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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM

For Meeting of 6-7-12

SUBMITTED LATE

June 6, 2012

MEMORANDUM

TO: The Commission

FROM: Anthony Herman *AH*
General Counsel

Kevin Deeley *KD*
Acting Associate General Counsel

Amy Rothstein *AR*
Assistant General Counsel

Theodore Lutz *TL*
Attorney

Subject: AO 2012-17 (Red Blue T LLC, ArmourMedia, Inc., and m-Qube, Inc.)

Attached is a proposed draft of the subject advisory opinion. We have been asked to have this draft placed on the Open Session agenda for June 7, 2012.

Attachment

1 ADVISORY OPINION 2012-17

2 Craig Engle, Esq.
3 Brett G. Kappel, Esq.
4 Arent Fox LLP
5 1050 Connecticut Avenue, NW
6 Washington, DC 20036-5339
7 Dear Messrs. Engle & Kappel:

DRAFT C

8 We are responding to your advisory opinion request on behalf of Red Blue T LLC
9 (“Red Blue T”), ArmourMedia, Inc. (“ArmourMedia”), and m-Qube, Inc. (“m-Qube”),
10 concerning the application of the Federal Election Campaign Act of 1971, as amended
11 (the “Act”), and Commission regulations to their proposal to use text messaging to raise
12 funds for political committees. The requestors ask whether the proposal (1) satisfies the
13 recordkeeping and reporting requirements of 2 U.S.C. 432(c); (2) conforms to the
14 prohibition on corporate contributions at 2 U.S.C. 441b; (3) complies with the forwarding
15 requirements of 2 U.S.C. 432(b), when m-Qube makes factored payments to political
16 committees; and (4) satisfies the segregation requirements for commercial vendors that
17 process political contributions.

18 The Commission concludes that the proposal satisfies the recordkeeping and
19 reporting requirements of 2 U.S.C. 432(c); conforms to the prohibition on corporate
20 contributions at 2 U.S.C. 441b; does not implicate the forwarding requirements of 2
21 U.S.C. 432(b), when factored payments are made; and satisfies the segregation
22 requirements for commercial vendors that process political contributions.

1 ***Background***

2 The facts presented in this advisory opinion are based on your letter received on
3 April 6, your emails of April 11, May 21, and June 4, 2012, information presented at the
4 May 24, 2012, open session, and on publicly available information.

5 Red Blue T and ArmourMedia are political and media consulting firms that advise
6 and represent political committees, including candidates and candidate committees.
7 m-Qube is a corporate aggregator of business-to-consumer messaging and merchant
8 billing for public wireless service providers. It operates direct interconnection gateways
9 with all of the nation's major public wireless service providers.¹

10 m-Qube proposes to enter into agreements with political committees, under which
11 it would provide its services as an aggregator to process contributions made to the
12 political committees via text messaging. The proposal envisions the use of text
13 messaging to make contributions in two ways. In the first method, a wireless user² would
14 text a pre-determined message to a common short code³ registered to a political
15 committee. m-Qube, as the connection aggregator, will respond to the user via text

¹ The requestors rely on the description of the mechanics of the wireless industry in Advisory Opinion 2010-23 (CTIA – The Wireless Association). As presented in that advisory opinion, content providers, application providers, connection aggregators, and wireless service providers work together to enable wireless users to access content through the use of mobile phone text messages. Content providers (such as the Red Cross) disseminate content to, or collect information or pledges from, wireless users. Application providers convert the text messages received into data that can be interpreted and used by content providers. Connection aggregators link application providers to wireless service providers' networks. Wireless service operators are the companies from which wireless subscribers purchase their mobile phone service.

² In Advisory Opinion 2010-23 (CTIA – The Wireless Association), the Commission distinguished between the terms “wireless subscriber” and “wireless user.” A “wireless subscriber” refers to an individual who a wireless service provider bills; a “wireless user” refers to a broader category of individuals, who are included in the subscriber’s billing plan, including, for example, a family or group plan and therefore are not directly responsible for payment to the “wireless service provider.”

³ A common short code is a five- or six-digit number to which wireless users can send text messages to access mobile content.

