



FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 14, 2012

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2012-28

Jan Witold Baran, Esq.
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Washington, DC 20006

Dear Messrs. Baran and Burns:

We are responding to your advisory opinion request on behalf of CTIA – The Wireless Association (“CTIA”) and its member wireless service providers, concerning the application of the Federal Election Campaign Act (the “Act”) and Commission regulations to the proposal to process contributions by text message. The Commission concludes that the proposal is consistent with the Act and Commission regulations.

Background

The facts presented in this advisory opinion are based on your letter received on July 3, 2012, the supplement that you provided on July 26, 2012, and the comment you submitted on August 13, 2012. Certain facts have also been incorporated from Advisory Opinion 2012-17 (Red Blue T LLC, ArmourMedia, Inc., and m-Qube, Inc.) (“m-Qube I”), Advisory Opinion 2012-26 (Cooper for Congress, ArmourMedia, Inc., and m-Qube, Inc.) (“m-Qube II”), and Advisory Opinion 2010-23 (CTIA – The Wireless Association) (“CTIA I”), as well as the supplements and comments received in connection with Commission consideration of those requests.

CTIA is an incorporated nonprofit trade association that represents the wireless communications industry. Members of CTIA include wireless service providers and their suppliers, as well as providers and manufacturers of wireless data services and products.

CTIA, through its Common Short Code Administration (the “Code Administration”), manages and oversees the technical and operational aspects of common short codes.¹ The Code Administration leases short codes, administers their registration, and maintains a public database of short codes, available at www.USShortCodes.com.

The Code Administration also works with wireless service providers, connection aggregators, application providers, and content providers to enable use of short codes. Wireless service providers are the companies from which customers purchase their mobile phone service. Content providers are organizations that use short codes to disseminate content to, or collect information or funds from, mobile phone users. Application providers convert text messages received through the code into data that can be interpreted and used by content providers. Connection aggregators link content providers, service providers, application providers, and users together.

Current and Proposed Practices

CTIA and the wireless service providers intend to follow their normal and usual commercial practices for issuing and administering short codes for use by political committees and for processing political contributions.² To lease a short code, a prospective code holder must first establish an account at www.USShortCodes.com and apply for a short code. Account holders are often connection aggregators and application providers who lease short codes on behalf of their content provider clients. The application for a short code must include several pieces of information, such as the identities of the content provider, connection aggregator, and service provider conducting the campaign; a description of the campaign, such as whether it is charitable or political; estimated message volumes; and samples of marketing materials.

The Code Administration reviews each application to make sure it includes all necessary information and confirms the identity of the content provider. The Code Administration does not, however, organize or process a content provider’s identity as an individual, corporation, or other type of organization or entity, or by the content provider’s nationality (U.S. or foreign). Nor does the Code Administration have a way to determine whether an applicant for a short code will use a factoring arrangement.³ CTIA does not monitor whether content providers register multiple short codes.

¹ A common short code is a five- or six-digit number to which wireless users can send text messages to access mobile content.

² CTIA incorporates by reference the facts of Advisory Opinion 2010-23 (CTIA – The Wireless Association) and Advisory Opinion 2012-17 (m-Qube I). CTIA and the wireless service providers are examining how they may permit contributions by text message consistent with their current business practices and those advisory opinions.

³ The Commission approved the use of factoring arrangements for contributions by text message in Advisory Opinion 2012-17 (m-Qube I). “Factoring” is a financial transaction in which an entity (such as a political committee) sells its accounts receivable to a third party (such as a connection aggregator) at a discount in exchange for receiving a percentage (or “factor”) of its outpayment on an expedited basis. More information on factoring appears in Advisory Opinion 2012-17 (m-Qube I).

