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July 18, 2012

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

Re: Request for Expedited Advisory Opinion

Dear Commission:

This firm represents M-Qube, Inc. and Armour Media, Inc. Joining in this request is Cooper for Congress Committee (the "Treasurer" or the "Committee") (and collectively the "Requestors" or "We"). We request an Advisory Opinion from the Federal Election Commission ("Commission") pursuant to the Federal Election Campaign Act of 1971, as amended (the "FECA" or the "Act"). Specifically, we seek the Commission's guidance in extending the analysis of Advisory Opinion 2012-17 to the duties and responsibilities a political committee treasurer would have when a candidate's campaign committee seeks contributions through text messaging campaigns, and any additional guidance on a connection aggregator's, or a wireless carrier's, responsibilities.¹

The Requestors seek an extension of the decision in Advisory Opinion 2012-17 (the "m-Qube Advisory Opinion") in order to give themselves and the wireless industry specific legal guidance when processing contributions via text messaging.² Because the Committee is competing in a primary within the next 60 days, and the presidential nominating conventions of both political parties are also within the next 60 days, we request the Commission expedite its review of this request pursuant to 2 U.S.C. § 437f(a)(2) (expedited review if advisory opinion is requested by an authorized committee of a candidate within 60 days of an election).

¹ The Commission specifically declined in the m-Qube Advisory Opinion to "comment as to the particulars of political committees' record keeping and reporting requirements under the Act or Commission regulations."

² This advisory opinion request relies on, and incorporates by reference, the facts contained in Advisory Opinion 2010-23 (CTIA – The Wireless Association) and Advisory Opinion 2012-17 (m-Qube) regarding the wireless industry, CTIA, m-Qube and text messaging campaigns. "Wireless service providers" are the nation's public mobile network operators, and we also refer to them as "carriers" or "wireless carriers."

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FACTS

Cooper for Congress Committee is the principal authorized campaign committee of Congressman Jim Cooper who seeks the Democratic nomination for United States Representative from the state of Tennessee in the 2012 election. The Democratic primary for this election is August 2, 2012, and the General Election is November 6, 2012. The Committee is in compliance with all FEC requirements, and otherwise meets the standards m-Qube requires its political committee customers to meet before it can use m-Qube's gateway for receiving contributions via text messaging.

Armour Media is a political media and advertising consulting firm and production company

m-Qube, Inc. is a leading carrier and messaging aggregator for the nation's wireless service providers, and is also described in the m-Qube Advisory Opinion.

The Committee intends to solicit and receive contributions by text messaging for the candidate's primary and the general election. The Committee will negotiate a service order with m-Qube (a model agreement was attached to the m-Qube Advisory Opinion) as soon as the Commission answers our questions. The proposed agreement would include all the terms and conditions the Commission acknowledged in that Advisory Opinion including:

- The service order is on terms which m-Qube offers its non-political customers or otherwise negotiates in its ordinary course of business;
- A requirement that donors confirm their intent to engage in a text message transaction and certify their eligibility to make a contribution under the Act and Commission regulations;³
- No mobile phone number may be billed more than \$50 per month for contributions made to any one political committee;
- The committee would use m-Qube's factoring system to receive a percentage of its texted contributions on a weekly basis, with trailing payments made on a regular basis;⁴

³ For example, the donor attestation would be consistent with that described in footnote 4 of Advisory Opinion 2012-17, page 3.

⁴ For example, for texted contributions made from day 1 from day 7, the Committee would receive a factor of the total contributed on day 10. Trailing payments would also be made on a weekly basis, after m-Qube has received an accounting from the carriers.

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- for forwarding and reporting purposes a contribution is deemed to have been made on the date the contribution is texted;
- the aggregator will keep a running tally each month to enforce the \$50 limit; will continue that tally past each billing cycle; and give the Committee real-time secured access to its gateway where a tally will be maintained to allow the Committee to identify phone numbers; and
- requiring the Committee to have only one short code per election.

