

## **PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS**

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

DRAFT ADVISORY OPINION 2010-23 is now available for comment. It was requested by Jan Witold Baran, Esq. and Caleb P. Burns, Esq., on behalf of CTIA – The Wireless Association, and is scheduled to be considered by the Commission at its public meeting on Thursday, November 18, 2010.

If you wish to comment on DRAFT ADVISORY OPINION 2010-23 (CTIA), 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 November 17, 2010.
- 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](mailto: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: Rosemary C. Smith  
Associate General Counsel  
(202) 694-1650

Other inquiries:

To obtain copies of documents related to Advisory Opinion 2010-23, 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/searchao>.

**ADDRESSES**

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

Office of General Counsel  
ATTN: Rosemary C. Smith, Esq.  
Federal Election Commission  
999 E Street, NW  
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AGENDA DOCUMENT NO. 10-67-A



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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2010 NOV 17 A 8:02

November 17, 2010

**AGENDA ITEM**

For Meeting of 11-18-10

MEMORANDUM

TO: The Commission

FROM: Christopher Hughey *pch*  
Acting General Counsel

Rosemary C. Smith *RCS*  
Associate General Counsel

Amy L. Rothstein *AR*  
Assistant General Counsel

Theodore M. Lutz *TML*  
Law Clerk

Subject: Draft AO 2010-23 (CTIA)

**SUBMITTED LATE**

Attached is a proposed draft of the subject advisory opinion. We have been asked to place this draft on the agenda for November 18, 2010.

Attachment

1 ADVISORY OPINION 2010-23

2

3 Jan Witold Baran, Esq.

4 Caleb P. Burns, Esq.

**DRAFT**

5 Wiley Rein, LLP

6 1776 K Street NW

7 Washington, DC 20006

8

9 Dear Messrs. Baran and Burns:

10 We are responding to your advisory opinion request on behalf of CTIA – The  
11 Wireless Association (“CTIA”), concerning the application of the Federal Election  
12 Campaign Act of 1971, as amended (“the Act”), and Commission regulations to the  
13 pledging of contributions to Federal candidates, political parties, and other political  
14 committees (collectively “political committees”) by sending text messages to Common  
15 Short Codes (“Codes”) over wireless networks. The Commission concludes that CTIA’s  
16 proposal for wireless service providers and connection aggregators to proceed under their  
17 current business practices to process contributions to political committees would not be  
18 permissible under the Act and Commission regulations.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on  
21 September 10, 2010.

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

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25 CTIA, through its Common Short Code Administration (“Code Administration”),  
26 manages the Codes. The Codes are five- or six-digit numbers to which wireless users can  
27 send text messages to access mobile content. The Code Administration oversees the

1 technical and operational aspects of Code functions and maintains a single database of  
2 Codes. The Code Administration leases Codes to entities, who use them for a variety of  
3 purposes, including sweepstakes, opinion polling, mobile coupons, and charitable  
4 donations. A prominent example of the use of Codes was the Red Cross's utilization of a  
5 Code to allow wireless users<sup>1</sup> to pledge ten dollar donations to the organization's  
6 earthquake relief efforts in Haiti in 2010.

7 Content providers, application providers, connection aggregators, and wireless  
8 service providers work together to enable wireless subscribers' use of Codes. Content  
9 providers (such as the Red Cross) are the organizations that use Codes to disseminate  
10 content to or collect information or pledges from, wireless users. Application providers  
11 convert the text messages received through Codes into data that can be interpreted and  
12 used by content providers. Connection aggregators link application providers to wireless  
13 service providers' networks. Wireless service providers are the companies from which  
14 wireless subscribers purchase their mobile phone service.

15 A wireless user who wishes to pledge a donation to an organization initiates the  
16 transaction by texting a predetermined word or phrase to a Code.<sup>2</sup> As a security  
17 precaution, the connection aggregator sends a reply text message to the wireless user,  
18 requesting confirmation of the pledge. If the wireless user confirms the pledge by

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<sup>1</sup> The Commission distinguishes between the terms "wireless user" and "wireless subscriber." A "wireless subscriber" refers to an individual who a wireless service provider would bill. By contrast, a "wireless user" refers to a broader category of individuals, who, for example, may be on a family or group plan and therefore not directly responsible for payment to the wireless service provider.

