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AOR 2012-28

FEDERAL ELECTION COMMISSION

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July 3, 2012

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OFFICE OF
 COUNSEL

Jan Witold Baran
 202.719.7330
 jbaran@wileyrein.com

BY HAND DELIVERY

Federal Election Commission
 Office of General Counsel
 999 E Street, NW
 Washington, DC 20463

Re: Request for Advisory Opinion

Dear Commissioners:

On behalf of CTIA – The Wireless Association (“CTIA”), we request an advisory opinion from the Federal Election Commission (“Commission”) pursuant to 2 U.S.C. § 437f of the Federal Election Campaign Act of 1971, as amended (the “Act”). Specifically, we seek clarification of Advisory Opinion 2010-23 (CTIA) and Advisory Opinion 2012-17 (m-Qube); these Opinions address the question of allowing political contributions through text messaging campaigns.¹

CTIA and its members wish to obtain these clarifications so they can complete their evaluation of how to potentially implement the text message campaigns. In order to ensure the prompt, consistent, and lawful use of these programs, CTIA seeks answers to the specific questions that are presented below. Given the importance and time sensitivity of this issue, we respectfully request that the Commission expedite its review of this request. Cf. 2 U.S.C. § 437f(a)(2) (statutory expedited review when advisory opinion is requested by a candidate within 60 days of an election).

QUESTIONS PRESENTED

1. *Who is responsible for determining the eligibility of a contributor?* The m-Qube Advisory Opinion suggests that wireless service providers have no such responsibility, which instead rests with the recipient political committee. However, the CTIA Advisory Opinion stated that in cases where a subscriber’s bill may indicate the subscriber is a corporation or has a foreign address, or when a wireless service provider is presented with other information raising questions as to the legality of a contribution, the

¹ This advisory opinion request relies on, and incorporates by reference, the facts contained in the CTIA Advisory Opinion and m-Qube Advisory Opinion regarding CTIA, the wireless industry, and text messaging campaigns.



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wireless service provider has an affirmative obligation to identify this information and forward it to the recipient committee.² For the reasons explained in the request for the CTIA Advisory Opinion, such an affirmative undertaking is simply neither practicable nor workable. Accordingly, we request confirmation from the Commission that this responsibility does not rest with the wireless service providers.

2. *Who is responsible for ensuring compliance with (a) the \$50 monthly limit on contributions; (2) the recordkeeping obligations for contributions in excess of \$200; (3) the limitation of one short code per campaign?* The M-Quibe Advisory Opinion suggests, but does not state, that it is the responsibility of the connection aggregators and participating political committees, and not the wireless service providers, to ensure compliance with these requirements; but given the importance of these issues and to avoid confusion, CTIA respectfully requests that assignment of this responsibility to the connection aggregators and the participating political committees alone be set out explicitly.
3. *Please confirm that wireless service providers are required to follow their normal business practices when implementing these campaigns. Would deviations from normal business practices constitute "in-kind" political contributions?* Wireless service providers charge a normal and usual commercial rate – which can include certain taxes and fees – to process payments made as part of text messaging campaigns. Please confirm that the Act would require wireless service providers to continue to charge their normal and usual commercial rates in connection with political contributions

² The CTIA Advisory Opinion stated:

[T]he subscriber's bill may indicate that the subscriber is a corporation or has a foreign address.

In any of these circumstances, where the certification is contradicted by evidence contained in the monthly bill, the wireless service providers would not be able to rely upon the certification and would be required to forward to the recipient committee the information required by 2 U.S.C. 432(b) and (c). As the Commission has previously explained, although "it is ultimately the responsibility of the political committee to obtain the identity of contributors and to prevent excessive and prohibited contributions," Advisory Opinion 1991-20 (Call Interactive), when presented with information raising questions as to the legality of a contribution, to ensure the committee can meet its obligations, it is incumbent upon the service provider to forward "the appropriate information." Advisory Opinion 1991-26 (Versatel).



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made pursuant to the m-Qube Advisory Opinion, and that any discount of those rates would constitute an illegal in-kind contribution by wireless service providers to the recipient political committees.

Wireless service providers also incorporate industry standards at <http://www.mmaglobal.com/uploads/Consumer-Best-Practices.pdf> and other requirements specific to each wireless service provider into their agreements with connection aggregators.³ These standards prevent, among other things, abusive practices such as deceptive marketing, placing unauthorized charges on wireless bills, and spamming by content providers (which, in this case, are the political committees). Wireless service providers' normal and usual practice is to enforce these standards and requirements against connection aggregators and content providers, up to and including the suspension or termination of their text messaging programs. CTIA wants to confirm that wireless service providers are legally required to apply these normal and usual commercial conditions to text message campaigns conducted pursuant to the m-Qube Advisory Opinion, and that any deviation from these conditions would constitute an illegal in-kind contribution to the recipient political committee.

