

PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS

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

DRAFT ADVISORY OPINION 2012-31 is now available for comment. It was requested by Wayne Watts on behalf of AT&T Inc., and is scheduled to be considered by the Commission at its public meeting on September 20, 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 DRAFT ADVISORY OPINION 2012-31, 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 noon (Eastern Time) on September 19, 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@fec.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
(202) 694-1040

Comment Submission Procedure: Kevin Deeley
Acting Associate General Counsel
(202) 694-1650

Other inquiries:

To obtain copies of documents related to Advisory Opinion 2012-31, 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/searchan>.

ADDRESSES

Office of the Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Office of General Counsel
ATTN: Kevin Deeley, Esq.
Federal Election Commission
999 E Street, NW
Washington, DC 20463

AGENDA DOCUMENT NO. 12-66



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Washington, DC 20463

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2012 SEP 13 PM 4:40

September 13, 2012

MEMORANDUM

AGENDA ITEM

TO: The Commission

For Meeting of 9-20-12

FROM: Anthony Herman *AH*
General Counsel

Kevin Deeley *KD/AH*
Acting Associate General Counsel

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Attorney

Subject: Draft AO 2012-31 (AT&T Inc.)

Attached is a proposed draft of the subject advisory opinion. We have been asked to have this draft placed on the Open Session agenda for September 20, 2012.

Attachment

1 ADVISORY OPINION 2012-31
2
3 Wayne Watts
4 AT&T Inc.
5 Whitacre Tower
6 208 South Akard Street, Room 3702
7 Dallas, TX 75202
8

DRAFT

9 Dear Mr. Watts:

10
11 We are responding to your advisory opinion request on behalf of AT&T Inc. and its
12 family of corepanies (collectively "AT&T"), concerning application of the Federal Election
13 Campaign Act (the "Act") and Commission regulations to a proposal to process contributions
14 made by text message to political committees. AT&T asks whether it may establish a new rate
15 structure for processing contributions to political committees by text message without making
16 in-kind contributions to the political committees. The Commission concludes that AT&T may
17 establish the new rate structure for processing contributions to political committees by text
18 message without making in-kind contributions to the political committees.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on August
21 16, 2012, and the supplement to that letter received on August 31, 2012. Certain facts have also
22 been incorporated, where indicated below, from Advisory Opinion 2010-23 (CTIA – The
23 Wireless Association) ("CTIA I"), Advisory Opinion 2012-17 (Red Blue T LLC, ArmourMedia,
24 Inc., and m-Qube, Inc.) ("m-Qube I"), Advisory Opinion 2012-26 (Cooper for Congress,
25 ArmourMedia, Inc., and m-Qube, Inc.) ("m-Qube II"), Advisory Opinion 2012-28 (CTIA – The
26 Wireless Association) ("CTIA II"), and Advisory Opinion 2012-30 (Revolution Messaging,
27 LLC), and public documents submitted to the Commission in connection with its consideration

1 of those advisory opinion requests. The Commission has also taken into consideration public
2 comments on your advisory opinion request.

3 AT&T provides a service that allows commercial vendors to have access to its premium
4 short messaging service (“SMS”) platform to sell various goods and services, such as mobile
5 phone applications, games, music, and ringtones, to AT&T’s wireless customers.¹ These
6 commercial vendors contract with connection aggregators, which in turn contract with AT&T, to
7 enable AT&T’s wireless customers to have access to the goods and services and to have the
8 convenience and security of paying for them through their monthly wireless bills. In return for
9 providing this service to the aggregators, AT&T charges them a percentage of the amount that its
10 wireless customers pay each month for the purchased content. As noted in Advisory Opinion
11 2012-17 (m-Qube I), a content provider typically receives 50-70 percent of the charges paid by
12 the customer after all fees are deducted.

13 AT&T also makes its premium SMS platform available for organizations exempt from
14 taxation under 501(c)(3) of the Internal Revenue Code (charities) to receive donations from
15 AT&T’s wireless customers. The charities contract with connection aggregators, which in turn
16 contract with AT&T, to enable AT&T’s wireless customers to make donations to the charities
17 through the customers’ monthly wireless bills. AT&T does not charge for or take a revenue
18 share in connection with these charitable giving campaigns.

