confirm via text message the transaction and certify his or her eligibility under the Act and Commission regulations to make a contribution. Alternatively, a contributor may enter his or her phone number on a political committee website in lieu of a credit card number. Prior to submitting the phone number, the user will be required to certify his or her eligibility to make a contribution under the Act. After making the certification and submitting his or her phone number, m-Qube will transmit to the user's mobile phone a text message that includes a PIN. The user will enter the PIN on the political committee's website to confirm the transaction.

Please respond by email. Your response may be treated as a supplement to the advisory opinion.

request; as such, it may be placed on the public record along with your letter dated April 5, 2012 and the attachment labeled "m-Qube CONFIDENTIAL Service Order US."

Thank you for your cooperation.

Theodore M. Lutz
Office of General Counsel, Policy Division
Federal Election Commission
tlutz@fec.gov
(202) 694-1650

IRS Circular 230 disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that, unless expressly stated otherwise, any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.