

FEDERAL ELECTION  
COMMISSION  
SECRETARIAT



FEDERAL ELECTION COMMISSION 18 A 10: 35  
Washington, DC 20463

November 18, 2010

**AGENDA ITEM**

For Meeting of 11-18-10

**MEMORANDUM**

TO: The Commission

FROM: Christopher Hughey *pch*  
Acting General Counsel

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Theodore M. Lutz *TML*  
Law Clerk

Subject: Draft AO 2010-23 (CTIA)

**SUBMITTED LATE**

Attached is a proposed draft of the subject advisory opinion. We have been asked to place this draft on the agenda for November 18, 2010.

Attachment

1 ADVISORY OPINION 2010-23

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Jan Witold Baran, Esq.  
Caleb P. Burns, Esq.  
Wiley Rein, LLP  
1776 K Street NW  
Washington, DC 20006

**DRAFT**

9 Dear Messrs. Baran and Burns:

10 We are responding to your advisory opinion request on behalf of CTIA – The  
11 Wireless Association (“CTIA”), concerning the application of the Federal Election  
12 Campaign Act of 1971, as amended (“the Act”), and Commission regulations to the  
13 pledging of contributions to Federal candidates, political parties, and other political  
14 committees (collectively “political committees”) by sending text messages to Common  
15 Short Codes (“Codes”) over wireless networks. The Commission concludes that CTIA’s  
16 proposal for wireless service providers and connection aggregators to proceed under their  
17 current business practices to process contributions to political committees would not be  
18 permissible under the Act and Commission regulations.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on  
21 September 10, 2010.

22 CTIA is an incorporated nonprofit trade association that represents the wireless  
23 communications industry. Members of CTIA include wireless service providers and their  
24 suppliers, as well as providers and manufacturers of wireless data services and products.  
25 CTIA, through its Common Short Code Administration (“Code Administration”),  
26 manages the Codes. The Codes are five- or six-digit numbers to which wireless users can  
27 send text messages to access mobile content. The Code Administration oversees the

1 technical and operational aspects of Code functions and maintains a single database of  
2 Codes. The Code Administration leases Codes to entities, who use them for a variety of  
3 purposes, including sweepstakes, opinion polling, mobile coupons, and charitable  
4 donations. A prominent example of the use of Codes was the Red Cross's utilization of a  
5 Code to allow wireless users<sup>1</sup> to pledge ten dollar donations to the organization's  
6 earthquake relief efforts in Haiti in 2010.

7 Content providers, application providers, connection aggregators, and wireless  
8 service providers work together to enable wireless subscribers' use of Codes. Content  
9 providers (such as the Red Cross) are the organizations that use Codes to disseminate  
10 content to or collect information or pledges from, wireless users. Application providers  
11 convert the text messages received through Codes into data that can be interpreted and  
12 used by content providers. Connection aggregators link application providers to wireless  
13 service providers' networks. Wireless service providers are the companies from which  
14 wireless subscribers purchase their mobile phone service.

15 A wireless user who wishes to pledge a donation to an organization initiates the  
16 transaction by texting a predetermined word or phrase to a Code.<sup>2</sup> As a security  
17 precaution, the connection aggregator sends a reply text message to the wireless user,  
18 requesting confirmation of the pledge. If the wireless user confirms the pledge by

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<sup>1</sup> The Commission distinguishes between the terms "wireless user" and "wireless subscriber." A "wireless subscriber" refers to an individual who a wireless service provider would bill. By contrast, a "wireless user" refers to a broader category of individuals, who, for example, may be on a family or group plan and therefore not directly responsible for payment to the wireless service provider.

<sup>2</sup> For example, in the aftermath of the earthquake in Haiti, individuals pledged ten-dollar donations to the Red Cross by texting "HAITI" to the Code "90999."

1 sending a reply text, then the pledge is complete and the charge will appear on the next  
2 wireless bill associated with that wireless user's phone number.

3 CTIA indicates that it is standard business practice in the wireless industry for the  
4 wireless service provider to forward the payment to the connection aggregator about  
5 seven to ten days after the wireless service provider receives payment from the wireless  
6 subscriber. The connection aggregator accumulates all funds designated for a specific  
7 recipient from all wireless service providers over a 30-day period, and then forwards all  
8 those collected funds to the appropriate content provider(s). Both the wireless service  
9 provider and the connection aggregator deduct fees from the payment; thus, the amount  
10 ultimately received by the content provider will be smaller than the amount paid by the  
11 wireless subscriber.

