



FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 14, 2012

CERTIFIED MAIL
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ADVISORY OPINION 2012-26

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Mr. Robert A. Davidson, Treasurer
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Dear Messrs. Engle, Kappel & Davidson:

We are responding to your advisory opinion request on behalf of Cooper for Congress (“the Committee”), m-Qube, Inc. (“m-Qube”), and ArmourMedia, Inc., concerning the application of the Federal Election Campaign Act (the “Act”) and Commission regulations to the proposed receipt and processing of contributions by text message. The Commission concludes that the proposal is consistent with the Act and Commission regulations.

Background

The facts presented in this advisory opinion are based on your letter received on July 18, 2012 and supplemental information that you provided on July 24 and August 2, 2012. Certain facts have also been incorporated from Advisory Opinion 2012-28 (CTIA – The Wireless Association) (“CTIA II”), Advisory Opinion 2012-17 (Red Blue T LLC, ArmourMedia, Inc., and m-Qube, Inc.) (“m-Qube I”) and Advisory Opinion 2010-23 (CTIA – The Wireless Association) (“CTIA I”), as well as supplements and comments received in connection with Commission consideration of those requests.

The Committee is the principal campaign committee of Representative Jim Cooper. Representative Cooper is a candidate in his party’s August 2, 2012, primary election to represent Tennessee’s Fifth Congressional District. The Committee intends to receive contributions by

text message for the primary and general elections. M-Qube is an aggregator of business-to-consumer messaging and merchant billing for public wireless service providers. ArmourMedia is a political and media consulting firm that advises and represents political committees.

1. Industry Overview

Text message transactions typically involve a number of commercial entities. The Common Short Code Administration (the “Code Administration”), a component of CTIA – The Wireless Association, oversees the technical and operational aspects of short codes.¹ The Code Administration leases short codes, administers their registration, and maintains a public database of short codes, available at www.usshortcodes.com. As part of its leasing process, the Code Administration requires that applicants provide identity information. CTIA commonly reviews applicants to verify that an applicant’s corporate address and leadership match those in incorporation documents and searches for any adverse regulatory or litigation history.² In addition to leasing short codes through the Code Administration, CTIA is also responsible for compiling and publishing industry best practices designed to protect consumers from deceptive marketing and to preserve its members’ business interests. CTIA also assists in monitoring compliance with these standards.

Wireless service providers³ are the companies from which subscribers purchase their mobile phone service. Content providers, such as the Committee, are typically vendors that use short codes to disseminate content to, or collect information or funds from, wireless users. Connection aggregators, such as m-Qube, link content providers, service providers, and users together. M-Qube operates direct interconnection gateways with all of the nation’s major public wireless service providers.

Typically, a wireless user initiates a text message transaction by texting a predetermined word or phrase to a short code. For example, in the aftermath of the 2010 earthquake in Haiti, individuals texted the word “HAITI” to Code “90999” to make ten dollar donations to the Red Cross. The connection aggregator then sends a reply text message that asks the user to confirm his or her desire to engage in the specific transaction. Once confirmation has been received, the user has completed the “opt-in” process and a charge will appear on the next wireless bill associated with that wireless user’s phone number. A wireless service provider will generally forward payment to the connection aggregator about seven to ten days after receiving it. A connection aggregator generally accumulates all funds designated for a specific content provider from all wireless service providers over a 30-day period before forwarding the accumulated funds to the content provider – in this example Red Cross. Both the wireless service provider

¹ A common short code is a five- or six-digit number to which wireless users can send text messages to access mobile content.

² The requestors expect that, in the case of political committees, CTIA will review Commission records to verify committee treasurers and addresses and search for adverse regulatory history. The requestors also expect that, in the course of reviewing the Committee’s application for a short code, CTIA may contact the Committee’s treasurer, rather than directly contact Representative Cooper.

³ The Commission understands the terms “wireless service providers,” “wireless carriers,” “carriers,” and “network operators” as used in the request to refer to “wireless service providers.”

and the connection aggregator deduct fees from the payment; thus, the amount received by the content provider is less than the amount paid by the wireless subscriber.