Once the Code Administration issues a short code, the short code is included in a text message campaign proposal that is submitted to wireless service providers for their review and approval. This process is known as “provisioning.”⁴ Wireless service providers determine whether to accept a text message proposal by measuring it against their own established business requirements, and they propose to establish objective business criteria that are specific to political contribution text messaging campaigns. The wireless service providers may decide, due to commercial considerations, to accept proposals from some political committees and not others. Alternatively, the wireless service providers may decide that it would not be in their “commercial” interest to participate in the political fundraising process and “refuse participation by all political committees.”

If a wireless service provider approves a proposed text messaging campaign, the wireless service provider and the connection aggregator serving the content provider enter into a contract that governs that text message campaign’s rates and terms.⁵ Although the rates and terms in these agreements are confidential, the wireless service providers plan to charge political committees their normal and usual commercial rate. These rates are determined by commercial factors, including, among other things, the dollar amounts of the transactions and the number of transactions made. Wireless service providers also incorporate into their agreements with connection aggregators industry standards for consumer best practices and each wireless service provider’s own consumer protection standards. CTIA and wireless service providers monitor compliance with these contracts throughout the course of a text message campaign. CTIA and wireless service providers intend to use these same standards and requirements in connection with text message campaigns used to process political contributions and not to deviate from those standards.⁶

In a typical “mobile-originated” short code transaction, a wireless user who wishes to initiate a transaction texts a predetermined word or phrase to a short code. For example, in the aftermath of the 2010 earthquake in Haiti, individuals pledged \$10 donations to the Red Cross by texting “HAITI” to code “90999.” The connection aggregator sends a reply text message to the wireless user, requesting confirmation that the user wishes to engage in the transaction. Once a user has confirmed his or her intent to conduct the transaction, the user has completed the “opt-in” process, and the user’s wireless service provider will place a charge on the next bill associated with that user’s phone number.

⁴ Similar to the process for leasing short codes, application providers and connection aggregators, rather than content providers, take the lead in monitoring a proposal’s progress during provisioning.

⁵ A connection aggregator typically enters into a single contract with each service provider that governs many or all of the text message campaigns that the aggregator services.

⁶ CTIA monitors text message campaigns’ compliance with the industry’s consumer best practice standards. It reviews advertising materials used by content providers to promote their campaigns and also signs up for text messaging campaigns to review the text messages themselves. If it discovers that a campaign has failed to comply with these standards, CTIA issues a “Program Violation Notice” to the connection aggregator and content provider. If unresolved, CTIA may freeze the campaign’s account. Wireless service providers also monitor compliance with industry standards and their own contracts.

Some of CTIA's member wireless service providers plan to enter into agreements with connection aggregators that plan to operate consistent with the plan of m-Qube set forth in Advisory Opinion 2012-17. Because wireless service providers propose to use only their customary business practices, they cannot guarantee that users will contribute only \$50 or less per month to a single political committee or otherwise account for mobile phone numbers that have incurred \$200 in charges to a political committee in a calendar year. Moreover, although wireless service providers maintain records of their subscribers' names, addresses, and the phone numbers of the wireless users associated with each account, they 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 by the subscriber's nationality. Wireless service providers do not propose to alter these business practices when processing contributions made by text message because, they assert, doing so would not be practicable or workable.

Wireless service providers typically forward payments to connection aggregators about seven to ten days after receiving payments from subscribers. Connection aggregators accumulate all funds designated for a specific recipient from all wireless service providers over a 30-day period before forwarding the collected funds to the content providers. Wireless service providers and connection aggregators deduct fees from these payments; thus, the amount ultimately received by content providers is smaller than the amount paid by the wireless subscriber.

In general, wireless service providers and connection aggregators reconcile their accounts with each other every 30 days. Each financial transaction is associated with the mobile phone number that completed the opt-in resulting in the charge. During the reconciliation process, wireless service providers deduct fees owed to them by connection aggregators and any refunds that the wireless service providers may have made to their subscribers.⁷ A wireless service provider may also delay or suspend a disbursement to a connection aggregator for commercial reasons provided for in its contract with the connection aggregator. Once a wireless service provider disburses funds, the connection aggregator will have access to information detailing the amounts associated with the reconciliation of each financial transaction and the accompanying mobile phone number.

