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September 10, 2010

BY HAND DELIVERY

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

AOR 2010-23

Re: Request for Advisory Opinion

Dear Commissioners:

On behalf of CTIA-The Wireless Association ("CTIA"), we respectfully request an advisory opinion from the Federal Election Commission ("FEC" or "Commission") pursuant to 2 U.S.C. § 437f of the Federal Election Campaign Act of 1971, as amended (the "Act"). Our client seeks confirmation that small contributions to federal candidate, party, and political committees of approximately \$10 may be initiated by text messages to Common Short Codes ("CSCs") over wireless networks.

FACTUAL BACKGROUND

CTIA is an incorporated nonprofit trade association that has represented the wireless communications industry since 1984. Members in the association include wireless carriers and their suppliers, as well as providers and manufacturers of wireless data services and products. In addition to conducting traditional trade association advocacy on behalf of its members, CTIA also coordinates the industry's efforts to provide consumers with a variety of choices and information regarding their wireless products and services. One of those efforts is CTIA's management of CSCs used to send text messages over wireless networks.

CSCs are either five-digit or six-digit numbers that can be leased by anyone interested in interacting with wireless consumers which now number more than 285 million. Wireless customers send text messages using CSCs to access a wide variety of mobile content. Applications of CSCs include tele-voting campaigns,¹ mobile coupons, other promotions, as well as a wide range of additional interactive wireless services. The most recent, newsworthy, and prolific application of CSCs has been for charitable giving in response to the earthquake in Haiti. See Stephanie Strom, *A Deluge of Donations via Text Messages*, N.Y. Times, Jan. 18, 2010.

¹ Tele-voting is opinion polling conducted by CSC.

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CTIA manages CSCs through its Common Short Code Administration (“CSCA”). The CSCA oversees the technical and operational aspects of CSC functions and maintains a single database of available, reserved, and registered CSCs. More information about the CSCA is available at www.usshortcodes.com.

Four categories of companies work together to bring CSCs to wireless users. They include (1) content providers, (2) application providers, (3) connection aggregators, and (4) wireless service providers. All four interface with the CSCA.

1. Content Providers

Content providers are typically media organizations, advertisers, and consumer product companies interested in disseminating content to wireless users. Recently, content providers have included charitable organizations. Content providers develop and/or sponsor programming or promotions for participation via CSCs.

2. Application Providers

Each text message addressed to an active CSC is routed to an application. The application processes the action dictated by the CSC. For example, if a wireless user is instructed to send a text message to a particular CSC to download a new mobile phone ringtone, the application would process the download request. Although an application may be developed and/or hosted by the content provider, there are a number of application providers that specialize in software development and application hosting. In addition to technical expertise, most application providers offer content providers guidance on the best methods and techniques for maximizing the success of CSC applications. Most application providers are specialists in a specific type of application, such as tele-voting, marketing, or gaming.

3. Connection Aggregators

Application providers and/or content providers must be connected to wireless service providers’ networks to utilize a CSC. Connection aggregators provide the connection. Connection aggregators have authorized connections to multiple wireless networks and maintain the security, technical, and service level requirements of each wireless network.

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4. Wireless Service Providers

Referred to by many names (wireless carriers, mobile operators, wireless networks), these are the companies from which wireless subscribers purchase their mobile phone service.

To make a pledge by CSC, e.g., to make a charitable donation, the user sends a pre-designated text message to a particular CSC. For example, wireless users can text "HAITI" to the CSC "90999" to make a charitable donation of \$10 to the Red Cross. As a security precaution, the connection aggregator sends a text message back to the wireless user to confirm that the user would like to proceed with the transaction. After the wireless user provides confirmation by sending a reply text message,² the transaction can be commenced.

The actual transaction begins with a charge by the wireless service provider on the subscriber's bill in the amount of the donation. Approximately seven to ten days after the wireless service provider receives the subscriber's bill payment, the wireless service provider forwards the donation to the connection aggregator. The connection aggregator accumulates all contributions from all wireless service providers over a thirty-day period and keeps an accounting of the funds. The connection aggregator then forwards all donations collected during the thirty-day period to the content provider.