4. *May wireless service providers establish criteria for determining eligibility for these campaigns or are wireless service providers obligated to make these programs available to every political candidate and/or committee?*
Similar to its commercial practices, the wireless service providers may seek to establish business criteria to limit participation in the proposal approved by the m-Qube Advisory Opinion. For example, wireless service providers may adopt criteria that would exclude candidates for certain offices, exclude so-called fringe candidates, or potentially refuse to provide service to all political committees. Please confirm that the establishment of such criteria is consistent with the Act.
5. *Does anything in the m-Qube Advisory Opinion require changes in the way wireless service providers process payments to connection aggregators?*
The m-Qube Advisory Opinion suggests that the factoring arrangement entered into between the connection aggregator and the political committee addresses the Commission's previous concerns about the handling of

³ In fact, some states mandate compliance by wireless service providers with a number of these industry standards.



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political contributions by the wireless service providers. Therefore, it appears that wireless service providers would be free to process payments to connection aggregators relating to political committees in the same fashion and timeframe as they would for any other commercial entity. However, CTIA would like to ensure that nothing in the proposal approved in the m-Qube Advisory Opinion requires wireless service providers to alter their business processes with respect to payments made to connection aggregators. Specifically:

- a. Wireless service providers would typically issue refunds to customers upon request if business reasons warrant. These refunds reduce payments to connection aggregators. CTIA would like to confirm that nothing in the m-Qube Advisory Opinion would require wireless service providers to change this refund practice.
- b. CTIA would also like to confirm that any delay, suspension, or termination by wireless service providers of their payments to a connection aggregator does not impose any additional legal obligations on wireless service providers under the Act.

There are many other operational issues beyond the Commission's jurisdiction that wireless service providers will need to resolve as they complete their own evaluations of how to implement the m-Qube Advisory Opinion including, among others, ensuring customer privacy and that campaigns inform customers in advance of the fees charged for this service and their impact on the amount received by the campaigns. Nevertheless, we would appreciate your prompt consideration of this request.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jan Baran", is written over a horizontal line.

Jan Witold Baran

Caleb P. Burns



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 OFFICE OF GENERAL
 COUNSEL

Re: Request for Advisory Opinion Supplemental Submission

Dear Commissioners:

On behalf of CTIA – The Wireless Association® (“CTIA”), we write to supplement our July 3, 2012, advisory opinion request (“AOR”) with additional information sought by the Office of General Counsel regarding the five questions presented in the AOR.

CTIA and the wireless service providers are examining how they can permit political contributions by text message over wireless networks consistent with their current business practices as well as Advisory Opinion 2010-23 (CTIA) and Advisory Opinion 2012-17 (m-Qube). As indicated in the AOR, CTIA seeks clarification of how the CTIA and m-Qube Advisory Opinions apply to the proposed activities of CTIA and its members who are wireless service providers.

In particular, connection aggregators seek to enter into agreements with wireless service providers to enable the making and collecting of political contributions by text message to political committees. As proposed, the wireless service providers would enter into these agreements based on their normal and usual commercial terms and to process political contributions by utilizing their normal and usual commercial processes. Similarly, CTIA intends to issue the Common Short Codes (“CSCs”) used to make political contributions by text message just as it would assign CSCs for similar commercial text message campaigns. In light of the m-Qube Advisory Opinion, CTIA and the wireless service providers are not proposing to implement any of the safeguards identified in the CTIA Advisory Opinion, the most significant of which being the obligation of the wireless service providers “when presented with information raising questions as to the legality of a contribution ... to forward the appropriate information” to the participating political committee. (Internal quotations omitted.) These safeguards are either unworkable or no longer necessary, it appears, if connection aggregators comply with the requirements of the m-Qube Advisory Opinion.

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The commercial processes of the wireless service providers and CTIA are described in the CTIA Advisory Opinion and the accompanying request. We are providing the following additional information about these processes to assist the Commission with its evaluation of the AOR.