Importantly, the Committee is going to add one additional feature to its Service Order with m-Qube. Because m-Qube can keep a running tally of contributions made from a particular phone number and because m-Qube's gateway permits political committees to block text message contributions from any phone number at any time for any reason:

The Committee will set the m-Qube gateway to inform the Committee if contributions from any one phone number equal or exceed \$200 during any one calendar year. Based on its own record keeping and reporting obligations, the Committee itself would determine, based on its compliance with the FECA, whether it will accept additional texted contributions from that phone number through the m-Qube gateway.

To be clear, this is a gateway setting operated solely by the Committee, and not by the aggregator. Carriers have no access to settings at m-Qube's proprietary gateway for individual merchant accounts.

In this improved form of the service order, the Committee could continue collecting contributions aggregating over \$200 from a phone number only after the Committee has satisfied itself through its best efforts that the contributor's identity has been correctly recorded by the Committee in accordance with FECA. As with any other form of soliciting and depositing contributions, the Committee would remain solely responsible for collecting information from contributors who have exceeded the \$200 reporting threshold. The Committee plans to collect that information via text message, or by texting a contributor a web-form to complete, or by any other legally permitted method. Under the proposed service order, the responsibility for monitoring the \$50-per month allowance on anonymous contributions and the \$200 reporting threshold for political contributions would remain solely with the political committee. The carriers themselves have no access to the m-Qube gateway, and no way to lift or change the self-imposed \$50 or \$200 limits, and finally: the carriers do not have any practical way to help the Committee meet its obligations. It is the political committees who have the ability and responsibility for complying with the \$50 cap, and controlling the \$200 limit.

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QUESTIONS PRESENTED

1. Does the responsibility for determining whether a contribution made by text messaging is from a prohibited source remain with the political committee, and not the wireless industry?
2. Does the responsibility for complying with the record keeping and reporting requirements of the Act – specifically the \$50 and \$200 limits imposed in this program, and the requirement of having only one short code per campaign – remain with the political committee?
3.
 - a. Please confirm the Committee will not be receiving an impermissible “in-kind” contribution if it negotiates rates and terms that are the usual and customary rates and terms of the carriers, or discounted rates and terms the carriers may offer in their ordinary course of business within general industry standards.
 - b. Please confirm the Treasurer will not be receiving an impermissible “in-kind” contribution from the carriers when the carriers follow their normal business practices with respect to administering premium SMS programs, and that if any changes are made it is because normal practices are not relevant to, or are impracticable for, political committees.
4. Can the Committee avoid receiving an “in-kind” contribution if it is subject to criteria, established by aggregators and wireless carriers, for determining the eligibility of political committees who may participate in text messaging contribution campaigns?
5. Please confirm that nothing in Advisory Opinion 2012-17 prevents treasurers from being subject to the methods wireless service providers normally process payments to connection aggregators.

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ANALYSIS

On the basis of the m-Qube Advisory Opinion and decades of FEC jurisprudence, we believe the answer to each of the above question is: yes.

1. Does the responsibility for determining whether a contribution made by text messaging is from a prohibited source remain with the political committee, and not the wireless industry?

Yes, the responsibility for determining whether a contribution is from a prohibited source remains with the political committee. As the Commission has frequently stated: it is ultimately the responsibility of the political committee treasurer to obtain the identity of contributors and prevent excessive and prohibited contributions. Advisory Opinion 1991-20 (Call Interactive). Treasurers of political committees have the authority to accept or reject any contribution, undertake whatever review they deem is necessary, and to exercise their "best efforts" to comply with the prohibitions, limitations and reporting requirements of the Federal Election Campaign Act. 2 U.S.C. § 432(i). Treasurers cannot shift these responsibilities to others or ask vendors to act in their place. In fact, a political committee may not even deposit a contribution without having its own treasurer in place. 2 U.S.C. § 432(a).