The wireless service providers and connection aggregators incur fees that they deduct from the amounts they receive.³ Accordingly, the net amount ultimately received by the content provider is an amount less than the amount of the original donation. The content provider is nonetheless informed of the amounts of the fees that were deducted and to whom they were paid.

Wireless service providers place spending limits on the amounts that may be processed by CSC. These limits are applied to each phone number issued by the wireless service provider. The limit on each transaction is approximately \$10 per phone number. Furthermore, most wireless service providers impose an overall

² Text messages are limited to 160 characters.

³ If a content provider has also retained the services of an application provider, the payments for the application provider's services are made separately.

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\$100 per phone number limit on all CSC transactions during a thirty-day billing cycle.

These limits are intended to avoid billing disputes that may arise if the wireless subscriber has multiple phone numbers in the subscriber's calling plan and charges are incurred by the users of the phones that the subscriber did not authorize or does not want to pay. For example, a mother who pays the bill for a family wireless plan may not be inclined to pay for the ringtone purchased or donation pledged by her child if the amounts are too high. Wireless service providers currently have the capability to impose these limits on a per phone number basis, not on entire calling plans.

Furthermore, wireless service providers only maintain standard billing information for their wireless subscribers such as the account holder's name, address, and the phone numbers associated with the calling plan.⁴ Wireless service providers do not categorize their subscribers by whether they are individuals, corporations, or other types of organizations or entities, or whether they are U.S. or foreign persons. Some of this information may be apparent to the wireless service providers if a subscriber has "Inc.," "Corp.," "LLC," or some other clearly identifiable reference in the subscriber's name indicating that the subscriber is not an individual. Furthermore, a subscriber's domestic or foreign billing address is the only information the wireless service providers may have regarding a subscriber's nationality. Lastly, wireless service providers do not maintain records of subscribers that have multiple accounts.

PROPOSAL

CTIA, through the CSCA, would like to issue CSCs for the purpose of processing small contributions of approximately \$10 to federal candidate, party, and political committees through the above-described process currently in place for processing charitable donations. The fees that would be charged would be based on amounts charged for similar commercial transactions.⁵

⁴ Wireless service providers do not share this information with connection aggregators or anyone else in the CSC process, but nonetheless maintain customer billing records as business records.

⁵ The fee structure would not be based entirely on the charitable donation model which can include waivers of fees in certain situations.

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If necessary for Commission approval, the connection aggregators could send wireless users text messages during the initial confirmation process whereby the wireless users would certify their compliance with the Act before confirming that they want to proceed with the contribution. For example, the confirming text messages might state:

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

If a wireless user answers N to any of the requests, the transaction would be terminated.

In its role as administrator of the CSC process, CTIA's CSCA would set the standards and oversee implementation of this proposal and any safeguards required by the Commission to process political contributions by CSC, but compliance would be the responsibility of the wireless service providers, connection aggregators, and the recipients of the contributions.

ALTERNATIVES

The current CSC technology and business practices preclude significant other changes to the proposal at this time. Furthermore, the costs to develop and

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implement any changes could be too high for the wireless service providers and connection aggregators to profit or to pass on to the participating federal candidate, party, or political committees given the small amount of each donation. This is true of the following additional burdens:

i. Require through the confirming text message process that the wireless user supply his or her name and address to the connection aggregator to submit to the recipient federal candidate, party, or political committee to monitor compliance with the Act's contribution limitations and prohibitions.

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

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

iii. Exclude payments for CSC political contributions from subscribers with "Inc.," "Corp.," "LLC," or some other clearly identifiable reference in the subscriber's name indicating that the subscriber is not an individual.

iv. Exclude payments for CSC political contributions from subscribers with a foreign address.

v. Impose an aggregate monthly cap on contributions from each subscriber to limit contributions by a subscriber to within the federal contribution limits.