¹ Text message transactions typically involve a number of entities. The Common Short Code Administration, a component of CTIA – The Wireless Association, oversees the technical and operational aspects of short codes and leases codes to content providers. A short code is the five- or six-digit number to which wireless users can send text messages to access mobile content. Wireless service providers, such as AT&T, are the companies from which subscribers purchase their mobile phone service. Content providers are entities, such as vendors, charitable organizations, or political committees, that use short codes to disseminate content to, or collect information or funds from, wireless users. Application providers convert text messages received through common short codes into data that can be interpreted and used by content providers. Connection aggregators link together content providers, service providers, application providers, and wireless users.

1 AT&T intends to contract with connection aggregators to enable political committees to
2 receive contributions by text message over AT&T's premium SMS platform from AT&T's
3 wireless users, as described in Advisory Opinion 2012-28 (CTIA II). AT&T states that the
4 model described in Advisory Opinion 2012-28 (CTIA II) "represents a new paradigm for
5 AT&T" that is "wholly different" from the model that it has established for commercial content
6 providers, as described above. AT&T asserts that the expectations of its wireless customers who
7 make contributions by text message over the AT&T platform will differ from those of wireless
8 customers who purchase commercial content by text message. AT&T asserts that customers
9 who purchase by text message commercial content, such as ringtones or sports scores, are
10 satisfied when they receive the expected content at the expected price. For these customers,
11 AT&T contends that the revenue-sharing arrangement between AT&T, the connection
12 aggregator, and the content provider is "irrelevant." According to AT&T, by contrast, customers
13 who contribute via text message to political committees "reasonably will expect that most of
14 their contribution is going to the political candidate or committee of their choice" and "do not
15 want a significant portion of their [contributions] siphoned off to the aggregators and wireless
16 [service] providers."² AT&T asserts that, if its wireless customers learn that AT&T and the
17 connection aggregator are retaining a significant portion of their contributions, the customers
18 will be dissatisfied with the transaction and will view AT&T unfavorably as a result.

19 AT&T therefore proposes to create a new rate structure for processing contributions to
20 political committees by text message. AT&T plans to allow for contributions in the amounts of

² See Supplemental Letter from AT&T at page 2. Although AT&T uses the word "donation" in its letter, the word "contribution" has been substituted because AT&T's proposal relates only to Federal *contributions* to political committees. Similarly, the bracketed word "service" has been added to avoid any possible ambiguity through consistent use of the term "wireless service provider" when referring to AT&T and other mobile phone service providers.

1 \$1, \$2, \$5, \$10, \$15, and \$20 to be made via its platform, and to structure its rates as a
2 percentage of the contribution amount, as a flat per-text message charge, or as some combination
3 of a percentage and a flat fee. These rates will be “substantially less” than what AT&T charges
4 for commercial content providers, but more than it charges for donations to charities. AT&T
5 represents that it will calculate the proposed rates based on commercial factors, including the
6 nature of the transactions, the volume of the transactions, the dollar amounts of the transactions,
7 and the volume of work the transactions generate for AT&T’s call centers. AT&T represents
8 that the same rates and rate structure would be charged to all aggregators representing political
9 committees seeking to gain access to AT&T’s text messaging platform. AT&T also represents
10 that these rates will be set to ensure that AT&T recovers all of the costs that it will incur in
11 providing the service, plus a return.³

12 *Question Presented*

13 *Under the Act and Commission regulations, may AT&T establish a new rate structure for*
14 *processing contributions to political committees by text message without making in-kind*
15 *contributions to the political committees?*

16 *Legal Analysis and Conclusion*

17 Yes, under the Act and Commission regulations, AT&T may establish a new rate
18 structure for processing contributions to political committees by text message without making in-
19 kind contributions to the political committees.

20 The Act and Commission regulations prohibit corporations from making contributions in
21 connection with Federal elections. *See* 2 U.S.C. 441b(a); 11 CFR 114.2(b)(1). A contribution

³ AT&T represents that it will need flexibility to adjust the rates over time based upon its actual operational experience. For example, AT&T expects that processing political contributions will put an increased strain on its network in short bursts, due to the volume of contributions that it expects to process during political rallies and political party conventions. It may adjust its rate structure based on the actual increase in volume at these times.