<sup>2</sup> For example, in the aftermath of the earthquake in Haiti, individuals pledged ten-dollar donations to the Red Cross by texting "HAITI" to the Code "90999."

1 sending a reply text, then the pledge is complete and the charge will appear on the next  
2 wireless bill associated with that wireless user's phone number.

3 CTIA indicates that it is standard business practice in the wireless industry for the  
4 wireless service provider to forward the payment to the connection aggregator about  
5 seven to ten days after the wireless service provider receives payment from the wireless  
6 subscriber. The connection aggregator accumulates all funds designated for a specific  
7 recipient from all wireless service providers over a 30-day period, and then forwards all  
8 those collected funds to the appropriate content provider(s). Both the wireless service  
9 provider and the connection aggregator deduct fees from the payment; thus, the amount  
10 ultimately received by the content provider will be smaller than the amount paid by the  
11 wireless subscriber.

12 It is also the wireless industry's standard business practice to impose limits on  
13 pledges made through Codes. Wireless service providers set a ten dollar ceiling per  
14 transaction, and most<sup>3</sup> wireless service providers impose an aggregate monthly cap of  
15 \$100 on all Code-initiated transactions per phone number. These limits reflect the  
16 concern of wireless service providers that wireless subscribers who pay one bill for  
17 multiple phone numbers (such as a family plan) or who pay for a phone number that they  
18 do not themselves use (such as a parent paying a child's wireless bill) would not pay their  
19 bills if the wireless user incurred large Code charges. Wireless providers have the  
20 capability to impose these limits on a per-phone-number basis only, rather than upon the  
21 entire account, which may include several phone numbers.

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<sup>3</sup> CTIA does not specify which wireless service providers impose the caps.

1           The wireless service providers maintain records of their wireless subscribers'  
2 names, addresses, and the phone numbers of the wireless users associated with that  
3 account. However, wireless service providers may not know if their subscribers or users  
4 are foreign nationals. A wireless subscriber's address, as provided by the wireless  
5 subscriber, is the only information that wireless service providers may have regarding  
6 nationality.

7           CTIA proposes to issue Codes so that wireless users may pledge contributions to  
8 political committees through the above-described process. Only those wireless industry  
9 participants who agree to CTIA's proposal would be eligible to lease Codes from the  
10 Code Administration. The transaction fees charged to the political committees by  
11 wireless service providers and connection aggregators under CTIA's proposal would be  
12 the usual and normal fees for such transactions. When forwarding contributions to  
13 political committees, the wireless service providers and connection aggregators would  
14 follow the same business practices that they use in collecting and forwarding other funds  
15 generated through Codes. Thus, the wireless service providers would send political  
16 contributions generated by the Codes to the connection aggregators seven to ten days  
17 after receiving payment. The connection aggregators would collect political  
18 contributions from all wireless service providers over a 30-day period and then forward  
19 the contributions on to political committees. The wireless service providers and  

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20 connection aggregators would not transmit the political contributions through separate  
21 merchant accounts. Also, wireless service providers and connection aggregators would  
22 not forward contributors' names and addresses to recipient political committees.

1           The connection aggregators could send text messages to wireless users to certify  
2 their compliance with the Act before accepting a wireless user's pledge. The messages  
3 would read:

- 4           1. Thank you for interest in contributing. Reply Y (YES) to proceed with the  
5           required legal certifications. Reply N (NO) if you do not wish to proceed.
- 6           2. I certify that I will make this contribution by paying my wireless bill with my  
7           personal, unreimbursed funds. Reply Y or N to proceed.
- 8           3. I certify that this contribution will not be made by a corporation, labor  
9           organization, or other person paying my wireless bill. Reply Y or N to proceed.
- 10          4. I certify that I am not a foreign national or government contractor. Reply Y or N  
11          to proceed.
- 12          5. I certify that my total contributions by text message to this recipient will not  
13          exceed \$50 this calendar year. Reply Y or N to proceed.
- 14          6. Contributions to political committees are not tax deductible. Please reply Y to  
15          initiate your contribution which will appear on your next wireless bill.