12 It is also the wireless industry's standard business practice to impose limits on  
13 pledges made through Codes. Wireless service providers set a ten dollar ceiling per  
14 transaction, and most<sup>3</sup> wireless service providers impose an aggregate monthly cap of  
15 \$100 on all Code-initiated transactions per phone number. These limits reflect the  
16 concern of wireless service providers that wireless subscribers who pay one bill for  
17 multiple phone numbers (such as a family plan) or who pay for a phone number that they  
18 do not themselves use (such as a parent paying a child's wireless bill) would not pay their  
19 bills if the wireless user incurred large Code charges. Wireless providers have the  
20 capability to impose these limits on a per-phone-number basis only, rather than upon the  
21 entire account, which may include several phone numbers.

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<sup>3</sup> CTIA does not specify which wireless service providers impose the caps.

1           The wireless service providers maintain records of their wireless subscribers’  
2 names, addresses, and the phone numbers of the wireless users associated with that  
3 account. However, wireless service providers may not know if their subscribers or users  
4 are foreign nationals. A wireless subscriber’s address, as provided by the wireless  
5 subscriber, is the only information that wireless service providers may have regarding  
6 nationality.

7           CTIA proposes to issue Codes so that wireless users may pledge contributions to  
8 political committees through the above-described process. Only those wireless industry  
9 participants who agree to CTIA’s proposal would be eligible to lease Codes from the  
10 Code Administration. The transaction fees charged to the political committees by  
11 wireless service providers and connection aggregators under CTIA’s proposal would be  
12 the usual and normal fees for such transactions. When forwarding contributions to  
13 political committees, the wireless service providers and connection aggregators would  
14 follow the same business practices that they use in collecting and forwarding other funds  
15 generated through Codes. Thus, the wireless service providers would send political  
16 contributions generated by the Codes to the connection aggregators seven to ten days  
17 after receiving payment. The connection aggregators would collect political  
18 contributions from all wireless service providers over a 30-day period and then forward  
19 the contributions on to political committees. The wireless service providers and  
20 connection aggregators would not transmit the political contributions through separate  
21 merchant accounts. Also, wireless service providers and connection aggregators would  
22 not forward contributors’ names and addresses to recipient political committees.

1           The connection aggregators could send text messages to wireless users to certify  
2 their compliance with the Act before accepting a wireless user's pledge. The messages  
3 would read:

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

16 A wireless user would be required to respond affirmatively to each statement to make the  
17 pledge.

18           CTIA asserts that technological limitations and cost considerations could  
19 constrain CTIA's ability to require the wireless service providers and connection  
20 aggregators to adopt the following measures when implementing the proposed program:

- 21          1. Require through the confirming text message process that the wireless user supply  
22          his or her name and address to the connection aggregator to submit to the

1 recipient Federal candidate, party, or political committee to monitor compliance  
2 with the Act's contribution limitations and prohibitions.

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

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

10  
11 3. Require wireless service providers and connection aggregators to refuse  
12 contributions from wireless subscribers with "Inc." or "Corp." or some other  
13 clearly identifiable reference in the subscriber's name indicating that the wireless  
14 subscriber is a corporation.

15 4. Require wireless service providers and connection aggregators to refuse  
16 contributions from wireless subscribers with foreign addresses.

17 5. Impose an aggregate monthly cap on contributions from each wireless subscriber  
18 to ensure that contributions do not exceed the Federal contribution limits.

19 ***Questions Presented***

20 1. *May CTIA establish the program described above to enable the wireless service*  
21 *providers and connection aggregators to process contributions to political*  
22 *committees by Code?*

23 2. *Will the proposed services be provided in the ordinary course of business for the*  
24 *normal and usual charge?*

25 3. *Must CTIA require that the wireless service providers and connection aggregators*  
26 *forward contributions by Codes to Federal candidate, party, and political committee*

1        *treasurers within ten or 30 days through separate merchant accounts or may they*  
2        *follow their ordinary business practices?*

3        4. *Does the \$10 approximate per transaction limit satisfy the \$50 anonymous*  
4        *contribution limit? If not, must CTIA ensure that wireless service providers and*  
5        *connection aggregators develop a means to ensure that the contributions are not from*  
6        *impermissible sources and do not aggregate in excess of the \$50 limit? If so, do the*  
7        *proposed confirming text message certifications satisfy these obligations?*

8        ***Legal Analysis and Conclusions***

9        1. *May CTIA establish the program described above to enable the wireless service*  
10        *providers and connection aggregators to process contributions to political*  
11        *committees by Code?*

12        No, CTIA may not establish the program as it is described above to enable  
13        wireless service providers and connection aggregators to process contributions to political  
14        committees by Code. As explained below, the program would not comply with the ten  
15        and thirty day contribution forwarding requirements of 2 U.S.C. 432 and would not  
16        separate corporate funds from political contributions in a manner approved by earlier  
17        advisory opinions.

