



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Commission Secretary's Office 

DATE: August 7, 2012

SUBJECT: Comments on Draft AO 2012-26
(Cooper for Congress, ArmourMedia,
Inc., and m-Qube, Inc.)

Attached is a timely submitted comment from Jan Witold Baran and Caleb P. Burns, counsel, on behalf of CTIA – The Wireless Association.

Attachment



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FEDERAL ELECTION COMMISSION
COMMUNICATIONS SECTION

2012 AUG -7 P 12:19

August 7, 2012

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BY HAND DELIVERY AND FAX (202.208.3333)

Federal Election Commission
Office of the Commission Secretary
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Washington, DC 20463

Re: Comments to Draft Advisory Opinion 2012-26

Dear Commissioners:

On behalf of CTIA – The Wireless Association® (“CTIA”), we are submitting these comments to Draft Advisory Opinion 2012-26 (the “Draft”) in response to questions raised by the Commission during its August 2, 2012, meeting.

1. Requested Edits to the Draft

First, we reiterate our request from the meeting that the Commission revise the Draft to explicitly state that the responsibility for determining the eligibility of a contributor, and any resulting liability, rests solely with the political committees who receive contributions by text message. This can be accomplished by inserting the word “solely” between the words “is” and “responsible” on line 28, page 7 of the Draft. Furthermore, we request that the Draft explicitly state that Advisory Opinion 2010-23 (CTIA I) is superseded and the requirements stated therein do not apply when contributions by text message are made pursuant to the terms of Advisory Opinion 2012-17 (m-Qube I).

Second, we understand that the Commission will follow the reasoning of the Draft when the Commission issues its response to our Advisory Opinion Request 2012-28 (CTIA II). Because the questions presented in the Draft differ in certain respects from those in our Advisory Opinion Request, it is our hope that the Commission will respond directly to our specific questions presented.

2. A Vendor’s Refusal to Sell Services is not a “Contribution” Regulated by the Campaign Finance Laws

At the August 2, 2012, meeting, the Commission raised questions about the criteria that CTIA and wireless service providers would use to determine which political committees would be granted common short codes and access to the billing and collection services of wireless service providers to collect contributions by text



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message. The CTIA II Advisory Opinion Request represented that the wireless service providers will permit or deny access based on various commercial considerations. Examples of relevant commercial considerations used by wireless service providers are listed on pages 83, 90, and 160 of the industry standards for consumer best practices at www.mmagnbal.com/files/bestpractices.pdf.

Page 90 indicates that a wireless service provider will prohibit a text message campaign that promotes hate toward groups.¹ During the August 2, 2012, meeting, Commissioner McGahn used the example of a candidate from the American Nazi Party. A wireless service provider might very well refuse to sell text message contribution services for the benefit of such a candidate in order to avoid promoting hatred.

Commissioner Bauerly and Vice Chair Weintraub expressed concern over -- and the Draft, itself, questions -- whether such a refusal to sell services by a commercial vendor to a political committee would be prohibited by the Federal Election Campaign Act, as amended, (the "Act") as an in-kind contribution to opposing political committees. However, the Act does not define a contribution to include the refusal of a vendor to sell any goods or services.

A "contribution" is "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). The Commission's regulations further provide that "anything of value" includes "in-kind contributions" defined as "the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services." 11 C.F.R. § 100.52(d)(1). Accordingly, a "contribution" only results when a service is provided to a political committee without full payment in return. A "contribution" does not include, as a matter of law, the refusal of a vendor to sell goods or services.

In fact, the Act does not contain any provision that would require vendors to sell their goods or services to any or all political committees. By contrast, Congress has been clear in other laws when it requires vendors to provide goods or services to political committees. For example, the communications laws administered by the Federal Communications Commission require that if a broadcaster "shall permit any

¹ These types of distinctions are often made by commercial service providers. You can view, for example, the New York Times advertising guidelines at: <http://nytmarketing.whsites.net/mediakit/reference/Advertising-Acceptability-Standards.pdf>.



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person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station." 47 U.S.C. § 315(a). No such mandate exists in the Act. As Commissioner McGahn noted at the August 2, 2012, meeting, vendors can, and often do, service political committees based on partisan affiliation. With no basis in the campaign finance laws, the Commission does not have the authority to condition the ability of a vendor to decide the political committees to which it will sell goods or services.

When deciding whether to provide any entity access to common short codes or the use of their billing services, CTIA and the wireless service providers must be able to exercise their discretion to make sound business decisions. When determining the eligibility of political committees, they will need to look at a wide variety of criteria, which may include factors such as a candidate's viability, whether a candidate is on the ballot, or whether the candidate's views may cause harm to the wireless service provider's brand. While they will be making these determinations for commercial reasons, the comments submitted by Revolution Messaging, LLC demonstrate that commercial judgments can be misconstrued as political judgments.² By stating that eligibility decisions must be based on "commercial, rather than political, considerations," the Draft establishes unnecessary and ill-defined limits on discretion. Without the discretion to decide the political committees with which to do business, the resulting advisory opinion could force CTIA and the wireless service providers to refrain from providing these services to any political committees.

CTIA and the wireless service providers require affirmation that the Act does not impose liability on a vendor that, for whatever reason, decides not to offer services to a political committee. This can be easily accomplished in the Draft by deleting the language beginning on line 11 of page 14 and on line 6 of page 15 that states "so long as the requirements are based on commercial, rather than political,

² The Revolution Messaging, LLC comments pejoratively refer to decisions by the wireless service providers as "arbitrary" and imply on page 3 that the wireless service providers have been politically motivated when applying their commercial standards "arbitrarily to deny text message services to advocacy and political organizations." Ironically, if the Commission requires the equal treatment espoused by Revolution Messaging, LLC, it will have unwittingly forced itself to decide between revising the business model described on page 1 of providing "text messaging services to progressive non-profit organizations, labor organizations, and Democratic federal and state political committees and organizations" or risk violating the law. (Emphasis added).



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considerations" and replacing it with the phrase "regardless of the eligibility criteria used." A similar unqualified response will also be necessary in the CTIA II Advisory Opinion.

Sincerely,

A handwritten signature in black ink, appearing to read "Caleb P. Burns".

Jan Witold Baran
Caleb P. Burns

cc: Office of General Counsel