16 A wireless user would be required to respond affirmatively to each statement to make the  
17 pledge.

18           CTIA asserts that technological limitations and cost considerations could  
19 constrain CTIA's ability to require the wireless service providers and connection

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20 aggregators to adopt the following measures when implementing the proposed program:

- 21           1. Require through the confirming text message process that the wireless user  
22           supply his or her name and address to the connection aggregator to submit to the

1 recipient Federal candidate, party, or political committee to monitor compliance  
2 with the Act's contribution limitations and prohibitions.

3 2. Include certification language along the following lines with each wireless  
4 subscriber's bill:

5 Contributions to political committees are not tax deductible. By  
6 proceeding with this contribution, I certify that all contributions by text  
7 message are: (1) made from personal, unreimbursed funds of a U.S.  
8 citizen, and (2) do not exceed \$50 in total to any recipient this calendar  
9 year.

10

11 3. Require wireless service providers and connection aggregators to refuse  
12 contributions from wireless subscribers with "Inc." or "Corp." or some other  
13 clearly identifiable reference in the subscriber's name indicating that the wireless  
14 subscriber is a corporation.

15 4. Require wireless service providers and connection aggregators to refuse  
16 contributions from wireless subscribers with foreign addresses.

17 5. Impose an aggregate monthly cap on contributions from each wireless subscriber  
18 to ensure that contributions do not exceed the Federal contribution limits.

19 ***Questions Presented***

20 1. *May CTIA establish the program described above to enable the wireless service*  
21 *providers and connection aggregators to process contributions to political*  
22 *committees by Code?*

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23 2. *Will the proposed services be provided in the ordinary course of business for the*  
24 *normal and usual charge?*

25 3. *Must CTIA require that the wireless service providers and connection aggregators*  
26 *forward contributions by Codes to Federal candidate, party, and political committee*

1        *treasurers within ten or 30 days through separate merchant accounts or may they*  
2        *follow their ordinary business practices?*

3        4. *Does the \$10 approximate per transaction limit satisfy the \$50 anonymous*  
4        *contribution limit? If not, must CTIA ensure that wireless service providers and*  
5        *connection aggregators develop a means to ensure that the contributions are not from*  
6        *impermissible sources and do not aggregate in excess of the \$50 limit? If so, do the*  
7        *proposed confirming text message certifications satisfy this obligation?*

8        ***Legal Analysis and Conclusions***

9        1. *May CTIA establish the program described above to enable the wireless service*  
10        *providers and connection aggregators to process contributions to political*  
11        *committees by Code?*

12        No, CTIA may not establish the program as it is described above to enable  
13        wireless service providers and connection aggregators to process contributions to political  
14        committees by Code. As explained in Question 3, the program would not comply with  
15        the ten and thirty day contribution forwarding requirements of 2 U.S.C. 432.

16        2. *Will the proposed services be provided in the ordinary course of business for the*  
17        *normal and usual charge?*

18        Yes, the proposed services will be provided in the ordinary course of business for  
19        the normal and usual charge.

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20        The Act and Commission regulations prohibit corporations from making  
21        contributions in connection with Federal elections. 2 U.S.C. 441b(a); 11 CFR 114.2(b).  
22        A “contribution” includes “any gift, subscription, loan, advance, or deposit of money or  
23        anything of value made by any person for the purpose of influencing any election for

1 Federal office.” 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a); *see also* 2 U.S.C. 441b(b)(2);  
2 11 CFR 114.2(b)(1). “Anything of value” includes all in-kind contributions, including  
3 the provision of any goods or services without charge or at a charge that is less than the  
4 usual and normal charge. *See* 11 CFR 100.52(d)(1). “Usual and normal charge” is  
5 defined as “the price of those goods in the market from which they ordinarily would have  
6 been purchased at the time of the contribution; and usual and normal charge for any  
7 services, other than those provided by an unpaid volunteer, means the hourly or  
8 piecework charge for the services at a commercially reasonable rate prevailing at the time  
9 the services were rendered.” *See* 11 CFR 100.52(d)(2).

10 A corporation does not make contributions if it provides goods or services in the  
11 ordinary course of business as a commercial vendor at the usual and normal charge. 11  
12 CFR 114.2(f)(1). A “commercial vendor” is any person “providing goods or services to a  
13 candidate or political committee whose usual and normal business involves the sale,  
14 rental, lease, or provision of those goods or services.” 11 CFR 116.1(c).

