

PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS

Members of the public may submit written comments on draft advisory opinions.

DRAFTS A and B of ADVISORY OPINION 2012-17 are now available for comment. They were requested by Craig Engle, Esq., and Brett G. Kappel, Esq., on behalf of Red Blue T LLC, Armour Media, Inc., and m-Qube, Inc., and are scheduled to be considered by the Commission at its public meeting on May 24, 2012. The meeting will begin at 10:00 a.m. and will be held in the 9th Floor Hearing Room at the Federal Election Commission, 999 E Street, NW, Washington, DC. Individuals who plan to attend the public meeting and who require special assistance, such as sign language interpretation or other reasonable accommodations, should contact the Commission Secretary, at (202) 694-1040, at least 72 hours prior to the meeting date.

If you wish to comment on DRAFTS A and B of ADVISORY OPINION 2012-17, please note the following requirements:

- 1) Comments must be in writing, and they must be both legible and complete.
- 2) Comments must be submitted to the Office of the Commission Secretary by hand delivery or fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel by hand delivery or fax ((202) 219-3923).
- 3) Comments must be received by 9 a.m. (Eastern Time) on May 24, 2012.
- 4) The Commission will generally not accept comments received after the deadline. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.
- 5) All timely received comments will be made available to the public at the Commission's Public Records Office and will be posted on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

REQUESTOR APPEARANCES BEFORE THE COMMISSION

The Commission has implemented a pilot program to allow advisory opinion requestors, or their counsel, to appear before the Commission to answer questions at the open meeting at which the Commission considers the draft advisory opinion. This program took effect on July 7, 2009.

Under the program:

- 1) A requestor has an automatic right to appear before the Commission if any public draft of the advisory opinion is made available to the requestor or requestor's counsel less than one week before the public meeting at which the advisory opinion request will be considered. Under these circumstances, no advance written notice of intent to appear is required. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2).
- 2) A requestor must provide written notice of intent to appear before the Commission if all public drafts of the advisory opinion are made available to requestor or requestor's counsel at least one week before the public meeting at which the Commission will consider the advisory opinion request. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2). The notice of intent to appear must be received by the Office of the Commission Secretary by hand delivery, email (Secretary@fee.gov), or fax ((202) 208-3333), no later than 48 hours before the scheduled public meeting. Requestors are responsible for ensuring that the Office of the Commission Secretary receives timely notice.
- 3) Requestors or their counsel unable to appear physically at a public meeting may participate by telephone, subject to the Commission's technical capabilities.
- 4) Requestors or their counsel who appear before the Commission may do so only for the limited purpose of addressing questions raised by the Commission at the public meeting. Their appearance does not guarantee that any questions will be asked.

FOR FURTHER INFORMATION

Press inquiries: Judith Ingram
Press Officer
(202) 694-1220

Commission Secretary: Shawn Woodhead Werth
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Comment Submission Procedure: Kevin Deeley
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Other inquiries:

To obtain copies of documents related to Advisory Opinion 2012-17, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at <http://saos.nictusa.com/saos/searchao>.

ADDRESSES

Office of the Commission Secretary
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Washington, DC 20463

Office of General Counsel
ATTN: Kevin Deeley, Esq.
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AGENDA DOCUMENT NO. 12-39



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May 23, 2012

MEMORANDUM

AGENDA ITEM

TO: The Commission

FROM: Anthony Herman *AH*
General Counsel

Kevin Deeley *KD*
Acting Associate General Counsel

Amy Rothstein *AR*
Assistant General Counsel

Theodore Lutz *TL*
Attorney

Subject: AO 2012-17 (Red Blue T LLC, Armour Media, Inc., and
m-Qube, Inc.) (Drafts A and B)

For Meeting of 5-24-12

SUBMITTED LATE

Attached are proposed drafts of the subject advisory opinion. We have been asked to have these drafts placed on the Open Session agenda for May 24, 2012.

Attachment

1 **ADVISORY OPINION 2012-17**

2 Craig Engle, Esq.
3 Brett G. Kappel, Esq.
4 Arent Fox LLP
5 1050 Connecticut Avenue, NW
6 Washington, DC 20036-5339
7

DRAFT A

8 Dear Messrs. Engle & Kappel:

9 We are responding to your advisory opinion request on behalf of Red Blue T LLC
10 ("Red Blue T"), ArmourMedia, Inc. ("ArmourMedia"), and m-Qube, Inc. ("m-Qube"),
11 concerning the application of the Federal Election Campaign Act of 1971, as amended
12 (the "Act"), and Commission regulations to their proposal to use text messaging to raise
13 funds for political committees. The requestors ask whether their proposal (1) satisfies the
14 recordkeeping and reporting requirements of 2 U.S.C. 432(c); (2) satisfies the segregation
15 requirements for commercial vendors that process political contributions; (3) conforms to
16 the prohibition on corporate contributions at 2 U.S.C. 441b; and (4) complies with the
17 forwarding requirements of 2 U.S.C. 432(b).

18 The Commission concludes that the proposal conforms to the prohibition on
19 corporate contributions at 2 U.S.C. 441b, but it does not satisfy the recordkeeping and
20 reporting requirements of 2 U.S.C. 432(c). In addition, certain aspects of the proposal do
21 not conform to the forwarding requirements of 2 U.S.C. 432(b) or the segregation
22 requirement for commercial vendors that process political contributions.

23 ***Background***

24 The facts presented in this advisory opinion are based on your letter received on
25 April 6, your email of April 11, the additional information you provided on May 21,
26 2012, and on publicly available information.

1 Red Blue T and ArmourMedia are political and media consulting firms that advise
2 and represent political committees, including candidates and candidate committees.
3 m-Qube is a corporate aggregator of business-to-consumer messaging and merchant
4 billing for public wireless service providers. It operates direct interconnection gateways
5 with all of the nation's major public wireless service providers.¹

6 m-Qube proposes to enter into agreements with political committees, under which
7 it would provide its services as an aggregator to process contributions made to the
8 political committees via text messaging. The proposal envisions the use of text
9 messaging to make contributions in two ways. In the first method, a wireless user² would
10 text a pre-determined message to a common short code³ registered to a political
11 committee. m-Qube, as the connection aggregator, will respond to the user via text
12 message and require the user to respond with his or her own text message to (1) confirm
13 the user's intent to engage in the transaction, and (2) certify the user's eligibility to make
14 a contribution under the Act and Commission regulations.

¹ The requestors rely on the description of the mechanics of the wireless industry in Advisory Opinion 2010-23 (CTIA – The Wireless Association). As presented in that advisory opinion, content providers, application providers, connection aggregators, and wireless service providers work together to enable wireless users to access content through the use of mobile phone text messages. Content providers (such as the Red Cross) disseminate content to, or collect information or pledges from, wireless users. Application providers convert the text messages received into data that can be interpreted and used by content providers. Connection aggregators link application providers to wireless service providers' networks. Wireless service operators are the companies from which wireless subscribers purchase their mobile phone service.

² In Advisory Opinion 2010-23 (CTIA – The Wireless Association), the Commission distinguished between the terms "wireless subscriber" and "wireless user." A "wireless subscriber" refers to an individual who a wireless service provider bills; a "wireless user" refers to a broader category of individuals, who are included in the subscriber's billing plan, including, for example, a family or group plan and therefore are not directly responsible for payment to the "wireless service provider."

³ A common short code is a five- or six-digit number to which wireless users can send text messages to access mobile content.

1 Under the second proposed method, a user would enter his or her mobile phone
2 number on a political committee's website in lieu of a credit card number. Before
3 submitting the phone number, the user will be required to certify his or her eligibility to
4 make a contribution under the Act. After the user makes the certification and submits the
5 phone number, m-Qube will transmit to the user's mobile phone a text message that
6 includes a PIN. The user will enter the PIN on the political committee's website to
7 confirm the transaction.