To fulfill its responsibility in this case, the Treasurer of the Committee intends to do five things: (1) use a pre-contribution attestation that requires the potential contributor to certify that he or she is not, for example, a corporation; (2) receive contributions from mobile users who obtain service through U.S.-based service providers to prevent persons who access wireless services through foreign service providers from initiating opt-ins via text message; (3) use the m-Qube gateway to maintain an on-going tally of all the phone numbers from which texts originate and the date and amount of each text; (4) ensure that when the Committee receives additional information about a donor that indicates a contribution is from a prohibited source or will cause the donor to make a contribution over the \$200 threshold, it will take steps to refund that contribution or block that phone number from making further texted contributions, and (5) keep the \$200 default limit on the gateway until it is released by the Committee.

By using the m-Qube system, the Treasurer seeks the Commission's agreement that the wireless carriers are not required to determine the eligibility of any particular contribution. Here, an explanation of key differences between the Advisory Opinion 2010-23(CTIA) and Advisory Opinion 2012-17 is helpful:

In Advisory Opinion 2010-23 (CTIA) the Commission held that a texted contribution was considered made on the date the wireless subscriber paid a bill sent to it by the carrier that contained a charge from a Code-initiated pledge. From this, the Commission expressed its concern that there may be cases where a subscriber's bill has a foreign address or indicates it is a

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corporation, giving the carrier an obligation to provide the treasurer with that information before the contribution was collected.

In m-Qube's proposal, the Commission found that the contribution is made at the time of the contributor's opt-in, just as a credit card contribution is made at the time the card is swiped or entered through a web-based solicitation. See Advisory Opinion 1990-04 (American Veterinary Medical Association) ("Contributions by credit card are considered as received upon the date the AVMA receives the member's authorization to charge his or her ... contribution to the member's credit card account.")

In fact, under the m-Qube method of factoring, the carriers do not even collect or receive political contributions. Instead, the carriers will be billing their subscribers in order to reimburse the aggregator for the extension of credit the aggregator has already given to the political committees for the contributions those donors have already contributed through opt-ins. Just as with a contribution by credit card, m-Qube's normal factoring arrangement with merchants and now political committees will forward to the political committee a factored payment within ten days of the opt-ins.

With contributions by credit cards, the contribution has been made, delivered and deposited soon after the charge was authorized by the card holder. The card member's issuing bank merely collects on an obligation that has already been made.⁵ In the case of mobile-carrier-billed transactions like premium SMS, the wireless carrier is analogous to the credit card issuer: it is the means by which payments are collected, and not how contributions are made. The Commission has, to our knowledge, never placed a requirement on the credit card issuer to monitor the name and address on the cardholder's statements. This same allowance now should be accorded to carriers and their mobile payment processing for political committees. Their obligation is to collect the money from the account holder, forward it to the processor along with any additional accounting, net of fees and refunds or chargebacks.

- 2. Does the responsibility for complying with the record keeping and reporting requirements of the Act – specifically the \$50 and \$200 limits imposed in this program -- and the requirement of having only one short code per campaign -- remain solely with the political committee?*

The Federal Election Campaign Act and Commission regulations require any person who receives a contribution in excess of \$50 for a political committee forward it to the recipient political committee with the name and address of the contributor and the date of the contribution.

⁵ Under generally accepted accounting principles, m-Qube and the political committee recognize revenue at the time of opt-in as well, because that is the time that the determinable and fixed amount arrangement was made and evidenced.

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2 U.S.C § 432(b)(1),(b)(2). The FECA also requires the treasurer of a political committee to collect the name and address of any person who makes any contribution in excess of \$50 and publicly report the identification of any person who makes a contribution or contributions aggregating more than \$200 during a calendar year. 2 U.S.C. § 432(c)(1)-(3). The Act further states the Treasurer of a political committee shall file periodic reports of its receipts and disbursements and personally sign the report stating that its contents are true, correct and complete. 2 U.S.C. § 434(a)(2). Importantly, the Act does not contain any provision allowing the Treasurer to assign or delegate this responsibility to any other person or vendor.