The fewer additional burdens imposed by the Commission, the greater the likelihood that these CSC services can be provided to federal candidate, party, and political committees. However, there should be no need for any of these additional burdens in light of the small amounts that would be contributed by CSC. Accordingly, we respectfully request that the Commission only consider these alternatives if it is undeniably convinced that the proposal cannot be reconciled with the Act.

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LEGAL BACKGROUND

Corporations are prohibited from contributing to federal candidate, party, or political committees. 2 U.S.C. § 441b. Entities that facilitate political contributions do not themselves make political contributions provided that they charge the “usual and normal” fee for their services. 11 C.F.R. § 100.52(d). Corporations that do so are specifically exempt from the Act’s prohibition on corporate contributions as so-called “commercial vendors.” *Id.* § 114.2(f)(1).

The Commission’s most recent Advisory Opinions regarding commercial vendors engaged in political fundraising were predicated on the following facts: (1) their services were rendered in the ordinary course of business for the usual and normal charge; (2) they forwarded contributions through separate merchant accounts; and (3) they incorporated adequate screening procedures to ensure that they were not forwarding illegal contributions. FEC Advisory Op. 2007-4 (Atlatl) (citing FEC Advisory Ops. 2004-19 (DollarVote) & 2002-7 (Careau)).

Some of the legal requirements discussed in these Advisory Opinions include those that require persons who receive contributions on behalf of candidates to forward the contributions to campaign treasurers within ten days. 2 U.S.C. § 432(b)(1); 11 C.F.R. § 102.8(a). This forwarding requirement is extended to thirty days when the contributions do not exceed \$50 and are intended for committees other than candidate committees. 2 U.S.C. § 432(b)(2)(A); 11 C.F.R. § 102.8(b)(1). However, these requirements were not referenced and apparently not imposed by the Commission in the two above-cited Advisory Opinions issued to companies not exclusively engaged in political fundraising. FEC Advisory Ops. 2007-4 (Atlatl) & 2002-7 (Careau); *but see* FEC Advisory Op. 2004-19 (DollarVote) (“The Commission notes that DollarVote must also comply with all timing and information requirements when forwarding contributions to candidates under 2 U.S.C. 432(c) and 11 CFR 102.8.”).

The information requirements referenced in Advisory Opinion 2004-19 (DollarVote) include an obligation to forward a contributor’s name, address, and date of contribution to the candidate, party, or political committee treasurer within ten days if the contribution exceeds \$50. 2 U.S.C. § 432(b); 11 C.F.R. § 102.8. Similarly, a treasurer is only required to keep records of contributions that exceed \$50. 2 U.S.C. § 432(c)(2); 11 C.F.R. § 102.9. This information must be disclosed by the candidate, party, or political committee in its reports to the FEC only if

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aggregate contributions exceed \$200 from the contributor. 2 U.S.C. § 434(b)(3)(A); 11 C.F.R. 104.3(a)(4)(i).

These record-keeping and reporting thresholds were addressed in *Buckley v. Valeo* where the Court recognized the value of permitting contributions “of relatively small amounts” to be made anonymously so as not to “discourage participation by some citizens in the political process” who “may be especially sensitive to recording or disclosure of their political preferences.” 424 U.S. 1, 83 (1976). The Court also acknowledged that anonymous contributions may provide a means by which the federal contribution limits and prohibitions could be evaded, but left to Congress the judgment of where to strike the appropriate balance when establishing the thresholds for anonymous contributions. *Id.* at 83-84 (it is possible, though “relatively difficult to aggregate secret contributions” based on the anonymous contribution threshold which is “best left in the context of this complex legislation to congressional discretion”).

When Congress subsequently amended the record-keeping threshold to increase it to the current \$50 level, it made clear that a contribution recipient was not required to comply with the disclosure requirements if it “has no knowledge that [a] particular contribution, when aggregated with other contributions from the same contributor,” exceeded the disclosure thresholds. H.R. Rep. No. 94-1057, at 39 (1976) (Conf. Rep.) Congress’s focus on whether the recipient of the contribution has knowledge of the identity of the contributor acknowledges *Buckley*’s conclusion that contributions can only be regulated if they pose a threat or appearance of corruption through “quid pro quo arrangements,” 424 U.S. at 27. Of course, there can be no “quid pro quo arrangements” if the identity of the contributor is unknown to the recipient of the contribution, especially a contributor who makes a small donation.

