

ADR 2012-31



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August 16, 2012

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

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OFFICE OF GENERAL
COUNSEL

Re: Request for Advisory Opinion

Dear Commissioners:

I am writing on behalf of AT&T Inc. and its family of companies ("AT&T") to request an advisory opinion from the Federal Election Commission ("Commission") pursuant to 2 U.S.C. § 437f of the Federal Election Campaign Act of 1971, as amended (the "Act"), and 11 C.F.R. § 112.1. We seek clarification of Advisory Opinion 2012-28, dated June 14, 2012 (the "CTIA AO"), which addresses the application of the Federal Election Campaign Act ("Act") and the Commission's regulations to the proposal to process contributions made to political candidates and committees by text message.

Specifically, AT&T seeks clarification of the Commission's answer to a single question:

"3. *Would deviations from normal business practices constitute 'in-kind' political contributions?*"¹

In the CTIA AO, the Commission concludes that "deviations from normal business practices could constitute "in-kind" contributions, where CTIA and the wireless service providers provide such a discount to a political committee as a result of preferential treatment outside of a business relationship."² Further, the Commission concludes that a "proposal to charge their usual and normal commercial rates for processing contributions by text message would not result in the provision of services at less than the usual and normal charge or the provision of a "gift...of...anything of value" to political committees that receive contributions by text message."³ Finally, the Commission concludes that "(a) change in business practices or rates would not necessarily result in an in-kind contribution," and "(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."⁴

AT&T believes that clarification of the Commission's conclusion in response to Question 3 is necessary because of the unique and novel circumstances surrounding the processing of

¹ CTIA AO at 7.
² *Id.*
³ *Id.* at 8.
⁴ *Id.*

contributions for political candidates and committees by text message. AT&T offers to third-party commercial enterprises, operating in a competitive industry, the ability to reach AT&T's customers over our text-messaging platform and sell these customers various goods and services such as ringtones ("content"). The third party content providers contract with connection aggregators ("aggregator"), which in turn contract with AT&T to provide its customers with access to this content and the ability to pay for the content through their monthly wireless bills. In return for providing this premium SMS service ("PSMS") to the aggregators, AT&T charges them a percentage of the amount its wireless customers pay each month for this content. Customers purchase these goods and services – on a one-time or subscription basis – and enjoy the convenience and security of paying for them through their monthly wireless bills. That is, AT&T facilitates a commercial transaction between third-party content providers and one or more of our customers via the aggregator, and charges the aggregator for access to our text-messaging platform that reflects the economic and operational dynamics of this particular transaction and the competitive marketplace.

The model articulated in the CTIA AO represents a new paradigm for AT&T which is wholly different from the competitive, commercial enterprise model described above. Indeed, the "transaction" at issue has none of the commercial characteristics inherent in the transactions that occur today and for which our "usual and normal" rates and terms apply for PSMS. In the case of the utilization of our text-messaging platform to facilitate AT&T customers making *voluntary* contributions to political candidates and committees, our customers would be purchasing no content nor receiving anything from the political candidate and committees. Hence, they would not be engaging in a commercial transaction. AT&T has never offered this service to its wireless customers, and therefore, has no experience with, nor pricing mechanism appropriate for, this paradigm.⁵ Accordingly, there is no "usual and normal charge" for providing customers the capability to make voluntary political contributions. See, e.g., Advisory Opinion 1994-10 (Franklin National Bank) (approving a bank's waiver of certain bank service fees and costs to borrowers who are political committees: "If the waiver of the charges discussed in your request...is part of the Bank's practice in the *normal course of business regarding its commercial customers* and is normal industry practice, then it would be permissible to offer the same consideration for *its political customers in similar circumstances.*" (Emphasis added.) Moreover, we believe that when making a voluntary political contribution, our customers reasonably will expect that most of their contribution is going to the political candidate or committee of their choice. In short, the putative activity of wireless service providers approved in the CTIA AO bears little resemblance to the commercial activity in which AT&T participates today. Rather, facilitating the ability for our customers to participate in the political process by making voluntary contributions to political candidates and committees is more akin to activity undertaken by a corporation in the public interest.

⁵ The closest thing that AT&T has to this paradigm is offering its customers the ability to make charitable contributions. However, in that context, charities share short codes, and the annual billed amount for these charitable contributions typically is a small fraction of the total amount billed for PSMS.