Complying with a Treasurer's self-imposed \$50 Monthly and \$200 Yearly Limits are obviously a Political Committee Treasurer's Sole Responsibility. In this case, by complying with the clear limitations and procedures required in the m-Qube service order, a treasurer can fulfill his recordkeeping and reporting responsibilities. The Treasurer does not intend to rely on the wireless carriers to monitor the \$50 monthly limit on contributions from any one phone number, or its self-imposed limit of receiving no more than \$200 from any one number in any one calendar year, unless the Committee itself lifts that limit for an individual phone number after it has satisfied its record keeping and reporting obligations. The \$50 and \$200 limitations are implemented under the service order at m-Qube's proprietary gateway, accessible only by m-Qube or the political committee. No involvement by the carrier is possible or required.

Under the m-Qube factoring method, there will never be a situation where any one contribution being forwarded to a political committee (within the aggregator's weekly lump sum extension of credit) can be greater than the \$50 monthly cap. Therefore the requirement that "any person" (which includes the carriers) who receives a contribution greater than \$50 for a political committee forward it along with the name and address of the donor is simply not applicable here. We note, again, as in the answer to question 1, that in actuality the carriers do not receive political contributions at all – they merely collect payment for contributions already charged to the contributors and already largely paid by m-Qube under its normal and usual factoring arrangement.

The Committees are Solely Responsible to Limit Themselves to One Short Code. In the same manner as the \$50 monthly and \$200 yearly limits, under the m-Qube service order, the political committee itself is solely responsible for its promise to operate one and only one premium short code. Neither m-Qube, nor the carrier has any responsibility under FECA to ensure that the Committee complies with this requirement.

The Committee does not intend to utilize more than one short code for fundraising purposes. The short code is not a secret account number. It is the actual short phone number that the Committee must publicize to potential contributors to encourage them to make a contribution. Moreover, the CTIA itself administers the registration of short codes, and requires that all

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applicants provide verified identity information. This verification may include a simple check against CTIA's own short code registry to confirm that a Committee has registered not more than one short code designated for premium SMS. Any attempt by a committee to register more than one premium short code is readily discoverable. There is no advantage to a political committee in even attempting to breach its obligation and to use more than one short code for fundraising purposes.

3. a) *Please confirm the Committee will not be receiving an impermissible "in-kind" contribution if it negotiates rates and terms that are the usual and customary rates and terms of the carriers, or discounted rates and terms the carriers may offer in their ordinary course of business within general industry standards.*

The affirmative answer to this question directly comes from one of the principal issues resolved in the m-Qube Advisory Opinion. m-Qube's proposal, which the Commission found compliant with the Act, was *"to enter into service orders with political committee customers, the basic terms of which are the same as those it offers to customers other than political committees in the ordinary course of its business."*

Simply put: the Committee may pay the carriers' usual and normal rates without receiving an "in-kind" contribution.

We also seek an extension of that analysis as to whether a political committees and carriers can negotiate those rates, while still safeguarding against offering discounts that would amount to impermissible "in-kind" contributions.

The Commission has routinely allowed treasurers to negotiate or receive discounts, new or other non-commercial rates, from vendors without that action constituting an impermissible corporate "in-kind" contribution. Accordingly, the Treasurer believes that carriers may even provide new or reduced rates for the Committee so long as these rates are negotiated in the carrier's ordinary course of business within industry standards, and not allocated in a discriminatory way among political committees.

The Commission has a long history of approving advisory opinions to corporations who are contemplating creating or furnishing existing discounts or other services to non-profit political committee customers that differ from their fully-priced rates for for-profit corporate customers.

The Act prohibits any contribution or expenditure by a national bank or by a corporation in connection with a Federal election. 2 U.S.C. § 441b(a). For the purposes of this prohibition, the term "contribution or expenditure" includes "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value ... to any candidate, [or] campaign committee ... in connection with any" Federal election. 2 U.S.C. § 441b(b)(2).