QUESTIONS PRESENTED

May CTIA, the wireless service providers, and connection aggregators proceed as commercial vendors with the above-described proposal to process small contributions of approximately \$10 to federal candidate, party, and political committees by CSC? Specifically:

a. Will the proposal constitute services provided in the ordinary course of business for the normal and usual charge and not a prohibited contribution?

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b. Must the wireless service providers and connection aggregators forward contributions by CSC to federal candidate, party, and political committee treasurers within ten or thirty days through separate merchant accounts or may they follow their ordinary business practices?

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

DISCUSSION

CTIA, as well as the wireless service providers and connection aggregators, qualify as commercial vendors under the Commission's existing framework.

1. CTIA, the wireless service providers, and the connection aggregators will render their CSC services to federal candidate, party, and political committees in the ordinary course of business at the usual and normal charge.

All of the participants in CTIA's proposal provide CSC services in the ordinary course of business. Furthermore, the fees charged for processing CSC political contributions would be based on the fees charged for non-political CSC transactions. Accordingly, these services do not result in a contribution by CTIA, the wireless service providers, or the connection aggregators because they will be provided in the ordinary course of business at the usual and normal charge.

2. The wireless service providers and connection aggregators will utilize their standard business practices to transmit CSC contributions.

To avoid disruption of their current business practices, all of the participants in CTIA's proposal would process political contributions by CSC using the same standard procedures used for all other CSC transactions. In particular, these procedures will require that the wireless service providers take seven to ten days to process and forward the contributions to the connection aggregators who, in turn, will require thirty days to process and forward the contributions to the campaign, party, or political committee treasurers.

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Though the Act and Commission regulations include ten and thirty day limits on how long contributions can be held before they are forwarded to committee treasurers, the Commission has not apparently imposed these limits directly on commercial vendors that provide the same services to non-political entities in the ordinary course of their business. FEC Advisory Ops. 2007-4 (Atlatl) & 2002-7 (Careau). In contrast, the Commission has expressly imposed these limits on organizations engaged exclusively in services for political entities. FEC Advisory Op. 2004-19 (DollarVote).

This differing treatment appears to be a recognition by the Commission that it will defer to the adequacy of a commercial vendor's established non-political business practices when they are applied in the political context. *See, e.g.*, 11 C.F.R. § 116.3(b), (c) (explicitly deferring to a commercial vendor's and industry's established non-political practices when extending credit). However, where no such practices exist the Commission has applied the forwarding requirements of the Act.

This bifurcated treatment imposes minimal additional burdens on the ability of established commercial vendors to provide their services to political entities. If the Commission were to impose additional requirements that increase the operating costs of the commercial vendors, they may simply decline to extend their services to political entities. This could put political entities at a distinct disadvantage when competing with charitable and other organizations for finite donor resources. Furthermore, the Commission can assume that the commercial vendor's established practices are commercially adequate because they have been successfully tested and used in other contexts.⁶

CTIA's proposal also does not contemplate the segregation of CSC political contributions into merchant accounts devoted exclusively to political contributions. Rather, the wireless service providers and connection aggregators will perform the same accounting they perform for non-political entities to ensure that the appropriate amounts are forwarded to the candidate, party, and political committees. For the reasons just provided, the Commission can comfortably defer to the wireless

⁶ Even if the Commission were inclined to impose the forwarding requirements on commercial vendors processing contributions by CSC, we respectfully request that it impose the thirty day requirement based on the fact that contributions to candidate, party, and other political committees will be processed by CSCs, not just those to candidate committees subject to the ten day requirement. If separate processes are required for different types of committees, the burden may be too great for commercial vendors to provide these services.

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service providers' and connection aggregators' standard business practices in this context too.