15 The Commission concludes that the proposed services would be rendered to the  
16 political committee in the ordinary course of business for the usual and normal charge.  
17 CTIA currently administers the Code Administration to enable wireless service providers  
18 and connection aggregators to process charitable donations via Code. CTIA’s proposal  
19 would establish a new program in which political committees would pay the usual and  
20 normal charge to become content providers. Further, the wireless service providers and  
21 connection aggregators will deduct fees from the contributions transmitted to political

1 committees based<sup>4</sup> on amounts charged for processing non-political funds. Therefore, the  
2 Commission concludes that CTIA's proposed services would be rendered in the ordinary  
3 course of business for the usual and normal charge. See Advisory Opinions 2010-21  
4 (ReCellular), 2010-06 (Famos), 2004-19 (DollarVote), and 2002-07 (Careau).

5 3. *Must CTIA require that the wireless service providers and connection aggregators*  
6 *forward contributions by Codes to Federal candidate, party, and political committee*  
7 *treasurers within ten or 30 days through separate merchant accounts or may they*  
8 *follow their ordinary business practices?*

9 Yes, CTIA must require that the wireless service providers and connection  
10 aggregators forward contributions by Code to political committee treasurers within ten or  
11 30 days, though it need not utilize separate merchant accounts to do so.

12 a. *Forwarding Requirements of 2 U.S.C. 432(b)*

13 The Act and Commission regulations state that all persons who receive a  
14 contribution for an authorized political committee must forward the contribution to the  
15 political committee's treasurer within ten days of receipt. 2 U.S.C. 432(b)(1);  
16 11 CFR 102.8(a). The Act and Commission regulations also require that all persons who  
17 receive a contribution for a political committee that is not an authorized committee must  
18 forward the contribution to the political committee within 30 days of receipt, if the  
19 contribution is \$50 or less, and within ten days of receipt, if the contribution is in excess

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<sup>4</sup> CTIA notes that the fees charged to political committees would not be based entirely on the charitable donation model because that model can at times include waivers of fees.

1 of \$50. 2 U.S.C. 432(b)(2)(A); 11 CFR 102.8(b); *see, e.g.*, Advisory Opinion 2009-32  
2 (Jorgensen).<sup>5</sup>

3 Under CTIA's proposal, a contribution would be made at the time that a wireless  
4 subscriber pays a bill that includes a charge resulting from a Code-initiated pledge to  
5 contribute – not at the time a pledge is made. The wireless service provider would  
6 forward that contribution to a connection aggregator approximately seven to ten days  
7 after receiving the payment. Next, over a 30-day period, the connection aggregator  
8 would collect all contributions for a particular political committee from all wireless  
9 service providers. The connection aggregator would then forward the contributions to the  
10 recipient political committee. Thus, 40 days could lapse before a political committee  
11 received a contribution made by a wireless subscriber. Therefore, because CTIA's  
12 proposal would not require wireless service providers and connection aggregators to  
13 forward contributions to recipient political committees within the applicable statutory and  
14 regulatory timeframes, this aspect of CTIA's proposal would not comply with the Act  
15 and Commission regulations.

16 b. *The Use of Separate Merchant Accounts*

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<sup>5</sup> The circumstances in this advisory opinion are distinguishable from those in Advisory Opinions 2006-30 (ActBlue) and 2003-23 (WE LEAD). In Advisory Opinion 2006-30 (ActBlue), the Commission approved a proposal for a nonconnected political committee to collect earmarked contributions for prospective candidates before those individuals had registered their authorized committees with the Commission, on the condition that the political committee forward the contributions to the candidates' committees within ten days after the candidates' committees filing their statements of organization. Similarly, in Advisory Opinion 2003-23 (WE LEAD), the Commission approved a proposal for a nonconnected political committee that sought to raise money for the "presumptive nominee of the Democratic Party," on the condition that the political committee forward the contributions within ten days after the "presumptive nominee is identified." Here, by contrast, CTIA's proposal envisions forwarding contributions only for existing political committees. *See also* Advisory Opinions 2006-08 (Brooks), 1998-25 (Manson Tenders), and 1982-23 (Westchester Citizens for Good Government).

1 CTIA's proposal does not envision the segregation of political contributions from  
2 the corporate funds of either the wireless service provider or the connection aggregators.  
3 However, the proposal does not raise any concerns that corporate funds will be forwarded  
4 to a political committee, either from CTIA, or any content providers, wireless service  
5 providers, or connection aggregators. Nor can any corporate funds pledged to any other  
6 content provider be forwarded to a political committee.