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Commission regulations define "anything of value" as "the provision of any goods or services without charge or at a charge which is less than the usual and normal charge for such goods or services." 11 C.F.R § 100.7(a)(1)(iii)(A).

In the past, the Commission has concluded that the receipt of complimentary items or the 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. See Advisory Opinions 1992-24, 1989-14 and 1987-24.

In Advisory Opinion 1994-10 (Franklin National Bank) a banking institution proposed to, at the request of the customer or, more often at the bank's initiative, waive certain charges. The bank did not have any special policy that governed waivers granted to political committees as opposed to other customers. Furthermore, a decision to grant a waiver is based on the bank's business judgment.

The Commission concluded that if the bank could show certain discounts were in the normal course of business regarding its commercial customers and is normal industry practice, then it would be permissible to offer the same consideration for its political customers in similar circumstances.

This allowance for discounts does not, however, extend to providing goods or services to a political committee without charge. In Advisory Opinion 1996-2 (CompuServe, Inc.) the Commission stated:

You have demonstrated that CompuServe provides free member accounts to a number of organizations and entities with a variety of public service orientations. You indicate that such free accounts increase the company's prestige and goodwill and encourage future use by present subscribers and potential subscribers. Even if the categories of free customers you describe is varied enough to indicate that your proposal may be in the ordinary course of business, the Commission still concludes that your proposed gift to Federal candidates of valuable services which enable them to communicate with voters and advocate their candidacies would constitute in-kind contributions to those candidates and would be prohibited by 2 U.S.C. § 441b(a). As indicated in the opinions addressing the relevance of promotional value, the fact that CompuServe may derive substantial publicity, goodwill, or other commercial benefit does not negate or reduce the corporate contribution. Such publicity or benefit does not constitute consideration for the services provided. See Advisory Opinions

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1988-25 and 1988-12. Moreover, the Commission has applied this principle to situations where goods or services are provided without charge, and it has explicitly noted that the allowance for providing goods or services at a discount does not (except under narrow circumstances not present here) extend to providing them without any charge. Advisory Opinion 1988-25.

Accordingly, the treasurer in this case believes it is within the carriers' discretion to provide political committees a reduced rate so long as the rate structure currently exists, or can be created by the judgment of the carrier within its ordinary course of business or within common industry standards. Any such discount would have to be accorded on an equal, non-partisan basis and not be so low as to constitute a service that is being provided free of charge.

On that legal basis, we respectfully request the Commission to confirm that carriers and aggregators may charge, and political committees are safe to pay the carriers and aggregators, the "usual and normal" rates they charge for similar services or any changes they may offer so long as they are compatible with normal industry practices.

3b) Please confirm that the Treasurer will not be receiving an impermissible "in-kind" contribution from the carriers when the carriers follow their normal business practices with respect to administering premium SMS programs, and that if any changes are made it is because normal practices are not relevant to, or are impracticable for, political committees.

Yes, CTIA and the carriers should be expected to enforce a requirement that political committees comply with all of their normal and usual business practices in registering and marketing premium short codes. The only exception would be in cases similar to where the Commission has found in prior advisory opinions issued to carriers on the question of whether their billing related activity constitutes "in-kind" contributions:⁶ that it would be inequitable to require carriers to enforce business practices that are not relevant to political committees.

For example, when normal corporations apply to register short code programs, carriers and the CTIA engage in a detailed vetting process to make sure that the corporation is in good standing and lacks a derogatory regulatory history. Similarly, the CTIA and carriers may rely on the political committee's regulation by the Commission for some of their normal and usual corporate

⁶ See, *FEC Advisory Opinion 2006-34*, issued to the wireless carrier "Working Assets, Inc." in which the Commission stated that it would be "inequitable to require a political committee sponsor to pay the full value of Working Assets' marketing services," since the carrier received other business benefits from providing subscribers with a service permitting them to make political contributions through their mobile phone bill.

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vetting practices. The Committee's records, of course, can be reviewed by anyone on the Commission's website: www.fec.gov.