Wireless service providers maintain records of their wireless subscribers' names and addresses and the phone numbers of the wireless users associated with each subscriber's account.

2. Service Order Between m-Qube and the Committee

The Committee intends to enter into a service order with m-Qube to enable the Committee to receive contributions by text message. The terms of the service order will be consistent with those approved by the Commission in Advisory Opinion 2012-17 (m-Qube I): The Committee must be registered "and in good standing" with the Commission and relevant State authorities; the Committee may register only one short code; no mobile phone number may make contributions exceeding \$50 per month to the Committee; and contributors must certify their eligibility to make a contribution under the Act and Commission regulations. Because common short codes are "country-specific," only users who obtain service through U.S.-based wireless service providers will be able to use a short code to complete an opt-in.

Also consistent with the Commission's determination in Advisory Opinion 2012-17 (m-Qube I), m-Qube will require the Committee to use m-Qube's factoring service. Factoring is a financial transaction in which an entity (here, the Committee) sells its accounts receivable to a third party (here, m-Qube) at a discount in exchange for receiving a percentage (or "factor") of its outpayment on an expedited basis.⁴ m-Qube currently offers factoring as an optional service in exchange for a fee to customers who wish to receive a portion of their outpayments more quickly than the normal industry practice would allow and has stated that it will make factoring mandatory for political committees. Additional information on m-Qube's factoring practices appears in Advisory Opinion 2012-17 (m-Qube I).

M-Qube does not propose to identify any of the wireless users whose opt-ins it analyzes as part of the factoring process or to transmit their names and addresses to the Committee, consistent with its current practice for customers that are not political committees. M-Qube will, however, provide the Committee with the ten-digit phone number associated with each contribution, as well as (1) the amount and date of the contribution, (2) confirmation that the contributor affirmatively consented to charge the contribution to his or her wireless bill, and (3) confirmation that the contributor certified his or her eligibility to make a contribution under the Act and Commission regulations.

M-Qube will also give the Committee access to a running, real-time tally of the dollar amount of contributions made via text message from each phone number and will configure its gateway to inform the Committee if contributions from any one phone number equal or exceed \$200 in a calendar year. Once alerted, the Committee will collect the contributor's identifying information via text message by texting the contributor a web form to complete, or by other

⁴ An "outpayment" is the total amount that a recipient content provider is entitled to receive after all fees have been deducted by the wireless service providers and connection aggregators. A "factor" is a reduced percentage of the outpayment.

legally permitted methods. The Committee will receive further contributions via text message from that phone number only after it has obtained the contributor's identifying information. If that information is not provided by the contributor, then the Committee will take steps to refund any contribution over \$200 and prevent that number from making additional contributions via text messaging. Further, if the Committee receives information about a contributor indicating that the contributor is a prohibited source, the Committee will take steps to refund the contribution and block the number from texting any further contributions. The Committee will take these steps based only on the information that m-Qube makes available to the Committee in m-Qube's ordinary course of business and without receiving any information from, or entering into any contractual relationships with, wireless service providers.

3. Agreements Between Wireless Service Providers, m-Qube, and the Committee

After the Committee receives its short code and completes a service order with m-Qube, m-Qube will work with the wireless service providers to gain access to their networks to communicate with mobile phone users. Even after CTIA has leased a short code to the Committee, the wireless service providers may permit or prohibit any type of text message program, and the wireless service providers may establish the conditions or rules that govern the manner in which a text message program may be operated. The requestors expect that the wireless service providers will establish commercially reasonable eligibility criteria for determining whether to permit or prohibit the use of a text message program.

The Committee will have no direct contractual relationship with the wireless service providers. Rather, m-Qube maintains its own contractual relationships with the wireless service providers, and any agreement between m-Qube and a wireless service provider would be an amendment to the standing master agreement between m-Qube and the wireless service provider. Due to trade secret concerns and antitrust regulations, the rates in these agreements are confidential and are not disclosed, including to the Committee. The requestors also represent that, aside from charitable programs where service is provided for free, wireless service providers do not offer different rates for specific types of text message programs.