Nonetheless, the relevant Commission Advisory Opinions have been predicated on the fact that the commercial vendors maintained political contributions in segregated merchant accounts to avoid comingling with corporate funds. Of course, money is fungible so it is not at all clear what benefit accrues or public policy is served by physically segregating funds as opposed to separately accounting for them. *See, e.g.*, 11 C.F.R. § 102.9(e)(1) (to distinguish between primary and general election contributions, a candidate may either deposit them in separate accounts or deposit them in the same account and utilize separate accounting records).

These commercial vendors already engage in detailed accounting to ensure that all their transactions are processed appropriately. That same accounting will be applied to their receipt and transfer of political contributions by CSC. Furthermore, the apparent basis for the segregated account requirement appears to be statutory and regulatory provisions that, by their terms, only apply to political committees to prevent comingling of their funds with the personal funds of a candidate or individual. 2 U.S.C. § 432(b)(3); 11 C.F.R. § 102.15. This requirement does not apply to commercial vendors who, as just explained, will have established practices to ensure that political contributions are accurately accounted for to reach their intended recipients.

3. The CSC contributions will be approximately \$10 per transaction and will not exceed the \$50 threshold for anonymous contributions.

In applying their established business practices, the wireless service providers will impose their per transaction limits of approximately \$10 on each political contribution by CSC. This amount is, of course, within the statutory \$50 anonymous contribution threshold. 2 U.S.C. § 432. Accordingly, the wireless service providers are not required to collect or forward any identifying information in connection with the contributions it processes by CSC. Furthermore, the treasurers of the recipient campaign, party, or political committees are not required to maintain any such information.

As alluded to above, CSC transactions pledged by the user of one phone may be paid by someone else if the user is not also the subscriber. This raises the issue of whether the payment for the contribution is made by someone other than the

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wireless user who pledged the contribution and whether that person is permitted to make political contributions. However, the Supreme Court anticipated the possibility that contributions below the \$50 anonymous threshold may be made from impermissible sources and has deferred to Congress the decision of where the anonymous contribution line should be drawn. *Buckley*, 424 U.S. at 83-84. Congress's response was to *increase* the anonymous contribution threshold and to focus not on whether the source of the anonymous contribution was prohibited, but on whether the recipient had actual knowledge of the source and, presumably, could be corrupted by the contribution. H.R. Rep. No. 94-1057, at 39 (1976) (Conf. Rep.).

The \$50 limit on anonymous contributions is the congressionally crafted balance between respecting the anonymity of low-level contributors and allowing otherwise impermissible contributions. The CSC transaction limit of approximately \$10 imposed by the wireless service providers is well below this \$50 anonymous contribution limit. Therefore, any small impermissible contributions are not, in Congress's judgment, violations of the Act. The fact that most wireless service providers impose \$100 aggregate spending limits on all CSC transactions during a thirty-day billing cycle discourage abuses. Accordingly, the CSC procedures satisfy the applicable statutory requirements that apply to anonymous contributions.

If the Commission nonetheless believes that additional safeguards are required to prevent impermissible contributions, it may be possible to require the above-described certifications in the confirming text messages from the connection aggregators to the wireless users. Through this process, the wireless users will certify that their contributions comply with the source restrictions and the \$50 anonymous contribution limit of the Act.

CONCLUSION

With over 285 million wireless consumers, wireless phones have become ubiquitous and CSCs have become a prime communications platform. The effectiveness of CSCs to initiate small dollar contributions in short order was clearly demonstrated in the Haiti relief context earlier this year. Accordingly, CSCs are potentially significant tools in grassroots campaign organizing and fundraising and a means to promote small dollar support for federal candidate, party, and political committees.

For these reasons, CTIA requests that the Commission approve this proposal to process political contributions by CSC. The proposal would follow all of the same

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procedures used to process other monetary transactions by CSC. Accordingly, the best-practices, safeguards, and similar protocols that have been developed in other commercial contexts will also apply here. If this is not enough, CTIA is proposing an additional possible safeguard in the form of the above-described certification.

Sincerely,



Jan Witold Baran
Caleb P. Burns