8 Both of these methods require a wireless user to (1) confirm that the user intends
9 to engage in the transaction, and (2) certify that the user is eligible to make contributions
10 under the Act and Commission regulations. Once the user has completed both of these
11 steps, the user has completed the "opt-in" process. Wireless service providers and
12 connection aggregators would not forward contributors' names and addresses to recipient
13 political committees.

14 m-Qube proposes to enter into service orders with political committee customers,
15 the basic terms of which are the same as those it offers to customers other than political
16 committees in the ordinary course of its business. In addition, for political committee
17 customers, m-Qube proposes to add special terms to the service order that would include
18 the following requirements: each political committee customer must be registered "and in
19 good standing" with the Commission and relevant State authorities; each political
20 committee customer must receive contributions through a single short code per election,
21 with m-Qube as the exclusive provider of services for that short code; no mobile phone
22 number may be billed more than \$50 per month for contributions to any one political
23 committee customer; each political committee customer must seek certifications from

1 wireless users that the users are eligible to make contributions under the Act and
2 Commission regulations; and each political committee customer must use m-Qube's
3 "factoring" service.

4 The requestors describe "factoring" as a financial transaction in which an entity
5 (here, a political committee) sells its accounts receivable to a third party (here, m-Qube)
6 at a discount in exchange for receiving a percentage (or "factor") of its outpayment on an
7 expedited basis.⁴ m-Qube currently offers factoring as an optional service in exchange
8 for a fee to customers that wish to receive a portion of their outpayments more quickly
9 than the normal industry payment process would allow.⁵ For political committee
10 customers, factoring would be required.

11 The factoring process begins with an assessment by m-Qube of the transaction
12 data that it has received on a daily basis, and a calculation of the net amount of funds that
13 will eventually be collected from the mobile service providers. m-Qube takes into
14 account certain variables "in [the] ordinary course of business . . . including perceived
15 risk on liabilities associated with the programs, and the availability of funds to provide
16 the factored donations" to arrive at an appropriate factored payment amount. m-Qube
17 states that it will calculate and transmit a "conservative" factor to political committees to
18 protect against overpayments. Under its service order as currently drafted, m-Qube may

⁴ An "outpayment" is the total amount that a recipient content provider is entitled to receive after all fees have been deducted by the wireless service providers and connection aggregators. A "factor" is a reduced percentage of the outpayment. A typical outpayment will range between 50 and 70 percent of the consumer charges, and a typical factor will range between 50 and 90 percent of the total outpayment.

⁵ Advisory Opinion 2010-23 (CTIA – The Wireless Association) describes the usual billing process in the wireless industry when connection aggregators are used to enable access to mobile content. Each wireless service provider transmits payments from wireless subscribers to connection aggregators seven to ten days after receipt by the wireless service providers. The connection aggregators then collect all funds flagged for a particular recipient from all the wireless service providers over a 30-day period and transmit those funds to recipient content providers.

1 suspend or terminate factored payments at any time, with or without notice to its
2 customers, and may require its customers to provide a security deposit to guard against
3 overpayments before restarting the payments.⁶ If a customer receives factored payments
4 that exceed the amount of outpayments due to it, the customer may not terminate the
5 service order or transfer services, programs, or short codes from m-Qube until it has
6 repaid m-Qube. Similarly, if m-Qube is charged an adjustment by a "Network Operator"
7 that exceeds the total amount owed by m-Qube to its customer, m-Qube may require the
8 customer to repay the factored payment to m-Qube. m-Qube proposes to adhere to these
9 standard terms for its political committee customers.

10 m-Qube plans to transmit factored payments to political committee customers on
11 a weekly basis.⁷ For example, m-Qube would assess all of the opt-ins that it received
12 between Day 1 and Day 7 and, based on that data, transmit a factored payment on Day
13 10. m-Qube does not propose to identify any of the wireless users whose opt-ins it
14 analyzes as part of the factoring process or to transmit their names and addresses to
15 political committee customers, consistent with its current practice for customers that are
16 not political committees.

17 After m-Qube receives payment from wireless service providers, m-Qube's
18 current practice is to reconcile the amount that it has provided to its customers as factored
19 payments and the actual outpayment that each customer is entitled to receive. Typically,

⁶ An overpayment may result from unexpected numbers of consumers disputing charges for third party content, such as contributions initiated through short codes. "Technical inconsistencies" between wireless service providers and aggregators can also result in overpayments.

⁷ The request states that a "committee will receive its share of its mobile phone contributions on a weekly basis of those texts being made." The request also states that committees will "typically . . . opt to receive weekly payments and could therefore expect to receive payment within one to ten days of mobile pledges being made." The Commission understands these statements to mean that m-Qube will transmit factored payments each week.

1 m-Qube transmits these “trailing payments” within 30 days after it receives payment
2 from the wireless service providers, but m-Qube proposes to transmit trailing payments to
3 its political committee customers within ten days after receipt. Consistent with its current
4 practice for customers that are not political committees, m-Qube does not propose to
5 segregate the trailing payments to political committee customers from its general
6 corporate treasury funds or to provide the payors’ names and addresses to the political
7 committees. The trailing payments, however, will be linked to a short code associated
8 with a particular political committee, and m-Qube represents that this link, in conjunction
9 with the requirement that each political committee only register one short code, ensures
10 that contributions are segregated from corporate treasury funds.

11 ***Questions Presented***

- 12 1. *Does the proposal described above satisfy the recordkeeping and reporting*
13 *requirements of 2 U.S.C. 432(c)?*
- 14 2. *Does the proposed commercial transaction of factoring of political contributions,*
15 *when it is performed by an aggregator in its ordinary course of business, conform*
16 *with the requirements of 2 U.S.C. 441b?*
- 17 3. *If the answer to Question 2 is “yes,” does the proposed method of factoring*
18 *comply with the forwarding requirements of 2 U.S.C. 432(b)?*
- 19 4. *Does the proposal described above satisfy the segregation requirements the*
20 *Commission has placed on commercial vendors that process political*
21 *contributions?*

1 ***Legal Analysis and Conclusions***

2 1. ***Does the proposal described above satisfy the recordkeeping and reporting***
3 ***requirements of 2 U.S.C. 432(c)?***⁸

4 No, the proposal described above does not satisfy the recordkeeping and reporting
5 requirements of 2 U.S.C. 432(c).

6 ***a. Reporting and Recordkeeping Requirements***

7 The Act and Commission regulations impose certain requirements on treasurers of
8 political committees and anyone receiving contributions for political committees. A
9 treasurer of a political committee must “keep an account of (1) all contributions received
10 by or on behalf of such political committee; (2) the name and address of any person who
11 makes any contribution in excess of \$50, together with the date and amount of such
12 contribution by any person; [and] (3) the identification of any person who makes a
13 contribution or contributions aggregating more than \$200 during a calendar year, together
14 with the date and amount of any such contribution.” 2 U.S.C. 432(c)(1)-(3); *see also* 11
15 CFR 110.4(c).

16 m-Qube proposes to meet these requirements by imposing a \$50 limit on the
17 amount that can be billed each month to a mobile phone number for contributions
18 pledged to a political committee customer. The \$50 limit, however, does not ensure that
19 political committees can meet their obligations under 2 U.S.C. 432(c)(2).

⁸ The Commission responds only with respect to m-Qube’s proposed activities. The proposal in the advisory opinion request does not refer to “a specific transaction or activity” by Red Blue T and ArmourMedia. 2 U.S.C. 437f(a)(1); 11 CFR 112.1(b); *see also* Advisory Opinion 1989-25 (New Hampshire Republican State Committee) (serving as a recruiter of and advisor to Federal candidates and their committees does not meet the requirements of 11 CFR part 112).