Further the CTIA itself administers the registration of common short codes in this country as more fully described in the www.usshortcodes.com website. In recent years, a number of wireless service providers have also relied upon the CTIA to assist in publishing and maintaining recommended best practices guidelines for short code marketers, and has assisted in monitoring compliance as well. The CTIA publishes the carriers' guidelines governing its industry-monitoring work. See http://www.wmglobal.com/images/CTIA_handbook.pdf. Those registration procedures and marketing best practices are designed to protect consumers from deceptive marketing, and to preserve the carriers' business interests.

4. *Can the Committee avoid receiving an "in-kind" contribution if it is subject to criteria, established by aggregators and wireless carriers, for determining the eligibility of political committees who may participate in text messaging contribution campaigns?*

Yes, the Commission has adopted regulations that allow organizations to establish criteria or standards a political committee must meet in order to participate in certain programs. By analogy, the treasurer seeks the Commission's agreement that the wireless industry can establish certain threshold eligibility standards it must meet before receiving a short code to begin a program for receiving text contributions.

The Commission has adopted very clear standards in other areas that allow organizations to establish criteria that would exclude certain candidates from participating in public programs or having access to platforms for fundraising events.

For example, candidate debates may be sponsored by a broadcaster; bona fide newspaper; magazine or other periodical or nonprofit organizations (i.e., those organizations under 501(c)(3) or (c)(4) of the Internal Revenue Code), in accordance with 11 C.F.R. § 110.13 of the Commission's regulations. In particular, a debate must include at least two candidates and should not be structured to promote or advance one candidate over the other.

Further, an organization sponsoring a debate may use additional criteria to determine which candidates may appear in the debate. The organization can require the candidate demonstrate some measure of popular support, such as having reached a consistent level of support in polling data or demonstrate sufficient financial support. An organization cannot, however, use the nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate. 11 C.F.R. § 110.13(c).

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5. Please confirm that nothing in Advisory Opinion 2012-17 prevents treasurers from being subject to the methods wireless service providers normally process payments to connection aggregators.

The Treasurer expects the wireless carriers to not change the way contributions, payments, refunds, time periods or other practices they usually perform when they apply them to processing political contributions via text messaging programs. This is well-explained in the m-Qube Advisory Opinion.

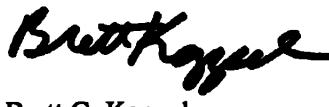
The risk of disputed charges or carrier refunds or suspensions are the main reason stated in the m-Qube Advisory Opinion explaining why m-Qube proposes to advance political committees only a "conservative" factor, estimated as 70% of "outpayments." (Advisory Opinion 2012-17 at page 4, and footnote 8, *inter alia*.) The extent to which wireless service providers offer refunds to political contributors, or to which they have the power to suspend payments to aggregators, are private contractual matters amongst the parties, and are not dictated by the Act so long as they remain in their ordinary course of business.

In Advisory Opinion 2012-14, granting refunds to political contributors, or suspending payments to connection aggregators for normal and usual business reasons, did not impose additional obligations on the carriers under the Act.

Sincerely,



Craig Engle



Brett G. Kappel


Robert A. Davison (Jul 18, 2012)

Jul 18, 2012

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July 24, 2012

Anthony Herman
General Counsel
Federal Election Commission
999 E St. NW
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Dear Mr. Herman:

Thank you for having your office initiate several conversations yesterday to discuss additions or changes to the Advisory Opinion Request this office submitted on July 18, 2012.

As a preface we note we are asking the Commission for this Advisory Opinion because the carriers and the political committees have no direct contractual relationship and little knowledge of each other. Each does not do know how the other party's actions may affect compliance with the Act. While Advisory Opinion 2012-17 was very thorough; it was written to m-Qube, an aggregator whose position in processing premium SMS contributions *lies between* its political committee customers and the carriers.

Interestingly, by working through m-Qube, the carriers and the committees have the same essential question, namely: how does a political committee treasurer demonstrate to a carrier that in processing political contributions by premium SMS, and employing all of its standard rates and practices for premium SMS, the carrier itself does not incur a risk of violating the Act. We believe affirmative answers to all our Questions Presented can demonstrate how this can be demonstrated.

