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OFFICE OF GENERAL
COUNSEL

June 4, 2012

Anthony Herman
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Advisory Opinion 2012-17

Dear Mr. Herman:

As you know, during the Commission's open meeting on May 24, 2012 to discuss Drafts A and B of Advisory Opinion 2012-17, several Commissioners requested additional information regarding our proposal to use text messaging to raise funds for political committees. We have consulted with our clients as well as other experts in the telecommunications field and are pleased to provide the following response to the Commission's questions. We believe that this additional information will allay many of the concerns raised during the May 24, 2012 open meeting and support the adoption of Draft B of Advisory Opinion 2012-17

Technological Barriers to Prevent Foreign National Contributions

Our proposal seeks to ensure compliance with 2 U.S.C. § 441e by requiring each wireless user to certify that they are eligible to make contributions under the Federal Election Campaign Act ("the Act") and Commission regulations prior to making a text message contribution. During the May 24, 2012 open meeting, Vice Chair Weintraub and Commissioner Bauerly both asked if there were additional technological barriers that could be added to prevent foreign nationals from making text message contributions. After consulting with our clients and experts in the telecommunications field, we are glad to report that there is already a technological barrier in place that will largely preclude foreign nationals from making text message contributions.

Our proposal calls for a wireless user to text a pre-determined message to a common short code registered to a political committee. Common short codes are country-specific. In the United States, common short codes are issued by the CTIA's Common Short Code Administration, and operated only by their members – the U.S. wireless carriers. Advisory Opinion 2010-23.

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Accordingly, the common short codes that would be utilized in our proposal would only be available to wireless users under their subscriptions to U.S. wireless carriers. Foreign nationals attempting to text to a U.S. common short code would not succeed – their text messages would be received at their foreign carrier, and routed to the owner (if any) of that short code in that country. Their text message would never reach a U.S. carrier, much less the registrant of that particular five-digit phone number in the U.S.

Effectively the same is true of a foreign wireless subscriber roaming in the United States. When the subscriber attempts to text to a short code, normally, the attempt would just fail. Even when the visited network (the U.S. carrier) has a system that transfers short code text message attempts to the foreign roamer's home network for processing, the foreign network would have no way to forward that text message to the CTIA-assigned U.S. short code registrant. Instead, the foreign carrier would attempt to send that text message on to the business that happened to register that same common short code in that country. It is essentially the same as visiting New York and dialing a seven-digit number of a friend in Los Angeles without using the area code. The call may be connected to the owner of that seven digit phone number in New York, but to a stranger who happened to have the same phone number in New York that the friend had in Los Angeles.

Accordingly, the country-specific nature of common short codes effectively prevents foreign nationals outside the United States from making text message contributions to U.S. political committees and is a major barrier to prevent text message contributions by foreign nationals visiting the United States.

Affirmations of Eligibility

Our proposal calls for each wireless user to specifically affirm that they are eligible to make contributions under the Act and Commission regulations prior to making a text message contribution. To do so, each wireless user would be sent a text containing the affirmation language approved by the Commission in Advisory Opinion 2011-13 (DSCC). During the May 24, 2012 open meeting, Vice Chair Weintraub asked us to submit the specific affirmation language that we propose to use during the opt-in process.

Under our proposal, two major methods of "opting in" to a mobile contribution are possible. In a webpage-based method, the contributor first enters his phone number on a political committee's web page, followed by receiving a unique PIN number on his handset that he enters onto the same web page in order to complete his contribution. That web page would include the same affirmation of eligibility that political committee web pages include today in accordance with prior Commission advisory opinions. *See, e.g.,* Advisory Opinions 2011-13 (DSCC), 2007-30 (Chris Dodd for President), 1995-35 (Alexander for President) and 1995-09 (NewtWatch PAC).

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When a contributor uses the other method, he might see an advertisement inviting him to "Text 'GIVE' to short code XXXXX to donate \$10 to Candidate." In that "M.O." scenario ("mobile-originating text message"), the wireless user will first text a keyword to the political committee's short code. She will receive a confirmation text message back from that short code, inviting her to complete the contribution by then texting "YES" to confirm that she wishes to be billed.

Under the Consumer Best Practices Guidelines of the Mobile Marketing Association -- the consumer protection rules enforced by all of the wireless carriers and aggregators -- that confirmation text message must include certain clear disclosures to ensure the customer is aware that she is being charged. Generally, the major U.S. carriers require that all merchants fit the entire confirmation message into just a *single* text message that would be readable on almost all handsets.

Of course, fitting the required consumer advisories and the election contribution eligibility message in a single 160-character text message is a challenge.

m-Qube's systems are capable of sending more than one text message before requiring the "YES" or "Y" reply to conclude the financial transaction, but there can be no assurance that carriers will relax their requirements to permit more than a single message.

Still, under these very unique constraints, m-Qube has managed to formulate a confirmation message that it believes adequately advises contributors of the charge and also states the eligibility affirmation with adequate clarity. Moreover, this formulation of the text message includes a URL (m-qube.com/r or m-qube.com/o), which would appear as a hyperlink on the mobile handset, enabling the recipient to click it in order to receive the full text of the affirmation¹.