1 Commission regulations provide that “a contribution shall be considered to be
2 made when the contributor relinquishes control over the contribution.” 11 CFR
3 110.1(b)(6). In the context of contributions pledged via text message, the Commission
4 has determined that a contribution is made when “the wireless subscriber pays the bill,”
5 not when the pledge is made. Advisory Opinion 2010-23 (CTIA – The Wireless
6 Association). Under your proposal, within the context of family and group plans, several
7 users could each pledge to make a contribution of up to \$50 per month, each of which
8 would appear on a single subscriber’s bill and be paid by the wireless subscriber. *Id.*
9 Thus, while each mobile number may be billed no more than \$50 for contributions to any
10 given political committee per month, the value of all contributions for that political
11 committee paid by a wireless subscriber with a family or group plan could exceed \$50
12 per month. The subscriber, therefore, would make a contribution of more than \$50 when
13 paying the monthly bill. And in such circumstances, the treasurer of the recipient
14 political committee must record the wireless subscriber’s name and address and the
15 “identification of any person who makes a contribution or contributions aggregating more
16 than \$200 during a calendar year.”⁹ 2 U.S.C. 432(c)(2)-(3).

⁹ Contributions by text message are not “truly anonymous contributions,” in contrast to small cash contributions collected through “mass collection” or “pass the hat” scenarios. Advisory Opinion 1991-20 (Call Interactive). In the latter scenarios, “[f]ew people [are] expected to attend more than one [such] event,” and thus the likelihood of circumventing the Act’s amount limitations, source prohibitions, and reporting requirements through multiple, small-dollar cash contributions is low. *Id.* (distinguishing Advisory Opinion 1980-99 (Republican Round-up Committee)). Under m-Qube’s proposal, however, even a wireless subscriber who pays only his or her own pledges could contribute up to \$50 to a political committee each month under the proposal, or up to \$600 each year, that the recipient political committee has no way to screen for illegality, aggregate with other contributions made by the contributor, or disclose to the public. The Act’s anti-circumvention concerns are heightened here given the amount of funds at issue and the ease with which a contribution may be made. If, for example, only three to five percent of adult Americans contribute \$10 to political committees by text message in an election cycle, as compared to nine percent of adult Americans who have donated to charities by text message, see Aaron Smith, *Real Time Charitable Giving*, PEW RESEARCH CENTER’S INTERNET & AMERICAN LIFE PROJECT (Jan. 12, 2012), political committees could raise approximately \$70-\$117 million through text messages per election cycle.

1 ***b. Screening Requirements***

2 Related to the provisions of 2 U.S.C. 432(c), treasurers of political committees
3 also must “examin[e] all contributions received for evidence of illegality and for
4 ascertaining whether contributions received, when aggregated with other contributions
5 from the same contributor, exceed the [Act’s] contribution limitations.” 11 CFR
6 103.3(b).

7 The Commission explained in Advisory Opinion 2010-23 (CTIA – The Wireless
8 Association) that, “although it is ultimately the responsibility of the political committee
9 to obtain the identity of contributors and to prevent excessive and prohibited
10 contributions, when presented with information raising questions as to the legality of a
11 contribution, to ensure the committee can meet its obligations, it is incumbent upon the
12 service provider to forward the appropriate information.” Advisory Opinion 2010-23
13 (CTIA – The Wireless Association) (internal citations and quotations omitted).

14 Neither the \$50 limit nor the certifications that m-Qube proposes to require
15 political committee customers to seek from mobile users will suffice to prevent excessive
16 and prohibited contributions. If, for example, a bill indicates that a wireless subscriber is
17 a corporation, a government contractor, or has a foreign address, m-Qube “would be
18 required to forward to the recipient committee the information required by 2 U.S.C.
19 432(b) and (c).” *Id.* Failing to do so could prevent a political committee from meeting

<http://pewinternet.org/Reports/2012/mobilegiving.aspx> (estimating that nine percent of American adults have donated to charity via text message); Lindsay M. Howden & Julie A. Meyer, *2010 Census Briefs: Age and Sex Composition 2010*, U.S. CENSUS BUREAU (May 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf> (calculating the number of adults in the United States at approximately 235 million); see also *The ANES Guide to Public Opinion and Electoral Behavior*, THE AM. NAT’L ELECTION STUDIES (Aug. 5, 2010), http://www.electionstudies.org/nesguide/toptable/tab6b_5.htm (concluding that 13 percent of Americans “[gave] money to help a campaign” in 2008).

1 its obligations under the Act and Commission regulations.¹⁰ m-Qube's proposal does not
2 enable political committees to meet these obligations.

3 Accordingly, for the reasons stated above, the proposal described above does not
4 satisfy the recordkeeping and reporting requirements of 2 U.S.C. 432(c).

5 2. *Does the proposed commercial transaction of factoring of political contributions,*
6 *when it is performed by an aggregator in its ordinary course of business, conform*
7 *with the requirements of 2 U.S.C. 441b?*

8 Yes, the proposed commercial transaction of factoring of political contributions,
9 when it is performed by an aggregator in its ordinary course of business, conforms with
10 the requirements of 2 U.S.C. 441b.

11 The Act and Commission regulations prohibit corporations from making a
12 contribution in connection with a Federal election. *See* 2 U.S.C. 441b(a);
13 11 CFR 114.2(b)(1). A contribution includes "any gift, subscription, loan, advance, or
14 deposit of money or anything of value made by any person for the purpose of influencing
15 any election for Federal office." 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a); *see also*
16 2 U.S.C. 441b(b)(2); 11 CFR 114.2(b)(1). "Anything of value" includes all in-kind
17 contributions, including the provision of goods or services without charge or at a charge
18 that is less than the usual and normal charge. *See* 11 CFR 100.52(d)(1). "Usual and
19 normal charge" is defined as "the price of goods in the market from which they ordinarily
20 would have been purchased at the time of the contribution, or the commercially

¹⁰ *See* Advisory Opinion 2009-32 (Jorgensen) ("The political committee, not the vendor, is responsible for determining the legality of contributions, as well as determining whether contributions, when aggregated with other contributions from the same contributors, exceed the contribution limits.").

1 reasonable rate prevailing at the time the services were rendered.” *See*

2 11 CFR 100.52(d)(2).

3 After wireless users have completed an opt-in to pledge funds to a political
4 committee, but prior to any receipt of a contribution, m-Qube will transmit funds from its
5 corporate treasury to political committee. m-Qube proposes to recoup its funds once
6 subscribers have paid their bills and the wireless service providers have transmitted those
7 payments, net of fees, to m-Qube. m-Qube’s proposal to make factored payments is not
8 an exclusive service for its political committee customers; rather, m-Qube offers the same
9 service on the same terms to its non-political customers, except that, unlike non-political
10 committee customers who may elect not to avail themselves of factoring, factoring
11 would be mandatory for political committee customers.

12 As m-Qube does with its non-political customers, it would employ extensive
13 safeguards to avoid making excessive factored payments. m-Qube will calculate and
14 transmit a “conservative” factor to political committees, and it will reevaluate the
15 potential risks of making factored payments on a weekly basis. Under the terms of its
16 service order, m-Qube may suspend or terminate factored payments at any time, with or
17 without notice to its customers, and may require its customers to provide a security
18 deposit to guard against overpayments before restarting the payments. If a customer
19 receives factored payments that exceed the amount of outpayments due to it, the customer
20 may not terminate the service order or transfer services, programs, or short codes from m-
21 Qube until it has repaid m-Qube. Similarly, if m-Qube is charged an adjustment by a
22 Network Operator that exceeds the total amount owed by m-Qube to its customer, m-
23 Qube may require the customer to repay the factored payment to m-Qube.