18        2. *Will the proposed services be provided in the ordinary course of business for the*  
19        *normal and usual charge?*

20        Yes, the proposed services will be provided in the ordinary course of business for  
21        the normal and usual charge.

22        The Act and Commission regulations prohibit corporations from making  
23        contributions in connection with Federal elections. 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  
2 anything of value made by any person for the purpose of influencing any election for  
3 Federal office.” 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a); *see also* 2 U.S.C. 441b(b)(2);  
4 11 CFR 114.2(b)(1). “Anything of value” includes all in-kind contributions, including  
5 the provision of any goods or services without charge or at a charge that is less than the  
6 usual and normal charge. *See* 11 CFR 100.52(d)(1). “Usual and normal charge” is  
7 defined as “the price of those goods in the market from which they ordinarily would have  
8 been purchased at the time of the contribution; and usual and normal charge for any  
9 services, other than those provided by an unpaid volunteer, means the hourly or  
10 piecework charge for the services at a commercially reasonable rate prevailing at the time  
11 the services were rendered.” *See* 11 CFR 100.52(d)(2).

12 A corporation does not make contributions if it provides goods or services in the  
13 ordinary course of business as a commercial vendor at the usual and normal charge. 11  
14 CFR 114.2(f)(1). A “commercial vendor” is any person “providing goods or services to a  
15 candidate or political committee whose usual and normal business involves the sale,  
16 rental, lease, or provision of those goods or services.” 11 CFR 116.1(c).

17 The Commission concludes that the proposed services would be rendered to the  
18 political committee in the ordinary course of business for the usual and normal charge.  
19 CTIA currently administers the Code Administration to enable wireless service providers  
20 and connection aggregators to process charitable donations via Code. CTIA’s proposal  
21 would establish a new program in which political committees would pay the usual and  
22 normal charge to become content providers. Further, the wireless service providers and  
23 connection aggregators will deduct fees from the contributions transmitted to political

1 committees based<sup>4</sup> on amounts charged for processing non-political funds. Therefore, the  
2 Commission concludes that CTIA's proposed services would be rendered in the ordinary  
3 course of business for the usual and normal charge. *See* Advisory Opinions 2010-21  
4 (ReCellular), 2010-06 (Famos), 2004-19 (DollarVote), and 2002-07 (Careau).

5 3. *Must CTIA require that the wireless service providers and connection aggregators*  
6 *forward contributions by Codes to Federal candidate, party, and political committee*  
7 *treasurers within ten or 30 days through separate merchant accounts or may they*  
8 *follow their ordinary business practices?*

9 Yes, CTIA must require that the wireless service providers and connection  
10 aggregators forward contributions by Code to political committee treasurers within ten or  
11 30 days through a separate merchant account.

12 a. *Forwarding Requirements of 2 U.S.C. 432(b)*

13 The Act and Commission regulations state that all persons who receive a  
14 contribution for an authorized political committee must forward the contribution to the  
15 political committee's treasurer within ten days of receipt. 2 U.S.C. 432(b)(1);  
16 11 CFR 102.8(a). The Act and Commission regulations also require that all persons who  
17 receive a contribution for a political committee that is not an authorized committee must  
18 forward the contribution to the political committee within 30 days of receipt, if the  
19 contribution is \$50 or less, and within ten days of receipt, if the contribution is in excess

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<sup>4</sup> CTIA notes that the fees charged to political committees would not be based entirely on the charitable donation model because that model can at times include waivers of fees.

1 of \$50. 2 U.S.C. 432(b)(2)(A); 11 CFR 102.8(b); *see, e.g.*, Advisory Opinion 2009-32  
2 (Jorgensen).<sup>5</sup>

3 Under CTIA’s proposal, a contribution would be made at the time that a wireless  
4 subscriber pays a bill that includes a charge resulting from a Code-initiated pledge to  
5 contribute – not at the time a pledge is made. The wireless service provider would  
6 forward that contribution to a connection aggregator approximately seven to ten days  
7 after receiving the payment. Next, over a 30-day period, the connection aggregator  
8 would collect all contributions for a particular political committee from all wireless  
9 service providers. The connection aggregator would then forward the contributions to the  
10 recipient political committee. Thus, 40 days could lapse before a political committee  
11 received a contribution made by a wireless subscriber. Therefore, because CTIA’s  
12 proposal would not require wireless service providers and connection aggregators to  
13 forward contributions to recipient political committees within the applicable statutory and  
14 regulatory timeframes, this aspect of CTIA’s proposal would not comply with the Act  
15 and Commission regulations.