For these reasons, AT&T is prepared to create a new service offering whereby its customers can make voluntary contributions to political candidates and committees, and to assess a fee that is in line with the service provided to, and the expectations of, the customer's non-commercial wishes. This fee likely will be substantially less than the rate we charge for access to our text-messaging platform for purely commercial purposes. The rate would be structured as a percentage of the donor's contribution, as a flat per text message contribution charge, or some combination of both. The same rate and rate structure would be charged equally to all aggregators representing political candidates and committees seeking to gain access to AT&T's text-messaging platform. The rates and rate structure would be set by AT&T based on commercial factors, including the unique nature of these transactions, the volume of the transactions, the dollar amounts of the transactions, and the volume of work these transactions generate for our call centers. While AT&T would establish initial rates and rate structure for this new non-commercial offering, we would need the flexibility to adjust these rates and rate structures over time based upon our actual operational experience including volume of traffic and other factors that are difficult to predict with certainty at this time.⁶

Accordingly, AT&T seeks clarification from the Commission that its creation of this new service offering with rates and a rate structure that reflects the unique nature of these transactions, and the flexibility to adjust its rates and rate structure, would not constitute an impermissible in-kind contribution under the Act.

AT&T understands the urgency of reaching closure in this matter given the interests of the aggregators and the political candidates and committees. However, we believe that it is just as important to remember that it is AT&T customers, not AT&T, who are making the voluntary political contributions here. Hence, the model must be constructed to fully and fairly account for the interests of our customers, who reasonably expect that when making a voluntary contribution, most of their contribution is going to the political candidate or committee of their choice. In the absence of this requested clarification, AT&T has serious misgivings about participating in the first instance. On the other hand, should the Commission accept that a new service offering at discounted rates to the aggregators to recognize the unique and different nature of this paradigm is not an in-kind contribution, AT&T would be prepared to begin offering these services as soon as is practicable.

⁶ Unlike most other PSMS services or charitable contributions, political contributions are expected to put a great deal of strain on our network in short bursts due to the volume of contributions expected to be processed simultaneously at rallies and the political conventions. For these reasons, some flexibility and experience is required to develop and adjust the rate structure.

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Given the pending presidential election, AT&T respectfully urges the Commission to give expedited consideration to this request for clarification.

Sincerely,

A handwritten signature in black ink, appearing to read "Wayne Watts", with a long horizontal flourish extending to the right.

Wayne Watts
Senior Executive Vice President & General Counsel, AT&T Inc.



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August 30, 2012 OFFICE OF GENERAL
COUNSEL

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Office of the General Counsel
999 E Street, NW
Washington, DC 20463

Re: Request for Advisory Opinion

Dear Commissioners:

I am writing in response to your request for additional information to assess AT&T Inc.'s request for clarification of Advisory Opinion 2012-28 (the "AT&T Request").

Customer Perceptions - Third Party Content vs. Political Donations

You have asked for AT&T's perspective on our customers' view of the difference between making a purchase of third-party content and a political donation.

As explained in the AT&T Request, AT&T offers to third-party content providers the ability to reach AT&T's customers over our text-messaging platform and sell these customers various goods and services ("content"). Typical content includes applications, games, music, and ringtones. These can be one-time purchases or ongoing monthly subscriptions. The third-party content providers contract with connection aggregators ("aggregators"), which in turn contract with AT&T to provide its customers with access to this content and the ability to pay for the content through their monthly wireless bills. In return for providing this premium SMS service ("PSMS"), AT&T charges the aggregators a percentage of the amount its wireless customers pay for this content, and likewise, the aggregators charge the third-party content providers a percentage of that same amount before they receive the remaining balance. As noted in Advisory Opinion 2012-17, the total amount that a content provider typically receives after these fees are deducted will range between 50 and 70 percent of the charges paid by the customer.¹

Based on AT&T's experience over more than seven years in offering its customers the capability to purchase third-party content and pay for it on their wireless bills, the revenue-sharing between the third-party content provider, aggregator and wireless service provider is irrelevant to our customers' purchasing decision. Like every other commercial transaction, what is important to the customer is the value proposition presented by the third-party content. If the customer believes that the content has value and is worth the price being charged for it, the customer will make the purchase. The

¹ AO 2012-17 at p. 3, fn 6.

customer most certainly does not care how much of what she pays is divided between the content provider, aggregator and wireless service provider. Her purchasing decision is simple – does she view third party content as having value and does she consider the price fair?