1 The Commission concludes that m-Qube's proposal to make factored payments
2 to its political committee customers on the same terms that it regularly offers to its
3 commercial customers would be a permissible extension of credit by m-Qube in the
4 ordinary course of business. Under the Act and Commission regulations, an incorporated
5 commercial vendor may extend credit to political committees under terms substantially
6 similar to those the vendor offers nonpolitical debtors. *See* 11 CFR 116.3(b), (c). m-
7 Qube is a "commercial vendor" because its usual and normal business involves the
8 provision of the same services that it proposes to provide to political committees.
9 11 CFR 116.1(c). An "extension of credit" includes, but is not limited to, "[a]ny
10 agreement between the creditor and political committee that full payment is not due until
11 after the creditor provides goods or services to the political committee." 11 CFR
12 116.1(e).¹¹

13 The Commission approved a proposal similar to m-Qube's factoring proposal in
14 the 900-line advisory opinions.¹² In Advisory Opinion 1990-14 (AT&T), for example,

¹¹ What comprises a true purchase of accounts receivable is not always readily apparent, and therefore the distinction between true factoring and another form of financial transaction "can be blurred." *Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co.*, 336 F.3d 410, 416 (5th Cir. 2003). When making this determination, courts have tended to engage in highly fact- and transaction-specific analyses to determine whether the creditor or debtor has assumed the risk of non-payment. *See, e.g., Nickey Gregory Co. v. Agricap, LLC*, 596 F.3d 591, 600-03 (4th Cir. 2010) (holding that a transaction was not a true purchase of accounts receivable because the "substantive aspects of the transaction are inconsistent with an outright sale of the assets"); *Endico Potatoes, Inc. v. CIT Grp.*, 67 F.3d 1063, 1068 (2nd Cir. 1995) (analyzing "the substance of the transaction," rather than "the label attached to the transaction"). The recipient political committees appear to assume the risk of nonpayment under m-Qube's proposal because the factoring agreement gives m-Qube broad discretion to suspend or terminate factored payments, to require deposits and to determine their amounts, to withhold overpayments, and to demand repayment from political committees when it is charged an adjustment by service providers. It is, however, not necessary for the Commission to make such a determination here because m-Qube's proposal falls within the definition of an extension of credit under the Commission's regulations.

¹² Advisory Opinion 1990-14 (AT&T) is part of a line of advisory opinions that analyzed the use of 900-lines for raising contributions for political committees. These advisory opinions involved complex transactions between corporations and political committees. *See, e.g.,* Advisory Opinion 1990-01 (Digital

1 the Commission considered whether a proposal under which contributors would call a
2 900-line to make contributions to political committees, and AT&T would provide funds
3 to the political committees (through a service bureau) before the contributors paid their
4 phone bills, would "implicate [AT&T] in making an unlawful advance of corporate funds
5 to a political committee." The Commission concluded that it would not, stating that,
6 "[a]s long as AT&T, or any other company providing service to AT&T in connection with its
7 . . . service, provides its usual and normal services at its usual and normal charges it will not,
8 in most circumstances, have made a prohibited corporate contribution." To guard against
9 making an unlawful advance of corporate funds, the Commission stated that AT&T
10 "should not remit funds . . . if it appears that, because of an adverse event, callers may
11 refuse to make payments." The Commission explained that this precaution was
12 consistent with AT&T's service agreements, in which AT&T reserved the right to
13 terminate the agreement or billing services "if it determines, in its sole discretion, that its
14 image would be adversely affected or its reputation or goodwill damaged by the
15 continued offer of billing services." *Id.*

16 Similarly, in Advisory Opinion 1979-36 (Fauntroy), the Commission approved a
17 proposal in which an incorporated direct mail fundraising firm would incur initial
18 expenses in implementing a direct mail fundraising program for a political committee.
19 Funds generated by the direct mail campaign would be deposited in the political
20 committee's account, and the political committee would use those funds to pay the
21 corporation for its costs and fees. *Id.* If the campaign was less successful than

Corrections). Generally, political committees contracted with service bureaus to provide 900-line services. Callers dialed a 900-line number maintained by the service bureau. The service bureaus, in turn, contracted with telephone common carriers, such as AT&T, to receive access to telephone circuits and billing services. *Id.*

1 anticipated, the political committee would not be entitled to any funds until the
2 corporation had recouped its costs and fees. *Id.* The Commission approved the proposal,
3 provided that the financial agreement between the corporation and the political committee
4 “is of a type which is normal industry practice and contains the type of credit which is
5 extended in the ordinary course of [the corporation’s] business with terms which are
6 substantially similar to those given to nonpolitical, as well as political, debtors of similar risk
7 and size of obligation,” and the costs charged by the corporation to the political committee
8 “are at least the normal charge for services of that type.” *Id.*

9 Accordingly, because m-Qube’s factored payments will be extensions of credit
10 under 11 CFR part 116 and otherwise consistent with prior Commission interpretations of
11 2 U.S.C. 441b, the proposed commercial transaction of factoring of political
12 contributions, when as here it is performed by an aggregator in its ordinary course of
13 business, conforms with the requirements of 2 U.S.C. 441b.

14 3. *If the answer to Question 2 is “yes,” does the proposed method of factoring*
15 *comply with the forwarding requirements of 2 U.S.C. 432(b)?*

16 The proposed method of factoring does not implicate the forwarding requirements
17 of 2 U.S.C. 432(b) because factoring does not involve the forwarding of contributions.
18 The proposed method of making trailing payments of contributions to authorized
19 committees, however, and of contributions exceeding \$50 to unauthorized committees,
20 does not comply with the forwarding requirement of 2 U.S.C. 432(b).

21 *a. Timeline Requirements*

22 Any person who receives a contribution for an authorized political committee
23 must forward the contribution to the political committee’s treasurer within ten days of

1 receipt. 2 U.S.C. 432(b)(1); 11 CFR 102.8(a). Any person who receives a contribution
2 for a political committee that is not an authorized committee must forward the
3 contribution to the political committee within 30 days of receipt if the contribution is \$50
4 or less, and within ten days of receipt if the contribution is in excess of \$50. 2 U.S.C.
5 432(b)(2)(A); 11 CFR 102.8(b); *see, e.g.*, Advisory Opinion 2010-23 (CTIA – The
6 Wireless Association); Advisory Opinion 2009-32 (Jorgensen).

7 The forwarding requirement of 2 U.S.C. 432(b) applies to any person that
8 receives a contribution for a political committee. Because a contribution is only made at
9 the time a subscriber pays a bill, not when a user completes an opt-in, the proposed
10 factored payments to political committees will not be forwarded contributions. Rather,
11 they will be extensions of credit by m-Qube in the ordinary course of business. Thus, the
12 forwarding requirements of 2 U.S.C. 432(b) and 11 CFR 102.8 are not implicated by m-
13 Qube's proposed factored payments.

14 The trailing payments that m-Qube proposes to make to political committees after
15 wireless subscribers pay their bills, however, are subject to the forwarding requirements
16 of 2 U.S.C. 432(b) and 11 CFR 102.8. In Advisory Opinion 2010-23 (CTIA – The
17 Wireless Association), the Commission found that CTIA's proposal would not comply
18 with the requirements of 2 U.S.C. 432(b) and 11 CFR 102.8 because "40 days could
19 lapse" between the making of a contribution and the receipt of that contribution by a
20 political committee. Similarly, under m-Qube's proposal, approximately 20 days could
21 lapse between the making of a contribution and its receipt by a political committee in the
22 form of trailing payments. Further, as discussed above in Question 1, because a
23 contribution is made when a wireless subscriber pays a bill, not when a user completes an

1 opt-in, the \$50 cap does not ensure that all contributions made under m-Qube's proposal
2 will be \$50 or less. Thus, trailing payments to authorized committees, and trailing
3 payments to unauthorized committees of contributions in excess of \$50, will not comply
4 with the 10-day forwarding requirements of 2 U.S.C. 432(b) and 11 CFR 102.8 and are
5 thus not permissible.

6 *b. Identification Requirements*

7 Section 432(b) of the Act also requires that any person who receives a
8 contribution in excess of \$50 for a political committee must forward to the recipient
9 political committee the name and address of the contributor and the date of the
10 contribution. 2 U.S.C. 432(b)(1), (b)(2); 11 CFR 102.8(a), (b).¹³ As discussed in the
11 response to Question 1, however, a wireless subscriber may make a contribution in
12 excess of \$50 because a subscriber pays all charges associated with a particular bill,
13 which could include multiple users. Further, m-Qube does not propose any mechanism
14 to forward to its political committee customers the names, addresses, and other
15 identification information of persons who make contributions in excess of \$50, as
16 required by 2 U.S.C 432(b).