We have the following answers to your questions and amendments to our Request.

1. On page 1, we state the "presidential nominating conventions of both political parties are also within the next 60 days." We do not rely upon that fact as part of our actual request, but instead are just noting that as an upcoming event.
2. On page 2, we state that the Committee intends to "solicit and receive contributions by text messaging." As we have discussed before, the word "solicit" is meant not in a legal, FECA sense, but is just a factual point that texters must affirmatively double-opt-in and

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make attestations via the internet or by text message as a condition to m-Qube processing their requested contribution. But to be clear, the words "solicit and" do not need to be part of the factual presentation section of our Request.

3. Regarding Question 1, we confirm it is intended to clearly establish the responsibility of the Committee to meet the requirements for establishing the eligibility of its contributors. In these specific circumstances, and given the structure of the mobile industry, the Committee is subject to the legal requirement to do what the carriers, as a practical matter, cannot do; namely: discharge this responsibility.

Accordingly, the question we raise in Question 1 can be best understood if it is written in the manner below, leaving none of the parties to the transaction unclear about their legal rights and responsibilities:

As between m-Qube, the carriers and the Committee, does the Committee bear the responsibility to determine its contributors' eligibility, which it would do by adopting the necessary safeguards?

4. Following the re-phrasing of Question 1 on page 5, we would restate one of the responsibilities and add a point (6). Responsibility (4) would be revised to state:

"Ensure that when the Committee receives additional information about a donor that indicates a contribution is from a prohibited source, it will take steps to refund that contribution and block that number from texting any further contributions; and ensure before the Committee receives a contribution that will cause the donor to have made over \$200 in contributions during a single year it will have exercised its best efforts to obtain information about the donor for itemization purposes, and if that information is not available, take steps to refund any donation over the \$200 self-imposed limit and prevent that number from making future texted donations."

And we will add an additional point number six:

"(6) and note that the treasurer can perform those five safeguards without any information from the carriers, no contractual relationship with the carriers, and only with the information

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available to them in the m-Qube gateway in its ordinary course of business.”¹

5. From our discussions, we believe a better way to re-phrase question 2. is:

If the Committee performs several of its own tasks and employs several of its own safeguards regarding the \$50 monthly limit on contributions; the recordkeeping obligations for contributions that tally in excess of \$200; and the limitation of one short code per campaign: will the Committee have fulfilled all the responsibilities for compliance under the Act without any additional action by any carrier or aggregator other than those set forth in this request?

6. On the self-imposed provision of a political committee having only one short code, we would add that if a committee is attempting to receive and advertise two short codes such conduct would clearly be seen by the general public and would breach the Committee’s service order contract with m-Qube.
7. In Question 3. we state the carriers might provide their standard rates to the Committee, or might provide *negotiated* rates to political customers so long as they are in the carrier’s ordinary course of business, within industry standards, and not allocated in a discriminatory way among political committees.

To be clear, any such negotiation over rates does not occur between the carriers and the political committees. Political committees will not have any contact with the carriers, and the carriers’ rates are confidential. Instead any negotiations that may occur about rates and terms would be amendments to the standing master agreements between m-Qube and each carrier, for the purpose of offering differentiated standard rates to all political contribution programs. Like any PSMS merchant, a political committee is not privy to those contracts.²

¹ It is understood that in the case of texted contributions, the only information carriers, aggregators and committees reasonably have access to is the phone number and the double opt-in records including the contributor’s attestation. With that attestation by the anonymous contributor in hand, there is no responsibility, on the part of committees, aggregators or carriers, to cross reference that information against, for example, carrier account records, or to investigate or discover any further information about the account to which the contributor’s phone number is attached. See Supplemental Material submitted by the Requestors in Advisory Opinion 2012-17, June 6, 2012.