Questions Presented

1. *Who is responsible for determining the eligibility of a contributor?*
2. *Who is responsible for ensuring compliance with (1) the \$50 monthly limit on contributions; (2) the recordkeeping obligations for contributions in excess \$200; (3) the limitation of one short code per campaign?*
3. *Would deviations from normal business practices constitute "in-kind" political contributions?*

⁷ Wireless service providers typically maintain "liberal repudiation policies" and may refund payments "as business reasons warrant (*e.g.*, claim that a payment was not properly authorized by the wireless subscriber)." Advisory Opinion 2012-17 (m-Qube I).

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?*
5. *Does anything in Advisory Opinion 2012-17 (m-Qube I) require changes in the way wireless service providers process payments to connection aggregators?*

Legal Analysis and Conclusions

1. *Who is responsible for determining the eligibility of a contributor?*
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?*

CTIA and the wireless service providers are not responsible for determining the eligibility of a contributor or for ensuring compliance with (1) the \$50 monthly limit on contributions; (2) the recordkeeping obligations for contributions in excess of \$200; or (3) the limitation of one short code per campaign. Such responsibilities rest with political committees.

The Act and Commission regulations impose certain requirements on treasurers of political committees. A treasurer of a political committee “must keep an account of (1) all contributions received by or on behalf of such political committee; (2) the name and address of any person who makes any contribution in excess of \$50, together with the date and amount of such contribution by any person; [and] (3) the identification of any person who makes a contribution or contributions aggregating more than \$200 during a calendar year, together with the date and amount of any such contribution.” 2 U.S.C. 432(c)(1)-(3); *see also* 11 CFR 110.4(c). Commission regulations also state that “[t]he treasurer shall be responsible for examining all contributions received for evidence of illegality and for ascertaining whether contributions received, when aggregated with other contributions from the same contributor, exceed the [Act’s] contribution limitations.” 11 CFR 103.3(b). The Act and Commission regulations impose comparatively fewer obligations on persons who receive and forward political contributions than on political committees. *Compare* 2 U.S.C. 432(b) (requiring persons who receive contributions for political committees to forward the contributions and certain information to the political committees’ treasurers within either ten or 30 days) *with* 2 U.S.C. 432(c) (recordkeeping requirements) *and* 2 U.S.C. 433 (filing requirements) *and* 2 U.S.C. 434(a)-(b) (reporting requirements).

The connection aggregator in Advisory Opinion 2012-17 (m-Qube I) planned to (1) limit contributions to the political committee from any mobile phone number to \$50 per month, (2) provide each political committee with access to information that would permit it to identify phone numbers associated with contributions aggregating \$200 or more, and (3) require the political committee to agree to receive contributions through a single short code per election cycle.

CTIA and the wireless service providers do not propose to monitor the activity of connection aggregators to ensure that such activity conforms to Advisory Opinion 2012-17 (m-Qube I). Instead, CTIA proposes to issue short codes for use by political committees just as it assigns short codes for use in comparable commercial text message campaigns. The wireless service providers also propose to use their normal and usual commercial practices when processing political contributions by text message. These practices do not include organizing or processing subscriber information based on a subscriber's status as an individual, corporation, or other type of organization or entity, or by the subscriber's nationality. Nor do they enable wireless service providers to guarantee that mobile phone users will not contribute to a political committee more than \$50 per month or \$200 or more in a calendar year or election cycle.

The Commission has considered similar plans in prior advisory opinions. Advisory Opinion 1978-68 (Seith for Senate Committee), for example, was the first advisory opinion in which the Commission concluded that contributions by credit card are permissible under the Act.⁸ The Commission predicated its conclusion on two explicit assumptions: first, that the credit card issuers "will follow their usual and normal collection procedures with respect to obtaining payment from persons who used their credit cards to make political contributions;" and second, that the credit card issuers would render their services "in the ordinary course of business and receiv[e] the usual and normal charge for their services." Advisory Opinion 1978-68 (Seith for Senate Committee).