17 Accordingly, for the reasons stated above, the proposed method of factoring does
18 not comply with the requirements of 2 U.S.C. 432(b).

19

¹³ See Amendments to Federal Election Campaign Act of 1971; Regulations Transmitted to Congress, 45 FR 15080, 15084 (Mar. 7, 1980) (explaining that section 102.8 serves to ensure that treasurers are able "to keep an account of the identification of contributors as required by 2 U.S.C. 432(c)(3)").

1 4. *Does the proposal described above satisfy the segregation requirements that the*
2 *Commission has placed on commercial vendors that process political*
3 *contributions?*

4 No, the proposal described above does not satisfy the segregation requirements
5 that the Commission has placed on commercial vendors who process political
6 contributions insofar as the trailing payments are concerned. The factored payments do
7 not implicate the segregation requirement.

8 As explained in Advisory Opinion 2010-23 (CTIA – The Wireless Association),
9 the Commission requires vendors to maintain separate accounts for political contributions
10 that are to be transmitted to candidates. This requirement is rooted in the Act’s
11 prohibition on contributions by corporations and labor organizations. *See* 2 U.S.C. 441b;
12 11 CFR 114.2(b); Advisory Opinion 2010-23 (CTIA – The Wireless Association). The
13 use of separate accounts by a corporation that forwards contributions to political
14 committees prevents a “commingling of corporate funds and campaign funds prohibited
15 by [2 U.S.C.] 441b.” Advisory Opinion 1999-22 (Aristotle Publishing).

16 The proposed factored payments do not implicate the segregation requirement.
17 As explained in the response to Question 2, the proposed factored payments will be
18 extensions of credit by m-Qube as a commercial vendor in the ordinary course of
19 business under 11 CFR 116.3, rather than contributions forwarded to political
20 committees.

21 The proposed trailing payments, by contrast, do implicate the segregation
22 requirement. As explained in the response to Question 1, a contribution will be made
23 under m-Qube’s proposal when a wireless subscriber pays a bill that includes a charge

1 resulting from an opt-in. Wireless service providers that receive the bill payment will
2 then transfer funds to m-Qube, and m-Qube will make trailing payments to political
3 committees. The trailing payments, thus, will be transmitted in the same manner as the
4 funds in Advisory Opinion 2010-23 (CTIA – The Wireless Association): from bill
5 payors to wireless service providers to m-Qube and finally to political committees. Also
6 like the requestor in Advisory Opinion 2010-23 (CTIA – The Wireless Association),
7 m-Qube does not propose to “use . . . separate accounts” to segregate political
8 contributions from its general treasury funds.¹⁴ As in Advisory Opinion 2010-23 (CTIA
9 – The Wireless Association), to be consistent with the Act, m-Qube must segregate its
10 trailing payments to political committees from corporate treasury funds.

11 Accordingly, the proposal described above does not satisfy the segregation
12 requirements that the Commission has placed on commercial vendors who process
13 political contributions insofar as the trailing payments are concerned, but the factored
14 payments do not implicate the segregation requirement.

15 This response constitutes an advisory opinion concerning the application of the
16 Act and Commission regulations to the specific transaction or activity set forth in your
17 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
18 of the facts or assumptions presented, and such facts or assumptions are material to a
19 conclusion presented in this advisory opinion, then the requestor may not rely on that
20 conclusion as support for its proposed activity. Any person involved in any specific
21 transaction or activity which is indistinguishable in all its material aspects from the

¹⁴ Linking funds of each recipient political committee to a short code does not address the concern that contributions will be commingled with corporate funds. *See* Advisory Opinion 2010-23 (CTIA – The Wireless Association).

1 transaction or activity with respect to which this advisory opinion is rendered may rely on
2 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
3 conclusions in this advisory opinion may be affected by subsequent developments in the
4 law, including, but not limited to, statutes, regulations, advisory opinions, and case law.
5 The cited advisory opinions are available on the Commission's website, www.fec.gov, or
6 directly from the Commission's Advisory Opinion searchable database at
7 <http://www.fec.gov/searchao>.

8

On behalf of the Commission,

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15

Caroline C. Hunter
Chair

1 ADVISORY OPINION 2012-17

2 Craig Engle, Esq.
3 Brett G. Kappel, Esq.
4 Arent Fox LLP
5 1050 Connecticut Avenue, NW
6 Washington, DC 20036-5339
7

DRAFT B

8 Dear Messrs. Engle & Kappel:

9 We are responding to your advisory opinion request on behalf of Red Blue T LLC
10 (“Red Blue T”), ArmourMedia, Inc. (“ArmourMedia”), and m-Qube, Inc. (“m-Qube”),
11 concerning the application of the Federal Election Campaign Act of 1971, as amended
12 (the “Act”), and Commission regulations to their proposal to use text messaging to raise
13 funds for political committees. The requestors ask whether the proposal (1) satisfies the
14 recordkeeping and reporting requirements of 2 U.S.C. 432(c); (2) conforms to the
15 prohibition on corporate contributions at 2 U.S.C. 441b; (3) complies with the forwarding
16 requirements of 2 U.S.C. 432(b), when m-Qube makes factored payments to political
17 committees; and (4) satisfies the segregation requirements for commercial vendors that
18 process political contributions.

19 The Commission concludes that the proposal satisfies the recordkeeping and
20 reporting requirements of 2 U.S.C. 432(c); conforms to the prohibition on corporate
21 contributions at 2 U.S.C. 441b; does not implicate the forwarding requirements of 2
22 U.S.C. 432(b), when factored payments are made; and satisfies the segregation
23 requirements for commercial vendors that process political contributions.

24

25

26

1 ***Background***

2 The facts presented in this advisory opinion are based on your letter received on
3 April 6, your emails of April 11 and May 21, 2012, and on publicly available
4 information.

5 Red Blue T and ArmourMedia are political and media consulting firms that advise
6 and represent political committees, including candidates and candidate committees.
7 m-Qube is a corporate aggregator of business-to-consumer messaging and merchant
8 billing for public wireless service providers. It operates direct interconnection gateways
9 with all of the nation's major public wireless service providers.¹

10 m-Qube proposes to enter into agreements with political committees, under which
11 it would provide its services as an aggregator to process contributions made to the
12 political committees via text messaging. The proposal envisions the use of text
13 messaging to make contributions in two ways. In the first method, a wireless user² would
14 text a pre-determined message to a common short code³ registered to a political
15 committee. m-Qube, as the connection aggregator, will respond to the user via text

¹ The requestors rely on the description of the mechanics of the wireless industry in Advisory Opinion 2010-23 (CTIA – The Wireless Association). As presented in that advisory opinion, content providers, application providers, connection aggregators, and wireless service providers work together to enable wireless users to access content through the use of mobile phone text messages. Content providers (such as the Red Cross) disseminate content to, or collect information or pledges from, wireless users. Application providers convert the text messages received into data that can be interpreted and used by content providers. Connection aggregators link application providers to wireless service providers' networks. Wireless service operators are the companies from which wireless subscribers purchase their mobile phone service.

² In Advisory Opinion 2010-23 (CTIA – The Wireless Association), the Commission distinguished between the terms "wireless subscriber" and "wireless user." A "wireless subscriber" refers to an individual who a wireless service provider bills; a "wireless user" refers to a broader category of individuals, who are included in the subscriber's billing plan, including, for example, a family or group plan and therefore are not directly responsible for payment to the "wireless service provider."

³ A common short code is a five- or six-digit number to which wireless users can send text messages to access mobile content.

1 message and require the user to respond with his or her own text message to (1) confirm
2 the user's intent to engage in the transaction, and (2) certify the user's eligibility to make
3 a contribution under the Act and Commission regulations.