In the case of political donations, however, the customer's decision to make a contribution to a political candidate or campaign is quite different. As discussed in the AT&T Request, our customers are not purchasing any products or services, nor are they receiving anything of value from the political candidate or campaign to which they will be making a donation. Rather, they are making a voluntary contribution, and expect nothing in return except for whatever intangible emotional, intellectual and/or personal satisfaction they derive from participating in the political process and lending financial support to the political candidate or campaign of their choice. It is for these reasons, however, that customers making political contributions reasonably expect that most of their contribution will go to the candidate or campaign of their choice. In short, while customers making a purchase of a product or service only care about the value of the service purchased and do not care whether or how the purchase price they pay is divided up among the seller and others, customers making campaign contributions expect the contribution made to flow to the candidate or campaign of their choice and do not want a significant portion of their donations siphoned off to the aggregators and wireless providers who have no direct connection with the campaigns. For these reasons, AT&T remains concerned that its customers will view the company unfavorably if it is required to charge its usual and normal commercial rates for providing a commercial service that is distinctly different from the campaign donation under review.

American Idol Analogs

As previously explained, AT&T's involvement with "American Idol" is an example of a standard-SMS campaign. Customers are able to vote their preferences about the performers using text messages sent to short codes advertised during the live broadcasts. There are other examples along these lines, including a similar text-to-vote arrangement involving the show "Dancing with the Stars." More recently, we used standard text messaging in connection with the Summer Olympics in London. By sending a text message to an advertised short code, customers were sent information and links that allowed them to access video diaries involving some of the athletes that AT&T sponsored. In each of these cases – "American Idol," "Dancing with the Stars," and the Summer Olympics – we did not assess customers an incremental charge for placing their vote or receiving the video diaries, because AT&T was seeking to create brand awareness. In short, these also were different from the PSMS campaign donations under review here.

Charitable PSMS

AT&T can confirm that it does not charge for or take a revenue share in connection with any charitable-giving campaigns that utilize the PSMS platform. In connection with

charitable-giving campaigns, AT&T deals with only three approved aggregators and, by contract with AT&T, those aggregators are required to verify and ensure that each charity is an IRS-approved 501(c)(3) organization.

Proposed Rate Structure

Subject to the Commission's clarification and confirmation that it can offer a new service with rates and a rate structure that reflects the unique nature of PSMS text-message contributions to political candidates and campaigns, AT&T has developed a rate structure that would allow a minimum contribution of \$1, as well as contributions of \$2 to \$5, \$10, \$15 and \$20. Of course, the campaigns would determine the levels of contribution they would solicit. At all of these levels of contribution, AT&T's anticipated rate structure to be charged to the aggregators would allow it to recover its costs plus a return. Notably, in negotiating and setting these rates, AT&T would deal directly and exclusively with the aggregators and not the political campaigns themselves. Finally, AT&T would apply the same rate structure to all political candidates and campaigns.²

Comparison of Approval Processes

In the case of commercial third-party content provided over our PSMS platform, there is a robust and comprehensive review process. The process includes CTIA screening of the short-code applicant; the applicant's acceptance of CTIA's Common Short Code Association Acceptable Use Policy ("CTIA AUP"); and in some cases AT&T's own review to verify that the content provider is a legitimate company in good standing with state authorities and that the content provider's compliance history with AT&T is sound. Thereafter, AT&T conducts a "pre-launch" test of the campaign to verify that it complies with applicable guidelines, as well as random compliance audits.

Should we ultimately decide to allow political donations to be made over our PSMS platform, the review process will be similar, but more streamlined, with the principal compliance obligations resting with the aggregators. CTIA will confirm that information provided by a political candidate or campaign matches registration information on the FEC website. AT&T will perform an initial check that the proposal includes adherence to standard PSMS guidelines. And, most importantly, AT&T's aggregator contracts will require that the aggregators comply with all requirements imposed on them in FEC

² To ensure that the rate structure allows customers to make contributions that benefit candidates or campaigns of their choosing, AT&T intends to require aggregators to pass on the full benefit of these reduced rates to the political candidate or campaign. Such an obligation is consistent with the Commission's prior determination that an aggregator may pass on wireless service provider discounts to campaign committees. See AO 2012-26 at p. 8. Further, AT&T understands that, under current practice, an aggregator's fee is a percentage of the total purchase amount, which in this case would be the total contribution amount to the political candidate or campaign. Therefore, unless the aggregators deviate from this established practice, the aggregator's fee will not depend on the fee charged by the wireless service provider.

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Advisory Opinions and with the current version of the CTIA Guidelines for Federal Political Campaign Contributions via Wireless Carrier's Bill. That is, the aggregators, not AT&T, will be responsible for interacting with the political campaigns to ensure that the requirements of the Advisory Opinions are fulfilled.

Please feel free to contact me if you require additional information.

Sincerely,

A handwritten signature in black ink that reads "Wayne Watts". The signature is written in a cursive style with a long horizontal line extending to the right from the end of the name.

Wayne Watts
Senior Executive Vice President
and General Counsel