Questions Presented

- 1. As between m-Qube, the carriers and the Committee, does the Committee bear the responsibility to determine its contributors' eligibility, which it would do by adopting the necessary safeguards?*
- 2. If the Committee performs several of its own tasks and employs several of its own safeguards regarding the \$50 monthly limit on contributions; the recordkeeping obligations for contributions that tally in excess of \$200; and the limitation of one short code per campaign: will the Committee have fulfilled all the responsibilities for compliance under the Act without any additional action by any carrier or aggregator other than those set forth in this request?*

3.

a.

i. *If any given carrier offering this service is not offering a discount on these services as provided in the ordinary course of business to all customers, is it correct that if m-Qube received a special discount from a carrier for political committees, and passed that savings on to the Committee, that the Committee could be seen as receiving an in-kind contribution, since the discount was not “usual and normal?”*

ii. *If any given carrier concludes that it could offer m-Qube a discount consistent with its ordinary course business practices, and m-Qube passed that savings on to the affected political committees, would the Committee be safe in receiving those savings without being viewed as having accepted an in-kind corporate contribution?*

b. *Please confirm the Treasurer will not be receiving an impermissible “in-kind” contribution from the carriers when the carriers follow their normal business practices with respect to administering premium SMS programs, and that if any changes are made it is because normal practices are not relevant to, or are impracticable for, political committees.*

4. *Can the Committee avoid receiving an “in-kind” contribution if it or any other political committee is subject to commercial eligibility requirements established by the aggregators and the wireless carriers for determining whether a committee may participate in a text messaging contribution campaign?*

5. *Please confirm that nothing in Advisory Opinion 2012-17 (m-Qube I) prevents treasurers from being subject to the methods wireless service providers normally process payments to connection aggregators.*

Legal Analysis and Conclusions

1. *As between m-Qube, the carriers and the Committee, does the Committee bear the responsibility to determine its contributors’ eligibility, which it would do by adopting the necessary safeguards?*

2. *If the Committee performs several of its own tasks and employs several of its own safeguards regarding the \$50 monthly limit on contributions; the recordkeeping obligations for contributions that tally in excess of \$200; and the limitation of one short code per campaign: will the Committee have fulfilled all the responsibilities for compliance under the Act without any additional action by any carrier or aggregator other than those set forth in this request?*

Yes, the Committee is solely responsible for determining the eligibility of its contributors. The Committee will satisfy its responsibilities under the Act by employing the safeguards described below.

The Act and Commission regulations impose certain requirements on treasurers of political committees. A treasurer of a political committee “must keep an account of (1) all contributions received by or on behalf of such political committee; (2) the name and address of any person who makes any contribution in excess of \$50, together with the date and amount of such contribution by any person; [and] (3) the identification of any person who makes a contribution or contributions aggregating more than \$200 during a calendar year, together with the date and amount of any such contribution.” 2 U.S.C. 432(c)(1)-(3); *see also* 11 CFR 110.4(c). Commission regulations also state that “[t]he treasurer shall be responsible for examining all contributions received for evidence of illegality and for ascertaining whether contributions received, when aggregated with other contributions from the same contributor, exceed the [Act’s] contribution limitations.” 11 CFR 103.3(b).

In Advisory Opinion 2012-17 (m-Qube I), the Commission approved a proposal very similar to the one proposed here.⁵ As in that advisory opinion, the requestors propose to enter into a service order that will require: (1) the Committee to register only one short code; (2) a monthly limit of \$50 for contributions to the Committee from any single mobile phone number;⁶ (3) contributors to certify their eligibility to make a contribution under the Act and Commission regulations; (4) the Committee to have real time access to m-Qube’s running tally of contributions made from mobile phone numbers; and (5) the Committee to use m-Qube’s factoring services. In addition, only wireless users who obtain service through U.S.-based wireless service providers will be able to complete an opt-in. The Committee will take additional steps to comply with the Act’s reporting and recordkeeping provisions if the Committee receives information that a contributor has made contributions aggregating in excess of \$200 in a calendar year.⁷ Under this proposal, the m-Qube gateway will alert the Committee when the value of contributions made from any one mobile phone number meets or exceeds \$200, which will prompt the political committee to collect the information necessary to identify the contributor before accepting additional contributions. The Commission determines that all of

⁵ Because no political committee was a party to that request, the Commission did not comment as to political committees’ recordkeeping and reporting requirements.