4 Under the second proposed method, a user would enter his or her mobile phone
5 number on a political committee's website in lieu of a credit card number. Before
6 submitting the phone number, the user will be required to certify his or her eligibility to
7 make a contribution under the Act. After the user makes the certification and submits the
8 phone number, m-Qube will transmit to the user's mobile phone a text message that
9 includes a PIN. The user will enter the PIN on the political committee's website to
10 confirm the transaction.

11 Both of these methods require a wireless user to (1) confirm that the user intends
12 to engage in the transaction, and (2) certify that the user is eligible to make contributions
13 under the Act and Commission regulations.⁴ Once the user has completed both of these
14 steps, the user has completed the "opt-in" process.

15 m-Qube proposes to enter into service orders with political committee customers,
16 the basic terms of which are the same as those it offers to customers other than political
17 committees in the ordinary course of its business. In addition, for political committee
18 customers, m-Qube proposes to add special terms to the service order that would include
19 the following requirements: each political committee customer must be registered "and in
20 good standing" with the Commission and relevant State authorities; each political
21 committee customer must receive contributions through a single short code per election,

⁴ m-Qube represents that the certifications that users will be required to make will be consistent with Advisory Opinion 2011-13 (DSCC).

1 with m-Qube as the exclusive provider of services for that short code; no mobile phone
2 number may be billed more than \$50 per month for contributions to any one political
3 committee customer; each political committee customer must seek certifications from
4 wireless users that the users are eligible to make contributions under the Act and
5 Commission regulations; and each political committee customer must use m-Qube's
6 "factoring" service.

7 The requesters describe "factoring" as a financial transaction in which an entity
8 (here, a political committee) sells its accounts receivable to a third party (here, m-Qube)
9 at a discount in exchange for receiving a percentage (or "factor") of its outpayment on an
10 expedited basis.⁵ m-Qube currently offers factoring as an optional service in exchange
11 for a fee to customers that wish to receive a portion of their outpayments more quickly
12 than the normal industry payment process would allow.⁶ For political committee
13 customers, factoring would be required.

14 The factoring process begins with an assessment by m-Qube of the transaction
15 data that it has received on a daily basis, and a calculation of the net amount of funds that
16 will eventually be collected from the mobile service providers. m-Qube takes into
17 account certain variables "in [the] ordinary course of business . . . including perceived
18 risk on liabilities associated with the programs, and the availability of funds to provide

⁵ An "outpayment" is the total amount that a recipient content provider is entitled to receive after all fees have been deducted by the wireless service providers and connection aggregators. A "factor" is a reduced percentage of the outpayment. A typical outpayment will range between 50 and 70 percent of the consumer charges, and a typical factor will range between 50 and 90 percent of the total outpayment.

⁶ Advisory Opinion 2010-23 (CTIA – The Wireless Association) describes the usual billing process in the wireless industry when connection aggregators are used to enable access to mobile content. Each wireless service provider transmits payments from wireless subscribers to connection aggregators seven to ten days after receipt by the wireless service providers. The connection aggregators then collect all funds flagged for a particular recipient from all the wireless service providers over a 30-day period and transmit those funds to recipient content providers.

1 the factored donations” to arrive at an appropriate factored payment amount. m-Qube
2 states that it will calculate and transmit a “conservative” factor to political committees to
3 protect against overpayments. Under its service order as currently drafted, m-Qube may
4 suspend or terminate factored payments at any time, with or without notice to its
5 customers, and may require its customers to provide a security deposit to guard against
6 overpayments before restarting the payments.⁷ If a customer receives factored payments
7 that exceed the amount of outpayments due to it, the customer may not terminate the
8 service order or transfer services, programs, or short codes from m-Qube until it has
9 repaid m-Qube. Similarly, if m-Qube is charged an adjustment by a “Network Operator”
10 that exceeds the total amount owed by m-Qube to its customer, m-Qube may require the
11 customer to repay the factored payment to m-Qube. m-Qube proposes to adhere to these
12 standard terms for its political committee customers.

13 m-Qube plans to transmit factored payments to political committee customers on
14 a weekly basis.⁸ For example, m-Qube would assess all of the opt-ins that it received
15 between Day 1 and Day 7 and, based on that data, transmit a factored payment on Day
16 10. m-Qube does not propose to identify any of the wireless users whose opt-ins it
17 analyzes as part of the factoring process or to transmit their names and addresses to
18 political committee customers, consistent with its current practice for customers that are
19 not political committees.

⁷ An overpayment may result from unexpected numbers of consumers disputing charges for third party content, such as contributions initiated through short codes. “Technical inconsistencies” between wireless service providers and aggregators can also result in overpayments.

⁸ The request states that a “committee will receive its share of its mobile phone contributions on a weekly basis of those texts being made.” The request also states that committees will “typically . . . opt to receive weekly payments and could therefore expect to receive payment within one to ten days of mobile pledges being made.” The Commission understands these statements to mean that m-Qube will transmit factored payments each week.

1 After m-Qube receives payment from wireless service providers, m-Qube's
2 current practice is to reconcile the amount that it has provided to its customers as factored
3 payments and the actual outpayment that each customer is entitled to receive. Typically,
4 m-Qube transmits these "trailing payments" within 30 days after it receives payment
5 from the wireless service providers, but m-Qube proposes to transmit trailing payments to
6 its political committee customers within ten days after receipt. Consistent with its current
7 practice for customers that are not political committees, m-Qube does not propose to
8 segregate the trailing payments to political committee customers from its general
9 corporate treasury funds or to provide the payors' names and addresses to the political
10 committees. The trailing payments, however, will be linked to a short code associated
11 with a particular political committee, and m-Qube represents that this link, in conjunction
12 with the requirement that each political committee only register one short code, ensures
13 that contributions are segregated from corporate treasury funds.

14 ***Questions Presented***

- 15 1. *Does the proposal described above satisfy the recordkeeping and reporting*
16 *requirements of 2 U.S.C. 432(c)?*
- 17 2. *Does the proposed commercial transaction of factoring of political contributions,*
18 *when it is performed by an aggregator in its ordinary course of business, conform*
19 *with the requirements of 2 U.S.C. 441b?*
- 20 3. *If the answer to Question 2 is "yes," does the proposed method of factoring*
21 *comply with the forwarding requirements of 2 U.S.C. 432(b)?*

- 1 4. *Does the proposal described above satisfy the segregation requirements the*
2 *Commission has placed on commercial vendors that process political*
3 *contributions?*

4 ***Legal Analysis and Conclusions***

- 5 1. *Does the proposal described above satisfy the recordkeeping and reporting*
6 *requirements of 2 U.S.C. 432(c)?⁹*

7 Yes, the proposal described above satisfies the recordkeeping and reporting
8 requirements of 2 U.S.C. 432(c).

9 The Act and Commission regulations impose certain requirements on treasurers of
10 political committees. A treasurer of a political committee must “keep an account of (1)
11 all contributions received by or on behalf of such political committee; (2) the name and
12 address of any person who makes any contribution in excess of \$50, together with the
13 date and amount of such contribution by any person; [and] (3) the identification of any
14 person who makes a contribution or contributions aggregating more than \$200 during a
15 calendar year, together with the date and amount of any such contribution.” 2 U.S.C.
16 432(c)(1)-(3); *see also* 11 CFR 110.4(c).

17 In Advisory Opinion 2010-23 (CTIA – The Wireless Association), the requestor
18 proposed to satisfy these requirements by imposing a \$10 limit on the value of each
19 charge initiated by opt-in and an overall \$100 limit on the value of all opt-in charges to a
20 mobile phone in a billing cycle. *Id.* The Commission rejected the proposal because a

⁹ The Commission responds only with respect to m-Qube’s proposed activities. The proposal in the advisory opinion request does not refer to “a specific transaction or activity” by Red Blue T and ArmourMedia. 2 U.S.C. 437f(a)(1); 11 CFR 112.1(b); *see also* Advisory Opinion 1989-25 (New Hampshire Republican State Committee) (serving as a recruiter of and advisor to Federal candidates and their committees does not meet the requirements of 11 CFR part 112).