Issuance of CSCs

To lease a CSC, a prospective code holder must first establish an account at www.USShortCodes.com. Once an account has been established, the account holder may sign into a secure web server to apply for and manage CSCs leased to that account. Search tools are provided for account holders to determine if specific CSCs are available for lease. Account holders may also lease randomly generated CSCs. Any account holder may apply for a CSC. Frequently, the account holders are connection aggregators and application providers who lease CSCs on behalf of their content provider clients. To lease a CSC the account holder must complete an application that identifies critical elements of the text message campaign including the content provider benefiting from the campaign, service providers supporting the campaign (e.g., connection aggregators and application providers), and appropriate details that define the campaign (e.g., type of campaign, whether it is for a charitable organization, location or screen shots of advertising promoting the campaign, expected messaging volumes, etc.). CTIA conducts a review of the application once it is submitted to determine whether the application provides the appropriate information. CTIA's review also includes validation of the identity of the content provider listed on the application, similar to a credit check, to confirm the content provider's information in the application.

Initiation of Text Message Campaigns with Wireless Service Providers

Once the application is complete and the CSC has been assigned, the CSC is included in a text message campaign proposal submitted to the wireless service providers for their review and processing known as provisioning. It is the responsibility of the service providers supporting the text message campaign, typically the connection aggregator, to submit the proposal and manage the provisioning of a CSC and the launch of the text message campaign with the wireless service providers. Each individual wireless service provider has an established set of requirements related to text messaging campaigns that it applies as part of the provisioning process. This process includes meeting milestones for implementation such as successful testing and the eventual launch of the campaign.



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Conducting the Campaign

The connection aggregator and each wireless service provider enter into a contract that governs the service terms associated with the text messaging campaign. There typically is one contract that governs many, or all, campaigns submitted by each connection aggregator to each wireless service provider. The terms of each contract differ among the wireless services providers and are kept confidential by the parties. The wireless service providers monitor compliance with those terms throughout the text messaging campaigns.

In general, a reconciliation occurs every 30 days between the wireless service provider and the connection aggregator to account for the financial transactions that occurred during the previous 30-day period. Each financial transaction is associated with the mobile phone number that sent the mobile-originated ("MO") text message to initiate the transaction. The MO text message included a keyword that is linked to a specific text message campaign. The wireless service providers conduct the reconciliation pursuant to the contractual terms between them and the connection aggregator supporting the text message campaign.

The reconciliation proceeds by deducting, for example, both the fees charged by the wireless service provider and any refunds made by the wireless service provider to wireless subscribers from the amount to be disbursed to the connection aggregator. A wireless service provider may also delay or suspend disbursements as part of the reconciliation process for commercial reasons provided for in its contract with the connection aggregator. The wireless service provider ultimately disburses the reconciled amount to the connection aggregator and the connection aggregator can then access information detailing the amounts associated with the reconciliation of each financial transaction and the accompanying mobile phone number.

CTIA also monitors text messaging campaigns for compliance with consumer best practices established by the Mobile Marketing Association. As part of its monitoring program, CTIA assesses both the advertising for text message campaigns and the text messages themselves by signing up for text messaging campaigns and reviewing them for compliance. CTIA issues Program Violation Notices, known informally as failure forms, to connection aggregators and content providers for noncompliant advertising and text messages. At the top of all Program Violation Notices is a unique audit number, the notice date and cure date, the applicable CSC, and the names of the responsible content provider and

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connection aggregator. Text message campaigns with unresolved violations are monitored and those unwilling or unable to correct their behavior may be subject to penalties imposed by CTIA which can include freezing the account associated with the relevant CSC.

Wireless service providers may use third-party auditors other than CTIA to monitor text message campaigns for compliance with the best practices established by the Mobile Marketing Association as well as their own unique requirements. Depending on the results of that monitoring, wireless service providers may issue violation notices to, and take remedial action against, connection aggregators, application providers, and/or content providers.

Against this backdrop, we are submitting the following additional information in connection with the five questions presented in the AOR:

1. *Who is responsible for determining the eligibility of a contributor? As explained in the request for the CTIA Advisory Opinion, wireless service providers only maintain standard billing information for their wireless subscribers such as the account holder's name, address, and the phone numbers associated with the calling plan. The subscriber's name may have "Inc." or "Corp." in it and the subscriber may have a foreign billing address. However, wireless service providers do not organize or process subscriber information based on a subscriber's status as an individual, corporation, or other type of organization or entity, or whether the subscriber is a U.S. or foreign national. As explained in the request for the CTIA Advisory Opinion, it is neither practicable nor workable for them to do so in connection with processing political contributions by text message. Furthermore, CTIA does not organize or process this information when leasing CSCs. Accordingly, the wireless service providers and CTIA propose to utilize their normal and usual business practices when processing political contributions by text message. Is that sufficient or do the requirements and safeguards of the CTIA Advisory Opinion still apply?*
2. *Who is responsible for ensuring compliance with (1) the \$50 monthly limit on contributions; (2) the recordkeeping obligations for contributions in excess of \$200; (3) the limitation of one short code per campaign? As is the case with contributor eligibility, it is neither practical nor workable for the wireless service providers and CTIA to ensure compliance with these*