⁶ As explained further in the text, the \$50 monthly limit on contributions ensures that the requirement in 2 U.S.C. 432(b) and 11 CFR 102.8(a) to forward to the Committee the contributor’s name and address and the date of receipt of the contribution will not be triggered.

⁷ m-Qube’s agreement with the Committee will include all of the terms discussed in Advisory Opinion 2012-17 (m-Qube I). The Committee will thus also be required to refund to m-Qube any factored contributions that it receives in excess of the amounts later received by m-Qube from wireless service providers, to post deposits to guard against such overpayments, or to have any overpayments offset against future factored payments. *See* Advisory Opinion 2012-17 (m-Qube I).

these safeguards, taken together, will enable the Committee to satisfy its requirements under the Act and Commission regulations.⁸

As compared to political committees, the Act and Commission regulations impose comparatively fewer obligations on persons who receive and forward political contributions. *Compare* 2 U.S.C. 432(b) (requiring persons who receive contributions for political committees to forward the contributions and certain other information to the political committees' treasurers within either ten or 30 days) *with* 2 U.S.C. 432(c) (recordkeeping requirements) *and* 2 U.S.C. 433 (filing requirements) *and* 2 U.S.C. 434(a)-(b) (reporting requirements). *See also* Advisory Opinion 2009-32 (Jorgensen) ("Contributions from foreign nationals, corporations, labor organizations, and [F]ederal contractors are prohibited. The political committee, *not the vendor*, is responsible for determining the legality of contributions.") (emphasis added).⁹

Although persons who receive and forward contributions in excess of \$50 to political committees must also forward the contributors' names, addresses, and other identifying information, 2 U.S.C. 432(b); 11 CFR 102.8(a), (b), none of the contributions under the proposal here will exceed \$50. The Commission determined in Advisory Opinion 2012-17 (m-Qube I) that on these facts, contributions will be made when the user completes an opt-in. Because of the \$50 monthly cap, no single opt-in will exceed \$50. Therefore, the obligation under 2 U.S.C. 432(b)(1)-(2) to forward the contributors' names, addresses, and other identifying information to the Committee will not be triggered. The Committee, however, will be able to satisfy its obligations under 2 U.S.C. 432(c)(3) regarding persons who will make a contribution aggregating more than \$200 during a calendar year.

Accordingly, for the reasons stated above, the Committee will have fulfilled the responsibilities for compliance under the Act and Commission regulations.

3.

a.

- i. *If any given carrier offering this service is not offering a discount on these services as provided in the ordinary course of business to all customers, is it correct that if m-Qube received a special discount from a carrier for political committees, and passed that savings on to the Committee, that the Committee could be seen as receiving an in-kind contribution, since the discount was not "usual and normal?"*

⁸ This conclusion does not relieve the Committee of the obligation to return or refund any contributions that it receives if it subsequently learns that they came from a prohibited source. *See generally* 11 CFR 103.3(b), 110.20(a)(4), (g).

⁹ Similarly, in Advisory Opinion 1978-68 (Seith for Senate), the Commission premised its conclusion that contributions by credit card were permissible on the "assum[ption] that the credit card issuers (BankAmericard and Master Charge) will follow their usual and normal collection procedures with respect to obtaining payment from persons who used their credit cards to make political contributions to the Committee." *Id.*

- ii. *If any given carrier concludes that it could offer m-Qube a discount consistent with its ordinary course business practices, and m-Qube passed that savings on to the affected political committees, would the Committee be safe in receiving those savings without being viewed as having accepted an in-kind corporate contribution?*

The Act and Commission regulations prohibit corporations from making a contribution in connection with a Federal election. *See* 2 U.S.C. 441b(a); 11 CFR 114.2(b)(1). A contribution includes “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); 11 CFR 100.52(a); *see also* 2 U.S.C. 441b(b)(2); 11 CFR 114.2(b)(1). “Anything of value includes all in-kind contributions,” including the provision of goods or services without charge or at a charge that is less than the usual and normal charge. *See* 11 CFR 100.52(d)(1). “Usual and normal charge” is defined as the price of goods in the market from which they ordinarily would have been purchased at the time of the contribution, or the commercially reasonable rate prevailing at the time the services were rendered. *See* 11 CFR 100.52(d)(2).