1 single user could make repeated pledges in a billing cycle and exceed the \$50
2 recordkeeping threshold when paying a bill. *Id.* The requirements of section 432(c)
3 would thus be triggered but not met because the proposal did not provide for contributor
4 names and addresses to be transmitted to political committees when a contribution
5 exceeded \$50.

6 m-Qube's proposal, however, is materially distinguishable from the proposal
7 considered in Advisory Opinion 2010-23 (CTIA – The Wireless Association) and
8 satisfies 2 U.S.C. 432(c). Unlike the overall \$100 monthly cap proposed by CTIA, m-
9 Qube proposes to impose a \$50 limit on the amount that can be billed each month to a
10 mobile phone number for contributions pledged to a political committee. The \$50 cap, in
11 conjunction with the certifications that m-Qube will require users to make, helps to
12 ensure that a contribution from a single wireless user will not trigger the recordkeeping
13 requirements of 2 U.S.C. 432(c)(2) by exceeding \$50. *See* Advisory Opinion 1980-99
14 (Republican Round-Up Committee) (political committees need not record the name and
15 address of every contributor when collecting small-dollar contributions less than \$50).
16 *But see* Advisory Opinion 1991-20 (Call Interactive) (distinguishing fundraising events
17 where small-dollar cash contributions are raised from other fundraising mechanisms that
18 “do not involve truly anonymous contributions”).

19 Nor does m-Qube's proposal violate 2 U.S.C. 432(c)(3). As explained by the
20 Commission in Advisory Opinion 1980-99 (Republican Round-Up Committee), the
21 requirements of section 432(c)(3) are triggered only “[i]f the committee retains
22 information on the names of its contributors” or if a committee receives a single
23 contribution in excess of \$50. Under m-Qube's proposal, the former condition will not

1 be met because m-Qube will not transmit contributors' names and addresses to political
2 committees; the latter condition also will not be satisfied because each wireless user must
3 attest that he or she will pay for his or her own pledges, and those pledges are capped at
4 \$50 to a single political committee per billing cycle.¹⁰

5 Accordingly, the proposal described above satisfies the recordkeeping and
6 reporting requirements of 2 U.S.C. 432(c).

7 2. *Does the proposed commercial transaction of factoring of political contributions,*
8 *when it is performed by an aggregator in its ordinary course of business, conform*
9 *with the requirements of 2 U.S.C. 441b?*

10 Yes, the proposed commercial transaction of factoring of political contributions,
11 when it is performed by an aggregator in its ordinary course of business, conforms with
12 the requirements of 2 U.S.C. 441b.

13 The Act and Commission regulations prohibit corporations from making a
14 contribution in connection with a Federal election. *See* 2 U.S.C. 441b(a);
15 11 CFR 114.2(b)(1). A contribution includes "any gift, subscription, loan, advance, or
16 deposit of money or anything of value made by any person for the purpose of influencing
17 any election for Federal office." 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a); *see also*

¹⁰ In Advisory Opinion 2010-23 (CTIA – The Wireless Association), the Commission also expressed concerns that a foreign national could circumvent the prohibition on contributions from foreign nationals or that, in the context of group or family plans, a single subscriber could pay charges incurred by multiple users on a single bill and thus make a contribution in excess of \$50. These concerns, in conjunction with the fact that subscribers who *only* paid for their own charges could also exceed the \$50 threshold, informed the Commission's decision to reject CTIA's proposal. Here, however, the Commission's concerns as to foreign nationals and group plans cannot be determinative because those same concerns extend to any situation in which a political committee receives small-dollar anonymous contributions. If the Commission were to reject m-Qube's proposal on those grounds alone, it would be required to reject all proposals in which a political committee receives anonymous small-dollar contributions.

1 2 U.S.C. 441b(b)(2); 11 CFR 114.2(b)(1). “Anything of value” includes all in-kind
2 contributions, including the provision of goods or services without charge or at a charge
3 that is less than the usual and normal charge. *See* 11 CFR 100.52(d)(1). “Usual and
4 normal charge” is defined as “the price of goods in the market from which they ordinarily
5 would have been purchased at the time of the contribution, or the commercially
6 reasonable rate prevailing at the time the services were rendered.” *See*
7 11 CFR 100.52(d)(2).

8 After wireless users have completed an opt-in to pledge funds to a political
9 committee, but prior to any receipt of a contribution, m-Qube will transmit funds from its
10 corporate treasury to the political committee. m-Qube proposes to recoup its funds once
11 subscribers have paid their bills and the wireless service providers have transmitted those
12 payments, net of fees, to m-Qube. m-Qube’s proposal to make factored payments is not
13 an exclusive service for its political committee customers; rather, m-Qube offers the same
14 service on the same terms to its non-political customers, except that, unlike non-political
15 committee customers who may elect not to avail themselves of factoring, factoring would
16 be mandatory for political committee customers.

17 As m-Qube does with its non-political customers, it would employ extensive
18 safeguards to avoid making excessive factored payments. m-Qube will calculate and
19 transmit a “conservative” factor to political committees, and it will reevaluate the
20 potential risks of making factored payments on a weekly basis. Under the terms of its
21 service order, m-Qube may suspend or terminate factored payments at any time, with or
22 without notice to its customers, and may require its customers to provide a security
23 deposit to guard against overpayments before restarting the payments. If a customer

1 receives factored payments that exceed the amount of outpayments due to it, the customer
2 may not terminate the service order or transfer services, programs, or short codes from m-
3 Qube until it has repaid m-Qube. Similarly, if m-Qube is charged an adjustment by a
4 Network Operator that exceeds the total amount owed by m-Qube to its customer, m-
5 Qube may require the customer to repay the factored payment to m-Qube.

6 The Commission concludes that m-Qube's proposal to make factored payments
7 to its political committee customers on the same terms that it regularly offers to its
8 commercial customers would be a permissible extension of credit by m-Qube in the
9 ordinary course of business. Under the Act and Commission regulations, an incorporated
10 commercial vendor may extend credit to political committees under terms substantially
11 similar to those the vendor offers nonpolitical debtors. See 11 CFR 116.3(b), (c). m-
12 Qube is a "commercial vendor" because its usual and normal business involves the
13 provision of the same services that it proposes to provide to political committees.
14 11 CFR 116.1(c). An "extension of credit" includes, but is not limited to, "[a]ny
15 agreement between the creditor and political committee that full payment is not due until
16 after the creditor provides goods or services to the political committee." 11 CFR
17 116.1(e).¹¹

¹¹ What comprises a true purchase of accounts receivable is not always readily apparent, and therefore the distinction between true factoring and another form of financial transaction "can be blurred." *Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co.*, 336 F.3d 410, 416 (5th Cir. 2003). When making this determination, courts have tended to engage in highly fact- and transaction-specific analyses to determine whether the creditor or debtor has assumed the risk of non-payment. See, e.g., *Nickey Gregory Co. v. Agricap, LLC*, 596 F.3d 591, 600-03 (4th Cir. 2010) (holding that a transaction was not a true purchase of accounts receivable because the "substantive aspects of the transaction are inconsistent with an outright sale of the assets"); *Endico Potatoes, Inc. v. CIT Grp.*, 67 F.3d 1063, 1068 (2nd Cir. 1995) (analyzing "the substance of the transaction," rather than "the label attached to the transaction"). The recipient political committees appear to assume the risk of nonpayment under m-Qube's proposal because the factoring agreement gives m-Qube broad discretion to suspend or terminate factored payments, to require deposits and to determine their amounts, to withhold overpayments, and to demand repayment from political

