

CTIA

Building The Wireless Future
Cellular Telecommunications & Internet Association

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Michael F. Altschul
Senior Vice President for
Policy and Administration and
General Counsel

August 19, 2002

Bradley Litchfield, Esq.
Associate General Counsel for Policy
Office of the General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Comment to
AOR 2002-09

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FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

Re: Request of Target Wireless for an Exemption from the Disclosure Requirement of 2 U.S.C. § 441d

Dear Mr. Litchfield:

Pursuant to 11 C.F.R. § 112.3(a), the Cellular Telecommunications & Internet Association (CTIA)¹ supports the request by Target Wireless seeking an exemption of certain disclosure requirements under the disclaimer exception, 11 C.F.R. § 110.11(a)(6), for the distribution of political advertising to Commercial Mobile Radio Service ("CMRS") subscribers who have "opted-in" to receive such messages on their wireless devices using Short Message Service ("SMS"). Accordingly, CTIA urges the Federal Election Commission to issue an advisory opinion stating that the disclaimer exception logically applies to political advertising using SMS text messages.

As Target Wireless describes in its Request for an Advisory Opinion, CMRS SMS permits subscribers to send and receive short text messages using wireless devices. At present, each SMS message is limited to 160 characters.² Accordingly, the provisions of 2 U.S.C. § 441d(a) and 11 C.F.R. § 110.11(a)(1), which require, *inter alia*, that a communication advocating the election or defeat of a candidate through public political

¹ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

² While different wireless technologies and devices have different text messaging capabilities, all platforms support 160 character messages, making this the *de facto* SMS standard for text messages in the United States.



advertising must be accompanied by a clear and conspicuous disclaimer to give the reader notice of the identity of the party who paid for the communication, would be impractical considering the length of the mandated disclaimer. Fortunately, the Federal Election Commission's rules provide for an exception to the disclosure requirement for advertising where the disclosure would be impracticable due to the relative size of the disclaimer to the advertisement. See 11 C.F.R. § 110.11(a)(6).

In the Twentieth Century, the Commission applied this exception to skywriting, and advertising on small items, such as pens and pencils, where a disclaimer would be impractical. CTIA urges the Federal Election Commission to extend this exception to SMS text messages.³ Given the severe limitations on the length of SMS text messages, this Twenty-First Century wireless messaging technology is similar to the types of advertising previously excepted under 11 C.F.R. § 110.11(a)(6). Absent such a ruling, political candidates will not be able to take advantage of SMS to reach the 135 million Americans who subscribe to CMRS offerings.

As the Association of National Advertisers observed in its August 12, 2002, letter in support of the Target Wireless request, any effort by the government to restrict either political or commercial speech must be "narrowly tailored" to reasonably address a substantial government interest to satisfy significant First Amendment concerns. See *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980). With respect to political speech, the government must justify any restriction, including overly burdensome disclosure requirements that effectively can preclude certain forms of speech.

Because SMS text messaging comes within the scope of the disclaimer exception, and because overly burdensome disclosure requirements implicate important First Amendment considerations, CTIA supports the request by Target Wireless seeking an exemption of certain disclosure requirements under the disclaimer exception, 11 C.F.R. § 110.11(a)(6), for the distribution of political advertising to Commercial Mobile Radio Service ("CMRS") subscribers who have "opted-in" to receive such messages on their wireless devices using Short Message Service ("SMS"). Accordingly, CTIA urges the Federal Election Commission to issue an advisory opinion stating that the disclaimer exception logically applies to political advertising using SMS text messages.

Sincerely,



Michael Altschul

³ Target suggests, in the alternative, that if the Commission does not fully except the disclosure requirement, it could limit the disclosure information to a phone number or Internet address where the recipient of the message could receive more information concerning the sponsor of the message.