¹ The full text would include clear definitions of the terms "foreign national" and "federal contractor" as approved by the Commission in Advisory Opinion 2011-13 (DSCC). The term "foreign national" would be defined by the following statement: "A foreign national is an individual who is not a U.S. citizen or not lawfully admitted for permanent residence in the U.S." 2 U.S.C. § 441e. Similarly, the term "federal contractor" would be defined by the following statement: "A federal contractor is someone who has a contract with the U.S. government for the performance of personal services; for the furnishing of material, supplies, or equipment; or for the sale of any land or buildings. It does not include employees, officers or shareholders of federal contractors who make contributions from personal funds." 11 C.F.R. § 115.1(a). These same definitions are currently used on the DSCC contribution page in accordance with Advisory Opinion 2011-13. See <https://dscc.org/donate?track=DPW-TopMenuBar> (last checked June 4, 2012).

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We believe that the following affirmation statements comply with the Commission's prior guidance (Advisory Opinion 2011-13) if the carriers are unable to relax the single-confirmation-message requirement:

Reply YES to give \$20 to Romney & certify ur 18+ & donating with own funds, not foreign national or Fed contractor. Terms m-qube.com/r Msg&Data Rates May Apply²

Or

Reply YES to give \$20 to Obama & certify ur 18+ & donating with own funds, not foreign national or Fed contractor. Terms m-qube.com/o Msg&Data Rates May Apply

If carriers do permit more than a single message to precede the subscriber's "YES" or "Y" confirmation of the charge, or as future protocols and technologies become more available on more handsets, of course it is possible that unabbreviated affirmation statements can be sent to contributors' handsets.

Here is an example:

Reply Y to charge your phone account \$15 contribution to Candidate and to affirm:

You affirm you are at least 18 years old, make this contribution with your own funds not another person's, and you are not a foreign national or federal contractor

See full terms and conditions at m-qube.com/R. Message and data rates may apply. Text HELP for help. Reply Y to charge the \$15 donation to your phone account.

The Commission approved precisely this type of compressed affirmation last year in Advisory Opinion 2011-13 (DSCC). The definitions of foreign national and federal contractor are derived from the Act and Commission regulations. 2 U.S.C. § 441e; 11 C.F.R. § 115.1(a).

Limiting Text Message Contributions to Wireless Subscribers Rather Than Users

Our proposal would allow a wireless user to contribute up to \$50 to any one political committee in any one billing cycle. During the May 24, 2012 open meeting, Vice Chair Weintraub and

² Note that this formulation still omits the statement "Text HELP for help" that is required by the Mobile Marketing Association's Consumer Best Practices Guidelines. We believe that carriers would permit that statement to be made in the confirmation message that follows the donor's texting "YES" or concluding the transaction.

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Commissioner Bauerly both raised questions regarding the application of Draft B of Advisory Opinion 2012-17 to wireless subscriber plans marketed to families.

Commissioners Weintraub and Bauerly both indicated that under Draft B, multiple wireless users in the same family could each make a text message contribution of \$50 or less that, individually, would fall below the recordkeeping threshold of 2 U.S.C. § 432(c)(2), but which, cumulatively, would have to be reported by the recipient political committee under 2 U.S.C. § 432(c)(3) if all the contributions had come from one individual.

Commissioners Weintraub and Bauerly also indicated that under Draft B, multiple wireless users could each make text message contributions of \$50 or less during the same billing cycle, but the monthly billing statement for that period could be paid by only one individual, thereby violating 2 U.S.C. § 441f. In light of these hypothetical circumvention concerns, Commissioners Weintraub and Bauerly wanted to know if it would be possible to limit text message contributions to \$50 per wireless subscriber per billing cycle rather than \$50 per wireless user per billing cycle.

Unfortunately, it would not be technologically possible to limit text message contributions to \$50 per wireless subscriber. In order to enforce that limit, aggregators would have to be able to determine each time a wireless user attempts to make a text message contribution whether the telephone number from which the text was sent was part of a group plan, what other telephone numbers were associated with that group plan and whether any of those other numbers had been used to make a text message contribution during the same billing cycle. As of this writing, neither the aggregators nor the carriers themselves have the capability of retrieving and analyzing that information in real-time. Moreover, even if it were possible at the level of the carriers and aggregators, it would not be possible for the political committees themselves to compare that information to ensure that those individual donors had not donated additional amounts by some other means (cash, credit card, check or in-kind) during that same billing cycle.

Limiting Text Message Contributions to \$10 Per Committee Per Billing Cycle

Our proposal would allow a wireless user to contribute up to \$50 to any one political committee during any one billing cycle. The \$50 figure was chosen solely because the Act's recordkeeping requirements are not triggered until a contribution exceeds \$50. 2 U.S.C. § 432(c)(2). During the May 24, 2012 open meeting, Vice Chair Weintraub asked if it would be possible to limit text message contributions to \$10 per committee per billing cycle.

As a matter of law, we respectfully suggest that in an advisory opinion the Commission should not depart from the statutory limit of \$50. To do so would discriminate between different types of anonymous contributions depending on the method by which the contribution is conveyed.

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As a practical matter, however, while limiting individual contributions to \$10 may impose unnecessary costs on the committees and their vendors, it is possible for m-Qube to limit each contribution to \$10, or to set a per-phone-number cap of less than \$50 per billing cycle. In 2010, almost all of the donations to Haiti earthquake charities that m-Qube processed were for \$10. Merchants using the carrier and aggregator systems in this country do commonly process individual charges of any amount up to \$20, and also process recurring bills or subscriptions of those amounts each month.

We hope that this additional information is useful to the Commission as it continues to deliberate Advisory Opinion 2012-17. We are, of course, available to answer any additional questions the Commission may have.

Sincerely,



Craig Engle



Brett G. Kappel