1 The Commission approved a proposal similar to m-Qube's factoring proposal in
2 the 900-line advisory opinions.¹² In Advisory Opinion 1990-14 (AT&T), for example,
3 the Commission considered whether a proposal under which contributors would call a
4 900-line to make contributions to political committees, and AT&T would provide funds
5 to the political committees (through a service bureau) before the contributors paid their
6 phone bills, would "implicate [AT&T] in making an unlawful advance of corporate funds
7 to a political committee." The Commission concluded that it would not, stating that,
8 "[n]s long as AT&T, or any other company providing service to AT&T in connection with its
9 . . . service, provides its usual and normal services at its usual and normal charges it will not,
10 in most circumstances, have made a prohibited corporate contribution." To guard against
11 making an unlawful advance of corporate funds, the Commission stated that AT&T
12 "should not remit funds . . . if it appears that, because of an adverse event, callers may
13 refuse to make payments." The Commission explained that this precaution was
14 consistent with AT&T's service agreements, in which AT&T reserved the right to
15 terminate the agreement or billing services "if it determines, in its sole discretion, that its
16 image would be adversely affected or its reputation or goodwill damaged by the
17 continued offer of billing services." *Id.*

committees when it is charged an adjustment by service providers. It is, however, not necessary for the Commission to make such a determination here because m-Qube's proposal falls within the definition of an extension of credit under the Commission's regulations.

¹² Advisory Opinion 1990-14 (AT&T) is part of a line of advisory opinions that analyzed the use of 900-lines for raising contributions for political committees. These advisory opinions involved complex transactions between corporations and political committees. *See, e.g.,* Advisory Opinion 1990-01 (Digital Corrections). Generally, political committees contracted with service bureaus to provide 900-line services. Callers dialed a 900-line number maintained by the service bureau. The service bureaus, in turn, contracted with telephone common carriers, such as AT&T, to receive access to telephone circuits and billing services. *Id.*

1 Similarly, in Advisory Opinion 1979-36 (Fauntroy), the Commission approved a
2 proposal in which an incorporated direct mail fundraising firm would incur initial
3 expenses in implementing a direct mail fundraising program for a political committee.
4 Funds generated by the direct mail campaign would be deposited in the political
5 committee's account, and the political committee would use those funds to pay the
6 corporation for its costs and fees. *Id.* If the campaign was less successful than
7 anticipated, the political committee would not be entitled to any funds until the
8 corporation had recouped its costs and fees. *Id.* The Commission approved the proposal,
9 provided that the financial agreement between the corporation and the political committee
10 "is of a type which is normal industry practice and contains the type of credit which is
11 extended in the ordinary course of [the corporation's] business with terms which are
12 substantially similar to those given to nonpolitical, as well as political, debtors of similar risk
13 and size of obligation," and the costs charged by the corporation to the political committee
14 "are at least the normal charge for services of that type." *Id.*

15 Accordingly, because m-Qube's factored payments will be extensions of credit
16 under 11 CFR part 116 and otherwise consistent with prior Commission interpretations of
17 2 U.S.C. 441b, the proposed commercial transaction of factoring of political
18 contributions, when as here it is performed by an aggregator in its ordinary course of
19 business, conforms with the requirements of 2 U.S.C. 441b.

20 3. *If the answer to Question 2 is "yes," does the proposed method of factoring*
21 *comply with the forwarding requirements of 2 U.S.C. 432(b)?*

22 The proposed method of factoring does not implicate the forwarding requirements
23 of 2 U.S.C. 432(b) because factoring does not involve the forwarding of contributions.

1 Any person who receives a contribution for an authorized political committee
2 must forward the contribution to the political committee's treasurer within ten days of
3 receipt. 2 U.S.C. 432(b)(1); 11 CFR 102.8(a). Any person who receives a contribution
4 for a political committee that is not an authorized committee must forward the
5 contribution to the political committee within 30 days of receipt if the contribution is \$50
6 or less, and within ten days of receipt if the contribution is in excess of \$50. 2 U.S.C.
7 432(b)(2)(A); 11 CFR 102.8(b); *see, e.g.*, Advisory Opinion 2010-23 (CTIA – The
8 Wireless Association); Advisory Opinion 2009-32 (Jorgensen). Any person who receives
9 a contribution in excess of \$50 for a political committee must also forward to the
10 recipient political committee the name and address of the contributor and the date of the
11 contribution. 2 U.S.C. 432(b)(1), (b)(2); 11 CFR 102.8(a), (b).

12 The requirements of 2 U.S.C. 432(b) apply to any person that receives a
13 contribution for a political committee. Because, as explained in response to Question 2,
14 the factored payments are extensions of credit by m-Qube in the ordinary course of
15 business and are not contributions that m-Qube has received and forwarded, the factored
16 payments do not trigger the forwarding requirements of 2 U.S.C. 432(b) and 11 CFR
17 102.8.

18 Accordingly, for the reasons stated above, the proposed method of factoring does
19 not implicate the requirements of 2 U.S.C. 432(b).

20

1 4. *Does the proposal described above satisfy the segregation requirements that the*
2 *Commission has placed on commercial vendors that process political*
3 *contributions?*

4 m-Qube's proposal satisfies the requirements of the Act and Commission
5 regulations.

6 In previous advisory opinions, the Commission has required vendors to maintain
7 separate accounts for political contributions that are to be transmitted to candidates. *See,*
8 *e.g.,* Advisory Opinion 2010-23 (CTIA – The Wireless Association). The Commission
9 explained that this requirement is rooted in the Act's prohibition on contributions by
10 corporations and labor organizations. *See* 2 U.S.C. 441b; 11 CFR 114.2(b); Advisory
11 Opinion 2010-23 (CTIA – The Wireless Association). The use of separate accounts by a
12 corporation that forwards contributions to political committees prevents a “commingling
13 of corporate funds and campaign funds prohibited by [2 U.S.C.] 441b.” Advisory
14 Opinion 1999-22 (Aristotle Publishing).

15 m-Qube's proposal ensures that corporate funds will not be transmitted to
16 political committees. Because, as explained in response to Question 2, the factored
17 payments are extensions of credit by m-Qube in the ordinary course of business and are
18 not contributions that m-Qube has received and forwarded, the factored payments do not
19 trigger the requirement that vendors maintain separate accounts for political contributions
20 that are to be transmitted to candidates.

21 The manner in which m-Qube proposes to receive and transmit the trailing
22 payments also satisfies the segregation requirement. The trailing payments that m-Qube
23 will receive from service providers and forward to political committees will be linked to a

1 common short code that is unique to each political committee. This mechanism, which
2 m-Qube regularly employs with all of its customers' funds, ensures that political
3 contributions are properly accounted for and that m-Qube's treasury funds will not be
4 inadvertently transmitted to political committees. Indeed, m-Qube's entire business
5 model depends upon its ability to use the short codes to ensure that it transmits the proper
6 funds to its customers. Because m-Qube proposes to apply these same processes to
7 political committees, m-Qube's proposal satisfies the requirements of the Act and
8 Commission regulations.¹³

9 This response constitutes an advisory opinion concerning the application of the
10 Act and Commission regulations to the specific transaction or activity set forth in your
11 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
12 of the facts or assumptions presented, and such facts or assumptions are material to a
13 conclusion presented in this advisory opinion, then the requestor may not rely on that
14 conclusion as support for its proposed activity. Any person involved in any specific
15 transaction or activity which is indistinguishable in all its material aspects from the
16 transaction or activity with respect to which this advisory opinion is rendered may rely on
17 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
18 conclusions in this advisory opinion may be affected by subsequent developments in the
19 law, including, but not limited to, statutes, regulations, advisory opinions, and case law.

¹³ To the extent that this conclusion supersedes prior Commission advisory opinions, those advisory opinions are now superseded.

1 The cited advisory opinions are available on the Commission's website, www.fec.gov, or
2 directly from the Commission's Advisory Opinion searchable database at
3 <http://www.fec.gov/searchao>.

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On behalf of the Commission,

Caroline C. Hunter
Chair