More recently, in Advisory Opinion 2009-32 (Jorgensen), the Commission concluded that a vendor could provide emails to political committees to use in fundraising without making a contribution, so long as the vendor performed the service at a commercially reasonable rate. Although the vendor provided the political committees with the means to raise contributions, the vendor was not responsible for ensuring that the political committee complied with the Act and Commission regulations when doing so. The Commission stated that the "*political committee will bear the burden* of ensuring that solicitation emails are not sent to prohibited sources, such as foreign nationals, corporations, labor organizations, or federal contractors, and that all required disclaimers are included in the text of the emails." Advisory Opinion 2009-32 (Jorgensen) (emphasis added). Even when the vendor collected contributions on behalf of the political committee, the Commission concluded that "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 limit." *Id.*

The Commission stated in Advisory Opinion 2010-23 (CTIA I) that wireless service providers had certain responsibilities for ensuring the permissibility of contributions made by text message, such as the responsibility to forward to a recipient political committee the information required by 2 U.S.C. 432(b) and (c) to ensure that the political committee could meet its obligations under the Act and Commission regulations if evidence in the wireless subscriber's monthly bill contradicted the user's certification of eligibility to make contributions. The Commission determines here that these requirements do not apply when contributions by text

⁸ The processing of contributions by text message for political committees is "similar to how credit card contributions are handled." Advisory Opinion 2012-17 (m-Qube I).

message are processed by a connection aggregator pursuant to the terms of Advisory Opinion 2012-17 (m-Qube I). *See also* Advisory Opinion 2012-26 (m-Qube II) (“As between m-Qube [a connection aggregator], the [wireless] carriers, and the Committee [an authorized committee receiving contributions via text message under contract with m-Qube], the Committee is solely responsible for determining the eligibility of its contributors.”).

In sum, CTIA and the wireless service providers provide political committees with the means to raise contributions by text messaging, but it is the political committees that are solely responsible for ensuring that the contributions are lawful under the Act and Commission regulations. CTIA and the wireless service providers are therefore not responsible for determining the eligibility of a contributor or for ensuring compliance with (1) the \$50 monthly limit on contributions; (2) the recordkeeping obligations for contributions in excess of \$200; and (3) the limitation of one short code per campaign.

3. *Would deviations from normal business practices constitute “in-kind” political contributions?*

Yes, deviations from normal business practices could constitute “in-kind” contributions, where CTIA and the wireless service providers provide such a discount to a political committee as a result of preferential treatment outside of a business relationship; CTIA and the wireless service providers’ proposal, however, would not result in their making an in-kind contribution. The Act and Commission regulations prohibit corporations from making a contribution in connection with a Federal election. *See* 2 U.S.C. 441b(a); 11 CFR 114.2(b)(1). A contribution includes “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. 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 of value includes all in-kind contributions,” including the provision of goods or services without charge or at a charge that is less than the usual and normal charge. *See* 11 CFR 100.52(d)(1). “Usual and normal charge” is defined as the price of goods in the market from which they ordinarily would have been purchased at the time of the contribution, or the commercially reasonable rate prevailing at the time the services were rendered. *See* 11 CFR 100.52(d)(2).

Each wireless service provider determines the rate it will charge to process payments made in text messaging campaigns based on its own usual and normal commercial criteria. These factors can include, for example, the dollar amounts of the transactions and the number of transactions made. Wireless service providers intend to charge their normal and usual commercial rates when processing political contributions by text message and not to deviate from those rates.

Wireless service providers also incorporate in their agreements with connection aggregators the industry standards for consumer best practices and other consumer protection requirements. CTIA monitors compliance with these standards. 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 to deviate from those standards.