1 includes “any gift, subscription, loan, advance, or deposit of money or anything of value made
2 by any person for the purpose of influencing any election for Federal office.” 2 U.S.C.
3 431(8)(A)(i); 11 CFR 100.52(a); *see also* 2 U.S.C. 441b(b)(2); 11 CFR 114.2(b)(1). “Anything
4 of value includes all in-kind contributions,” including the provision of goods or services without
5 charge or at a charge that is less than the usual and normal charge. *See* 11 CFR 100.52(d)(1).
6 “Usual and normal charge” is defined as the price of goods in the market from which they
7 ordinarily would have been purchased at the time of the contribution, or the commercially
8 reasonable rate prevailing at the time the services were rendered. *See* 11 CFR 100.52(d)(2).

9 AT&T proposes to establish a new rate structure for processing contributions to political
10 committees made through its premium SMS platform. AT&T proposes to charge a fee that is
11 less than the fee that it charges to process text message purchases of goods and services from
12 commercial content providers.⁴ AT&T will base its proposed rate structure on commercial
13 considerations, including the volume of transactions that AT&T expects to process, the dollar
14 amounts of those transactions, the volume of work that the transactions will generate for
15 AT&T’s call centers, and the protection of AT&T’s brand and relationship with its wireless
16 customers. The rate structure, moreover, will be set to ensure that AT&T recovers its costs and
17 receives a return. AT&T will use the same rates and rate structure for all aggregators
18 representing political committees seeking to gain access to AT&T’s text messaging platform.
19 AT&T plans to adjust its rate structure, as necessary, once it gains operational experience with
20 processing contributions via premium SMS technology.

⁴ As noted above, AT&T does not charge for or take a revenue share in connection with charitable giving campaigns.

1 The Commission has recently addressed questions regarding wireless service providers’
2 rates and business practices in the context of text message processing. In Advisory Opinion
3 2012-26 (m-Qube II) and Advisory Opinion 2012-28 (CTIA II), the Commission considered
4 whether wireless service providers would make in-kind contributions to political committees if
5 they modified their existing rate structures for processing contributions to the political
6 committees. In Advisory Opinion 2012-26 (m-Qube II), the Commission stated that, where rates
7 charged by wireless service providers for premium SMS programs “reflect commercial
8 considerations, such as volume of messages, refund rates, customer satisfaction, and technical
9 level of effort, and do not reflect considerations ‘outside of a business relationship,’” political
10 committees would not receive in-kind contributions. Additionally, in Advisory Opinion 2012-28
11 (CTIA II), the Commission noted that corporations could offer reduced rates to political
12 committees so long as the discounts “were available to others on equal terms or as part of a pre-
13 existing business relationship.”⁵ Advisory Opinion 2012-28 (CTIA II) (quoting Advisory
14 Opinion 1994-10 (Franklin National Bank)).

15 Here, the rate structure that AT&T proposes to establish for processing text message
16 contributions to political committees reflects commercial considerations and does not reflect
17 considerations outside of a business relationship. Accordingly, the Commission concludes that
18 AT&T’s proposal will not cause AT&T to make in-kind contributions to the political
19 committees.

20 This response constitutes an advisory opinion concerning the application of the Act and
21 Commission regulations to the specific transaction or activity set forth in your request. *See*

⁵ *See also* Advisory Opinion 2010-21 (ReCellular) (concluding that a corporation’s expansion of a business model to include transactions with political committees did not result in in-kind contributions); Advisory Opinion 2004-18 (Lieberman) (finding that purchase by a candidate’s authorized committee of remaindered copies of book from publisher at discounted rate available to other potential purchasers did not constitute an in-kind contribution).

1 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or
2 assumptions presented, and such facts or assumptions are material to a conclusion presented in
3 this advisory opinion, then the requestor may not rely on that conclusion as support for its
4 proposed activity. Any person involved in any specific transaction or activity which is
5 indistinguishable in all its material aspects from the transaction or activity with respect to which
6 this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B).
7 Please note that the analysis or conclusions in this advisory opinion may be affected by
8 subsequent developments in the law, including, but not limited to, statutes, regulations, advisory
9 opinions, and case law. The cited advisory opinions are available on the Commission's website,
10 www.fec.gov, or directly from the Commission's Advisory Opinion searchable database at
11 <http://www.fec.gov/searchao>.

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On behalf of the Commission,

Caroline C. Hunter
Chair