1 message and require the user to respond with his or her own text message to (1) confirm
2 the user's intent to engage in the transaction, and (2) certify the user's eligibility to make
3 a contribution under the Act and Commission regulations.

4 Under the second proposed method, a user would enter his or her mobile phone
5 number on a political committee's website in lieu of a credit card number. Before
6 submitting the phone number, the user will be required to certify his or her eligibility to
7 make a contribution under the Act. After the user makes the certification and submits the
8 phone number, m-Qube will transmit to the user's mobile phone a text message that
9 includes a PIN. The user will enter the PIN on the political committee's website to
10 confirm the transaction.

11 Both of these methods require a wireless user to (1) confirm that the user intends
12 to engage in the transaction, and (2) certify that the user is eligible to make contributions
13 under the Act and Commission regulations.⁴ Once the user has completed both of these
14 steps, the user has completed the "opt-in" process and a charge is placed on the account
15 associated with the user's wireless number. Aggregators regularly process charges up to
16 \$20, but m-Qube can limit individual charges to \$10. Also, because common short codes
17 are "country-specific," only users that obtain service through U.S.-based wireless service
18 providers will be able use a short code to complete an opt-in process.

⁴ The substance of the attestations would be consistent with that approved in prior advisory opinions. *See* Advisory Opinion 2011-13 (DSCC). When users initiate the opt-in process by the use of a short code, however, it may be necessary to transmit the certification language in 160 characters or less, and m-Qube provides two examples of how it could do so:

- 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 Apply
- 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

The hyperlinks that m-Qube will transmit within the certifications, when opened by users on their smartphones, will send users to a webpage that includes the unabbreviated attestation. The webpage would also explain terms such as "foreign national" and "Federal contractor."

1 m-Qube proposes to enter into service orders with political committee customers,
2 the basic terms of which are the same as those it offers to customers other than political
3 committees in the ordinary course of its business. In addition, for political committee
4 customers, m-Qube proposes to add special terms to the service order that would include
5 the following requirements: each political committee customer must be registered “and in
6 good standing” with the Commission and relevant State authorities; each political
7 committee customer must receive contributions through a single short code per election,
8 with m-Qube as the exclusive provider of services for that short code; no mobile phone
9 number may be billed more than \$50 per month for contributions to any one political
10 committee customer;⁵ each political committee customer must seek certifications from
11 wireless users that the users are eligible to make contributions under the Act and
12 Commission regulations; and each political committee customer must use m-Qube’s
13 “factoring” service.

14 The requestors describe “factoring” as a financial transaction in which an entity
15 (here, a political committee) sells its accounts receivable to a third party (here, m-Qube)
16 at a discount in exchange for receiving a percentage (or “factor”) of its outpayment on an
17 expedited basis.⁶ m-Qube currently offers factoring as an optional service in exchange
18 for a fee to customers that wish to receive a portion of their outpayments more quickly

⁵ m-Qube represents that it is not possible to apply the \$50 monthly limit to a single subscriber.

⁶ 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. A typical outpayment will range between 50 and 70 percent of the consumer charges, and a typical factor will range between 50 and 90 percent of the total outpayment.

1 than the normal industry payment process would allow.⁷ For political committee
2 customers, factoring would be required.

3 The factoring process begins with an assessment by m-Qube of the transaction
4 data that it has received on a daily basis, and a calculation of the net amount of funds that
5 will eventually be collected from the mobile service providers. m-Qube takes into
6 account certain variables “in [the] ordinary course of business . . . including perceived
7 risk on liabilities associated with the programs, and the availability of funds to provide
8 the factored donations” to arrive at an appropriate factored payment amount. m-Qube
9 states that it will calculate and transmit a “conservative” factor to political committees to
10 protect against overpayments. Under its service order as currently drafted, m-Qube may
11 suspend or terminate factored payments at any time, with or without notice to its
12 customers, and may require its customers to provide a security deposit to guard against
13 overpayments before restarting the payments.⁸

14 If a customer receives factored payments that exceed the amount of outpayments
15 due to it, the customer may not terminate the service order or transfer services, programs,
16 or short codes from m-Qube until it has repaid m-Qube. m-Qube may require that its
17 political committee customers refund to m-Qube any overpayment that results from a
18 higher than expected number of subscribers refusing to pay text message charges on their

⁷ Advisory Opinion 2010-23 (CTIA – The Wireless Association) describes the usual billing process in the wireless industry when connection aggregators are used to enable access to mobile content. Each wireless service provider transmits payments from wireless subscribers to connection aggregators seven to ten days after receipt by the wireless service providers. The connection aggregators then collect all funds flagged for a particular recipient from all the wireless service providers over a 30-day period and transmit those funds to recipient content providers.