The requestors represent that wireless service providers base their text message program rates on commercial considerations, such as volume of messages, refund rates, customer satisfaction, and technical level of effort. As a general matter, the requestors state that, aside from charitable programs where services are provided for free, wireless service providers do not differentiate their rates among text message programs. The requestors, however, also represent that m-Qube may attempt to negotiate special rates for its political committee program when it amends its master agreements with wireless service providers, and to pass any savings on to the Committee.

The Commission has previously determined that a political committee’s “purchase of goods or services at a discount does not result in a contribution if the discounted or complimentary goods were available to others on equal terms or as part of a pre-existing business relationship.” Advisory Opinion 1994-10 (Franklin National Bank); *see also* Advisory Opinion 2006-01 (PAC for a Change) (approving a bulk purchase of books at a discount because “the items [were] made available in the ordinary course of business and on the same terms and conditions offered to the vendor’s other customers that are not political committees”). The Commission has also found, however, that a corporation may not provide a discount to a political committee “where a political committee [is] accorded preferential treatment different from other customers, or the treatment [is] *outside of a business relationship*.” Advisory Opinion 1994-10 (Franklin National Bank) (emphasis added); *see also* Advisory Opinion 1991-23 (Retail Druggists) (corporation may not provide a car for a political committee to use as a raffle prize because doing so would violate 2 U.S.C. 441b).

M-Qube, therefore, may pass on discounts that it negotiates with wireless service providers to the Committee as part of m-Qube’s plan for all committees on an “equal, non-partisan basis” without the amount of discounts constituting corporate in-kind contributions to the Committee if: (1) m-Qube receives discounts from wireless service providers for their services in processing contributions by text message that are consistent with the discounts that m-Qube receives from wireless service providers in connection with similar services rendered to

customers that are not political committees; or (2) the discounts otherwise reflect commercial considerations, such as volume of messages, refund rates, customer satisfaction, and technical level of effort, and do not reflect considerations “outside of a business relationship.”¹⁰

- b. *Please confirm the Treasurer will not be receiving an impermissible “in-kind” contribution from the carriers when the carriers follow their normal business practices with respect to administering premium SMS programs, and that if any changes are made it is because normal practices are not relevant to, or are impracticable for, political committees.*

As discussed above, the definition of contribution includes “any gift . . . of . . . 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); 11 CFR 100.52(a); *see also* 2 U.S.C. 441b(b)(2); 11 CFR 114.2(b)(1). “Anything of value includes all in-kind contributions.” 11 CFR 100.52(d)(1).

The requestors represent that CTIA and the wireless service providers adhere to routine business practices when administering text message programs. Before leasing a short code, CTIA vets content providers. It does this by reviewing publicly available incorporation documents, contacting the content provider’s corporate leadership by phone and email, and searching for any adverse regulatory actions or litigation history. Wireless service providers also engage in a diligence review of content providers before entering into agreements with aggregators that represent the content providers. Furthermore, CTIA maintains industry best practice standards to protect consumers from deceptive marketing, and, upon the implementation of a text message program, CTIA monitors compliance with these standards.

While the requestors expect CTIA and wireless service providers to conform to these normal business practices in connection with the Committee’s text message program, the requestors also note that the Committee is different from content providers with which CTIA and the wireless service providers have previously done business. Specifically, the Committee is regulated under the Act and Commission regulations, and public documents pertaining to the Committee may facilitate the vetting process. The requestors expect, therefore, that CTIA and the wireless service providers may tailor their business practices accordingly. CTIA and the wireless service providers may, for example, search the Commission’s website for available information on the Committee and contact the Committee’s treasurer, rather than directly contacting Representative Cooper.