16 b. *The Use of Separate Merchant Accounts*

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<sup>5</sup> The circumstances in this advisory opinion are distinguishable from those in Advisory Opinions 2006-30 (ActBlue) and 2003-23 (WE LEAD). In Advisory Opinion 2006-30 (ActBlue), the Commission approved a proposal for a nonconnected political committee to collect earmarked contributions for prospective candidates before those individuals had registered their authorized committees with the Commission, on the condition that the political committee forward the contributions to the candidates’ committees within ten days after the candidates’ committees filing their statements of organization. Similarly, in Advisory Opinion 2003-23 (WE LEAD), the Commission approved a proposal for a nonconnected political committee that sought to raise money for the “presumptive nominee of the Democratic Party,” on the condition that the political committee forward the contributions within ten days after the “presumptive nominee is identified.” Here, by contrast, CTIA’s proposal envisions forwarding contributions only for existing political committees. *See also* Advisory Opinions 2006-08 (Brooks), 1998-25 (Mason Tenders), and 1982-23 (Westchester Citizens for Good Government).

1           CTIA’s proposal does not envision the segregation of political contributions from  
2 the corporate funds of either the wireless service provider or the connection aggregators.

3           In previous advisory opinions, the Commission has required that vendors  
4 maintain separate accounts for political contributions that are to be dispersed to  
5 candidates. The Commission has based this requirement in the Act’s prohibition on  
6 corporate and labor organization contributions. *See* 2 U.S.C. 441b; 11 CFR 114.2(b);  
7 Advisory Opinions 2007-04 (Atlatl), 2006-34 (Working Assets), 2004-19 (DollarVote),  
8 2002-07 (Careau), and 1999-22 (Aristotle Publishing). The Supreme Court has  
9 interpreted this prohibition to require a “strict segregation” between general treasury  
10 funds and political contributions. *Pipefitters Local Union No. 562 v. United States*, 407  
11 U.S. 385, 414 (1972).

12           The use of separate accounts by a corporation that forwards contributions to  
13 political committees prevents “a commingling of corporate funds and campaign funds  
14 prohibited by [2 U.S.C.] 441b.” Advisory Opinion 1999-22 (Aristotle Publishing).  
15 While the creation of a separate account for contributions to each individual recipient  
16 political committee is no longer required, the Commission has consistently required the  
17 use of at least one separate account to segregate its general treasury funds from  
18 contributions. *See* Advisory Opinions 2007-04 (Atlatl), 2004-19 (DollarVote), 2002-07  
19 (Careau), Advisory Opinions 1999-22 (Aristotle Publishing) and 1991-20  
20 (Call Interactive).

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1 4. *Does the \$10 approximate per transaction limit satisfy the \$50 anonymous*  
2 *contribution limit? If not, must CTIA ensure that wireless service providers and*  
3 *connection aggregators develop a means to ensure that the contributions are not from*  
4 *impermissible sources and do not aggregate in excess of the \$50 limit? If so, do the*  
5 *proposed confirming text message certifications satisfy these obligations?*

6 No, the \$10 approximate per transaction limit, on its own, does not satisfy the \$50  
7 anonymous contribution limit in all circumstances. CTIA must ensure that wireless  
8 service providers and connection aggregators use a means to ensure that contributions are  
9 not from impermissible sources and, if in excess of \$50, are forwarded together with the  
10 requisite information in a timely manner. CTIA's proposed certifications may satisfy  
11 these obligations in many circumstances. If, despite the certifications, however, a  
12 subscriber makes pledges in excess of \$50 in one billing cycle or has a corporate or  
13 foreign address, the wireless service providers would need to take additional measures.

14 The Act and Commission regulations require that any person who receives a  
15 contribution in excess of \$50 for a political committee must forward to the recipient  
16 political committee the name and address of the contributor and the date of the  
17 contribution. 2 U.S.C. 432(b)(1) and (b)(2); 11 CFR 102.8(a) and(b). Further, treasurers  
18 of political committees must "keep an account of (1) all contributions received by or on  
19 behalf of such political committee; (2) the name and address of any person who makes  
20 any contribution in excess of \$50, together with the date and amount of such contribution  
21 by any person; [and] the identification of any person who makes a contribution or  
22 contributions aggregating more than \$200 during a calendar year, together with the date  
23 and amount of any such contribution[.]" 2 U.S.C. 432(c)(1)-(3); *see also* 11 CFR

1 110.4(c). Commission regulations also require that treasurers of political committees  
2 “examin[e] all contributions received for evidence of illegality and for ascertaining  
3 whether contributions received, when aggregated with other contributions from the same  
4 contributor, exceed the [Act’s] contribution limitations . . . .” 11 CFR 103.3(b) (emphasis  
5 added).