7 As the requestor notes, "[t]hese commercial vendors already engage in detailed  
8 accounting to ensure that all their transactions are processed appropriately. That same  
9 accounting will be applied to their receipt and transfer of political contributions by  
10 CSC."<sup>6</sup> Moreover, there is no indication that any treasury funds are ever transferred into  
11 a connection aggregator from CTIA, or any content providers or wireless service  
12 providers; rather the connection aggregator only receives monies from wireless  
13 customers, which are then forwarded onto the appropriate recipients.<sup>7</sup> Finally, neither the  
14 Act nor Commission regulations specifically require a vendor to segregate contributions  
15 from all other donations to be forwarded to other entities or from the treasury funds of the  
16 vendor itself. Commission regulations do, however, recognize the sufficiency of  
17 acceptable accounting methods to distinguish funds in other contexts. *See, e.g.*, 11 CFR  
18 102.9(e)(1) (allowing separate accounts or acceptable accounting methods to distinguish  
19 between primary election and general election contributions).

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<sup>6</sup> Advisory Opinion Request 2010-23 (CTIA) at 11.

<sup>7</sup> It is unclear whether the connection aggregator maintains a separate account for all money that is received from wireless service providers through the CSC program. Such a separation is not required under the statute or under Commission regulations, but it would provide a safe harbor to ensure that no treasury funds from the commercial vendor were inappropriately sent to a political committee that participated in the CSC program.

1           Therefore, this part of CTIA’s proposal complies with the Act and Commission  
2 regulations.

3           4. *Does the \$10 approximate per transaction limit satisfy the \$50 anonymous*  
4           *contribution limit?*

5           Yes, the \$10 approximate per transaction limit satisfies the \$50 anonymous  
6 contribution limit.

7           The Act and Commission regulations require that any person who receives a  
8 contribution in excess of \$50 for a political committee must forward to the recipient  
9 political committee the name and address of the contributor and the date of the  
10 contribution. 2 U.S.C. 432(b)(1) and (b)(2); 11 CFR 102.8(a) and(b). Further, treasurers  
11 of political committees must “keep an account of (1) all contributions received by or on  
12 behalf of such political committee; (2) the name and address of any person who makes  
13 any contribution in excess of \$50, together with the date and amount of such contribution  
14 by any person; [and] the identification of any person who makes a contribution or  
15 contributions aggregating more than \$200 during a calendar year, together with the date  
16 and amount of any such contribution[.]” 2 U.S.C. 432(c)(1)-(3); *see also* 11 CFR  
17 110.4(c). Commission regulations also require that treasurers of political committees  
18 “examin[e] all contributions received for evidence of illegality and for ascertaining  
19 whether contributions received, when aggregated with other contributions from the same  
20 contributor, exceed the [Act’s] contribution limitations . . . .” 11 CFR 103.3(b) (emphasis  
21 added).

22           According to the proposal, each of the pledged contributions would  
23 approximately total \$10. Nothing in the Act or in the Commission’s regulations requires

1 that the name and address of contributors who make contributions of \$50 or less through  
2 a third party be forwarded to the political committee that is the ultimate recipient. While  
3 the Commission has consistently approved proposals in which the contributors have  
4 provided, at a minimum, their names and addresses, which were then forwarded to the  
5 recipient political committees, such information is not required to be provided for low-  
6 dollar contributions.<sup>8</sup> Thus, the Commission concludes that CTIA's proposal satisfies the  
7 \$50 anonymous contribution limit.

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

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<sup>8</sup> While not required under the Act or Commission regulations for anonymous contributions, the screening procedures proposed by CTIA provide an added safeguard similar to those approved by the Commission in Advisory Opinions 2007-04 (Atlant) and 2004-19 (Dollar Vote). In fact, given the limit of text messages, the certification language proposed is more expansive than that of prior advisory opinions as CTIA plans to require certification that the contributor not only utilize his or her own funds, not those of a corporation or labor organization, and that the contributor is not a foreign national or government contractor, but also that the contributor will not make contributions via text message in excess of \$50 in the calendar year.

1 The cited advisory opinions are available on the Commission's website at

2 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

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Matthew S. Petersen

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Chairman

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