The Commission concludes that the Committee would not receive a “gift . . . of . . . anything of value” from CTIA and wireless service providers that engage in these business practices when reviewing and administering the Committee’s text message program. Nor would the Committee receive a “gift . . . of . . . anything of value” from CTIA and wireless service providers that use publicly available information about the Committee to vet the Committee before issuing a short code or approving the Committee’s proposal.

¹⁰ In reaching this conclusion, the Commission assumes that *m-Qube*’s normal commercial practice is to pass negotiated discounts to its customers that are not political committees or that passing on such a discount reflects commercial considerations and not considerations “outside of a business relationship.”

Accordingly, the Committee will not receive an impermissible in-kind contribution when CTIA or the wireless service providers apply their normal business practices in their administration of the Committee's text message program.

4. *Can the Committee avoid receiving an "in-kind" contribution if it or any other political committee is subject to commercial eligibility requirements established by the aggregators and the wireless carriers for determining whether a committee may participate in a text messaging contribution campaign?*

Yes, the Committee can avoid receiving an in-kind contribution if it and other political committees are subject to commercial eligibility requirements established by aggregators and wireless service providers for determining whether a political committee may participate in a text messaging contribution campaign.¹¹ This answer is not altered if the application of those eligibility requirements results in the Committee being able to receive contributions via text message and other political committees not being able to do so.

A vendor may establish and apply eligibility criteria to political committees in order to protect the commercial viability of the vendor's program. In Advisory Opinion 2006-34 (Working Assets), for example, the Commission approved an affinity program that a corporate vendor proposed to make available to any political party committee and nonconnected committee that asked to participate, "'subject to each particular program's commercial viability, determined by common commercial principles,' including, for example, size of membership and hence number of potential customers, potential for long-term customer commitment, strength of trademark, and credit rating of membership." Further, in finding the program to be commercially reasonable, the Commission "assume[d] that *the commercial viability of the vendor's relationship with each political committee would stand or fall on its own*," and thus that the vendor "would not depend on profitability from its relationship with other [non-political committee] clients to sustain the arrangement with a particular [political] committee sponsor." *Id.* (emphasis added).

Similarly, here, the Committee represents that its participation in text message fundraising programs will be subject to "objective and to commercially reasonable"¹² criteria established by the wireless service providers for determining the eligibility of political committees to participate in text message fundraising programs. Just as Working Assets could develop eligibility criteria for political committees to participate in an affinity program based on "common commercial principles" without conferring a contribution on the political committee that met its criteria, so too the Committee would not receive an in-kind contribution if it participates in text message fundraising programs as described in the request.

¹¹ See Advisory Opinion 2012-28 (CTIA II) ("Wireless service providers propose 'to establish objective business criteria that are specific to political contribution text messaging campaigns.' They may decide, for commercial reasons, to accept only proposals from some political committees and not others.")

¹² Supplement to Advisory Opinion Request 2012-26 (m-Qube II) (August 2, 2012).

5. *Please confirm that nothing in Advisory Opinion 2012-17(m-Qube I) prevents treasurers from being subject to the methods wireless service providers normally process payments to connection aggregators.*

In Advisory Opinion 2012-17 (m-Qube I) the Commission approved m-Qube's proposal to process contributions by text message for political committees. To the extent the proposal here is "indistinguishable in all its material aspects," 2 U.S.C. 437f(c), from that proposal, the Committee's treasurer may rely upon it when accepting contributions by text message. *See also* Advisory Opinion 1978-68 (Seith for Senate), *supra* n.7. To the extent the proposal here differs, none of those changes affects the permissibility of m-Qube's planned payment arrangements with the wireless service providers.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law, including, but not limited to, statutes, regulations, advisory opinions, and case law. The cited advisory opinions are available on the Commission's website, www.fec.gov, or directly from the Commission's Advisory Opinion searchable database at <http://www.fec.gov/searchao>.

On behalf of the Commission,

(signed)
Caroline C. Hunter
Chair