6       According to the proposal, while each of the pledged contributions would total  
7 approximately \$10, the contribution is not made until the wireless subscriber pays the  
8 bill. A wireless user may make repeated pledges to the same political committee within a  
9 single billing cycle, resulting in the wireless subscriber making a contribution more than  
10 \$50 when paying the monthly bill, thereby triggering the requirements of 2 U.S.C. 432(b)  
11 and (c). Moreover within the context of family and group plans, several users could each  
12 pledge to make a contribution. CTIA’s proposal does not satisfactorily address these  
13 concerns. Further, the individual pledge limit does not provide any safeguard against the  
14 prohibitions on contributions from foreign nationals and corporations, despite the fact  
15 that the wireless service providers will know that particular wireless subscribers have  
16 foreign addresses or are corporations.

17       CTIA also states, however, that it could require wireless service providers and  
18 connection aggregators to use screening procedures that consist of a series of inquiries by  
19 text messages, to which a wireless user pledging a contribution must affirmatively  
20 respond. In prior advisory opinions, the Commission has approved a number of  
21 arrangements designed to ensure that corporations do not forward illegal contributions to  
22 political committees and thereby enable treasurers to comply with the Commission’s  
23 regulations. *See* 11 CFR 103.3(b); Advisory Opinions 2009-32 (Jorgensen), 2007-04

1 (Atlatl), 2004-19 (DollarVote), and 2002-07 (Careau). For example, in Advisory  
2 Opinion 2004-19 (DollarVote), the Commission approved screening procedures that  
3 relied on contributor certifications as to the legality of the contributions, identified  
4 individual contributors, and compared residential and billing addresses to guard against  
5 corporate contributions. In Advisory Opinion 2007-04 (Atlatl), the Commission  
6 approved procedures that entailed certifications as to the legality of contributions and that  
7 forwarded contributor identification information to recipient political committees.

8 CTIA's alternative safeguard is similar to those approved by the Commission in  
9 prior advisory opinions. *See* Advisory Opinions 2010-21 (ReCellular), 2010-06 (Famos),  
10 2007-04 (Atlatl), 2006-34 (Working Assets), 2004-19 (DollarVote), 2002-07 (Careau),  
11 1995-09 (NewtWatch). Accordingly, CTIA's proposed certifications may satisfy this  
12 obligation in many, but not all, circumstances.

13 CTIA's proposed certification language requires the individual making the pledge  
14 to certify that he or she will be utilizing his or her own funds, not those of a corporation  
15 or labor organization, that he or she is not a foreign national, and that he or she will not  
16 make contributions via text message in excess of \$50 in the calendar year. As noted  
17 previously, however, it will be possible for a wireless subscriber to make repeated  
18 pledges to the same political committee within a single billing cycle, resulting in the  
19 wireless subscriber making a contribution more than \$50 when paying the monthly bill.  
20 Similarly, the subscriber's bill may indicate that the subscriber is a corporation or has a  
21 foreign address.

22 In any of these circumstances, where the certification is contradicted by evidence  
23 contained in the monthly bill, the wireless service providers will not be able to rely upon

1 the certification and would be required to forward to the recipient committee the  
2 information required by 2 U.S.C. 432(b) and (c). As the Commission has previously  
3 explained, although “it is ultimately the responsibility of the political committee to obtain  
4 the identity of contributors and to prevent excessive and prohibited contributions,” Advisory  
5 Opinion 1991-20 (Call Interactive), when presented with information raising questions as to  
6 the legality of a contribution, to ensure the committee can meet its obligations, it is  
7 incumbent upon the service provider to forward “the appropriate information.” Advisory  
8 Opinion 1991-26 (Versatel).

9 This response constitutes an advisory opinion concerning the application of the  
10 Act and Commission regulations to the specific transaction or activity set forth in your  
11 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
12 of the facts or assumptions presented, and such facts or assumptions are material to a  
13 conclusion presented in this advisory opinion, then the requestor may not rely on that  
14 conclusion as support for its proposed activity. Any person involved in any specific  
15 transaction or activity which is indistinguishable in all its material aspects from the  
16 transaction or activity with respect to which this advisory opinion is rendered may rely on  
17 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or  
18 conclusions in this advisory opinion may be affected by subsequent developments in the  
19 law, including, but not limited to, statutes, regulations, advisory opinions, and case law.

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1 The cited advisory opinions are available on the Commission's website at

2 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

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Matthew S. Petersen

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Chairman