The Commission concludes that the requestors' proposal to charge their usual and normal commercial rates for processing contributions by text message would not result in the provision of services at less than the usual and normal charge or the provision of a "gift . . . of . . . anything of value" to political committees that receive contributions by text message. The Commission reaches the same conclusion with respect to the requestors' proposal to apply and enforce the same standards and requirements against political committees that they apply and enforce against other commercial campaigns.

A change in business practices or rates would not necessarily result in an in-kind contribution. A political committee's "purchase of goods or services at a discount does not result in a contribution if the discounted or complimentary goods were available to others on equal terms or as part of a pre-existing business relationship." Advisory Opinion 1994-10 (Franklin National Bank); *see also* Advisory Opinion 2006-01 (Pac for a Change) (approving a bulk purchase of books at a discount because "the items [were] made available in the ordinary course of business and on the same terms and conditions offered to the vendor's other customers that are not political committees"). A corporation may not, however, provide a discount to a political committee "where a political committee [is] accorded preferential treatment different from other customers, or the treatment [is] outside of a business relationship." Advisory Opinion 1994-10 (Franklin National Bank); *see also* Advisory Opinion 1991-23 (Retail Druggists) (corporation may not provide a car for a political committee to use as a raffle prize because doing so would violate 2 U.S.C. 441b).

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 eligibility criteria proposed by the wireless service providers are consistent with the Act and Commission regulations.

Wireless service providers propose "to establish objective business criteria that are specific to political contribution text messaging campaigns." They may decide, for commercial reasons, to accept only proposals from some political committees and not others.

A vendor may establish and apply eligibility criteria to political committees in order to protect the commercial viability of the vendor's program. In Advisory Opinion 2006-34 (Working Assets, Inc.), the Commission approved an affinity program that a corporate vendor proposed to make available "subject to each particular program's commercial viability, determined by common commercial principles, including, for example, size of membership and hence number of potential customers, potential for long-term customer commitment, strength of trademark, and credit rating of membership." Further, in finding the program to be commercially reasonable, the Commission "assume[d] that *the commercial viability of the vendor's relationship with each political committee would stand or fall on its own*," and thus that the vendor "would not depend on profitability from its relationship with other [non-political committee] clients to sustain the arrangement with a particular [political] committee sponsor." *Id.* (emphasis added).

Similarly, just as in Advisory Opinion 2006-34 (Working Assets, Inc.), where Working Assets proposed to develop eligibility criteria based upon “common commercial principles,” CTIA and the wireless service providers also propose to develop eligibility criteria based upon commercial considerations. Accordingly, the Commission concludes that the wireless service providers may establish such commercial eligibility requirements.

5. *Does anything in Advisory Opinion 2012-17 (m-Qube I) require changes in the way wireless service providers process payments to connection aggregators?*

No, nothing in Advisory Opinion 2012-17 (m-Qube I) requires changes in the way that wireless service providers process payments to connection aggregators.

In their ordinary course of business, wireless service providers typically issue refunds to wireless service subscribers if business reasons warrant (such as if the subscriber disputes a charge on a bill), and these refunds may reduce the service providers’ payments to connection aggregators. Wireless service providers may also terminate, delay or suspend payments to enforce their agreements with connection aggregators.

In Advisory Opinion 2012-17 (m-Qube I), the Commission acknowledged that wireless service providers have “liberal repudiation policies” for text message charges disputed by their subscribers, and could “adjust” (reduce) their payments to aggregators after the aggregators have made factored payments to political committees. The Commission nonetheless approved m-Qube’s proposal to make factored payments to a political committee, because of the safeguards against corporate contributions that m-Qube had built into its business model. *Id.* The Commission sees no reason to reconsider that determination here. Thus, nothing in Advisory Opinion 2012-17 (m-Qube I) requires wireless service providers to change the way that they process payments to connection aggregators including when aggregators employ factoring arrangements with participating political committees. *See also* Advisory Opinion 1978-68 (Seith for Senate Committee).

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

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

On behalf of the Commission,

(signed)
Caroline C. Hunter
Chair