² We further note that at this time, aside from charitable programs where service is provided for free, no carriers offer differentiated rates for one type of premium SMS program or another. Further, until they permit political contributions programs, carriers will lack much of the business information that could inform potential discounts – such as volume, refund rates, customer satisfaction and technical level of effort. Therefore, we fully expect that during this election cycle, some carriers will conclude that their “usual and normal” and “ordinary business

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In its most simple terms, we believe the Committee may pay, through m-Qube, the carriers' normal premium SMS rates or any discount from those rates that carriers permit using their ordinary business judgment, and that neither will be seen as an impermissible in-kind contribution under the Act.

8. Once again, we are seeking to clarify m-Qube's and the Committee's legal responsibilities in accepting the rates that carriers charge m-Qube for the use of premium SMS messaging for political contributions, and our responsibilities when the carriers adhere to their normal business practices. The question 3. can be clarified in two parts:

a. *(i) If any given carrier offering this service is not offering a discount on these services as provided in the ordinary course of business to all customers, is it correct that if m-Qube received a special discount from a carrier for political committees, and passed that savings on to the Committee, that the Committee could be seen as receiving an in-kind corporate contribution, since the discount was not "usual and normal?"*

(ii) If any given carrier concludes that it could offer m-Qube a discount consistent with its ordinary course business practices, and m-Qube passed that savings on to the affected political committees, would the Committee be safe in receiving those savings without being viewed as having accepted an in-kind corporate contribution?

b. *Please confirm the Treasurer will not be receiving an impermissible "in-kind" contribution from the carriers when the carriers follow their normal business practices with respect to administering premium SMS programs, and that if any changes are made it is because normal practices are not relevant to, or are impracticable for, political committees.*

9. In addition to the analysis given in response to question 3. b. we would like to add the following information:

"For example, it is a standard practice for CTIA to review a proposed applicant for a short code to see if that company's actual corporate address and leadership (verified through emails and phone calls to the applicant's CEO) matches those set forth in state incorporation records, and to search Lexis for adverse regulatory or

practices" rules governing discounts under the Act will require them to charge aggregators their full premium SMS rates charged to other premium SMS merchants.

Arent Fox

litigation history. In the case of political committees, the CTIA may decide to achieve some of the same purposes by (i) reviewing the political committee in the FEC website, by verifying information with Committee treasurers, possibly searching the Commission's database for adverse regulatory history and that (ii) verification emails or phone calls may be made to the committee treasurer or designated staff member rather than requiring such a communication with the campaign manager or candidate herself."

10. In addition to the analysis given in response to Question 3. b. we would like explain that the political committees themselves have no direct relationship with the wireless carriers. Instead, a Committee has its own contractual relationship with the aggregator and the aggregator has its own contractual relationships with the carriers. Accordingly there will never be a situation where there are negotiations between a particular wireless carrier and a particular political committee. Individual carriers have the contractual power, of course, to permit or prohibit any type of premium SMS programs, or to establish conditions or rules governing the manner in which any such premium SMS programs may be operated.

11. From our discussions, we believe the better way to phrase Question 4 is:

"Can the Committee avoid receiving an "in-kind" contribution if it or any other political committee is subjected to eligibility requirements established by the aggregators and the wireless carriers for determining whether a committee may participate in a text messaging contribution campaign?"

12. In addition to the analysis provided in Question 5. We would like to add that the Committee expects to receive its net contributions as part of the aggregator's normal services, and that the Committee would not be receiving an in-kind contribution if a carrier either maintained or adjusted its practices on making refunds. M-Qube is informed that carriers' refund policies and practices are private and trade secret information of the carriers. They do not disclose them, but the practices are known to be flexible and adaptable to individual circumstances.

Arent Fox

Thank you again for your prompt response to our submission and the detailed questions you asked last week. We hope today's answers will allow the Commission to render a decision in what we all appreciate is a very tight deadline.

Sincerely,

A handwritten signature in black ink, appearing to read "Craig Engle", with a long horizontal flourish extending to the right.

Craig Engle