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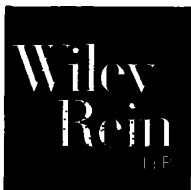
Page 5

provisions of the m-Qube Advisory Opinion. The m-Qube Advisory Opinion appears to impose these compliance obligations on the connection aggregators and participating political committees, and not on the wireless service providers or CTIA. Accordingly, when processing political contributions by text message, the wireless service providers and CTIA propose to utilize their normal and usual business practices which (1) do not guarantee a \$50 monthly limit on political contributions from a single mobile phone number to any one political committee; (2) do not account for the recordkeeping obligations that apply to contributions in excess of \$200; and (3) do not monitor campaigns for compliance with the requirement of one short code per campaign. Is that sufficient?

3. *Please confirm that wireless service providers are required to follow their normal business practices when implementing these campaigns. Would deviations from normal business practices constitute "in-kind" political contributions? Wireless service providers charge a normal and usual commercial rate – which can include certain taxes and fees – to process payments made in text messaging campaigns. The rate charged by each wireless service provider is based on commercial factors which can include, among other things, the dollar amounts of the transactions and the number of transactions made. Each wireless service provider determines its rate based on its own commercial factors.¹ The wireless service providers intend to charge their normal and usual commercial rates when processing political contributions by text message and not deviate from those rates. Is that required to avoid making an illegal in-kind contribution to the recipient political committees?*

As explained in more detail in the AOR, wireless service providers also incorporate in their agreements with connection aggregators the industry standards for consumer best practices at <http://www.mmaglobal.com/uploads/Consumer-Best-Practices.pdf>, as well as other consumer protection requirements specific to each wireless service provider. These standards require, for example, that text messages follow a certain protocol to assist wireless users with obtaining help in connection with their transactions. CTIA monitors compliance with this and other industry standards for

¹ Antitrust laws preclude wireless service providers from sharing these individual rates with each other or CTIA.



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consumer best practices. CTIA and the wireless service providers intend to enforce the same standards and requirements against text message campaigns used to process political contributions and not deviate from those standards. Is that required to avoid making an illegal in-kind contribution to the recipient political committees?

4. *May wireless service providers establish criteria for determining eligibility for these campaigns or are wireless service providers obligated to make these programs available to every political candidate and/or committee?*

The wireless service providers have developed business criteria to determine whether to accept various types of text message campaigns proposed by connection aggregators. First, and similar to their normal business practices for other text message campaigns, the wireless service providers will seek to establish objective business criteria that are specific to political contribution text messaging campaigns that may limit participation by certain political committees. For example, commercial considerations may dictate that a wireless service provider is only willing to permit participation by political committees with the potential for a large volume of transactions. The application of their objective business criteria could result in wireless service providers permitting participation by only certain types of political committees (e.g., presidential campaigns), and those that can demonstrate significant fundraising ability (e.g., candidates with approval ratings over a certain threshold or with a strong record of past fundraising). *Cf.* 11 C.F.R. § 110.13 (participation in candidate debates can be based on “pre-established objective criteria”). Second, a wireless service provider may decide to refuse participation by all political committees because it may not be in the wireless service provider’s interest to participate in the political fundraising process. When considering whether to enter into agreements with connection aggregators for political contribution text message campaigns, is it permissible for wireless service providers to (1) develop objective business criteria like these to limit participation by certain political committees and/or (2) refrain from accepting all agreements from connection aggregators for political contribution text message campaigns?

5. *Does anything in the m-Qube Advisory Opinion require changes in the way wireless service providers process payments to connection aggregators?*

The m-Qube Advisory Opinion suggests that the factoring arrangement entered into between the connection aggregator and participating political

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committees would address potential adjustments by wireless service providers in payments to connection aggregators. Unless stated in their agreements with the connection aggregators, the wireless service providers do not know when connection aggregators employ factoring arrangements. Similarly, CTIA does not have a means to determine whether an applicant for a CSC will be utilizing a factoring arrangement. May wireless service providers process payments for political contributions by text message by using their normal and usual commercial practices? These practices can include refunding customer payments as business reasons warrant (e.g., a claim that a payment was not properly authorized by the wireless subscriber) and delaying, suspending, or terminating payments to enforce agreements with connection aggregators. Is this permissible or does it result in an illegal in-kind contribution by the wireless service providers to the recipient political committees that have already received a factored payment from the connection aggregators?

Sincerely,



Jan Witold Baran
Caleb P. Burns