⁸ An overpayment may result from unexpected numbers of consumers disputing charges for third party content, such as contributions initiated through short codes. “Technical inconsistencies” between wireless service providers and aggregators can also result in overpayments.

1 bills. Similarly, if m-Qube is charged an adjustment by a “Network Operator” that
2 exceeds the total amount owed by m-Qube to its customer, m-Qube may require the
3 customer to repay the factored payment to m-Qube. m-Qube proposes to adhere to these
4 standard terms for its political committee customers.

5 m-Qube plans to transmit factored payments to political committee customers on
6 a weekly basis.⁹ For example, m-Qube would assess all of the opt-ins that it received
7 between Day 1 and Day 7 and, based on that data, transmit a factored payment on Day
8 10. m-Qube does not propose to identify any of the wireless users whose opt-ins it
9 analyzes as part of the factoring process or to transmit their names and addresses to
10 political committee customers, consistent with its current practice for customers that are
11 not political committees.

12 After m-Qube receives payment from wireless service providers, m-Qube’s
13 current practice is to reconcile the amount that it has provided to its customers as factored
14 payments and the actual outpayment that each customer is entitled to receive. Typically,
15 m-Qube transmits these “trailing payments” within 30 days after it receives payment
16 from the wireless service providers, but m-Qube proposes to transmit trailing payments to
17 its political committee customers within ten days after receipt. Consistent with its current
18 practice for customers that are not political committees, m-Qube does not propose to
19 establish a segregated account for the trailing payments to political committee customers;
20 trailing payments will be made from its general corporate treasury funds. The trailing

⁹ The request states that a “committee will receive its share of its mobile phone contributions on a weekly basis of those texts being made.” The request also states that committees will “typically . . . opt to receive weekly payments and could therefore expect to receive payment within one to ten days of mobile pledges being made.” The Commission understands these statements to mean that m-Qube will transmit factored payments each week.

1 payments, however, will be linked to a short code associated with a particular political
2 committee, and m-Qube represents that this link, in conjunction with the requirement that
3 each political committee only register one short code, ensures that contributions are
4 segregated from corporate treasury funds. Also, while m-Qube does not propose to
5 provide the payors' names and addresses to political committee customers, m-Qube will
6 provide a list of wireless phone numbers that completed opt-ins and the total receipts
7 generated through those numbers.

8 ***Questions Presented***

- 9 1. *Does the proposal described above satisfy the recordkeeping and reporting*
10 *requirements of 2 U.S.C. 432(c)?*
- 11 2. *Does the proposed commercial transaction of factoring of political contributions,*
12 *when it is performed by an aggregator in its ordinary course of business, conform*
13 *with the requirements of 2 U.S.C. 441b?*
- 14 3. *If the answer to Question 2 is "yes," does the proposed method of factoring*
15 *comply with the forwarding requirements of 2 U.S.C. 432(b)?*
- 16 4. *Does the proposal described above satisfy the segregation requirements the*
17 *Commission has placed on commercial vendors that process political*
18 *contributions?*

1 ***Legal Analysis and Conclusions***

2 1. *Does the proposal described above satisfy the recordkeeping and reporting*
3 *requirements of 2 U.S.C. 432(c)?*¹⁰

4 Yes, the proposal described above satisfies the recordkeeping and reporting
5 requirements of 2 U.S.C. 432(c).

6 The Act and Commission regulations impose certain requirements on treasurers of
7 political committees. A treasurer of a political committee must “keep an account of (1)
8 all contributions received by or on behalf of such political committee; (2) the name and
9 address of any person who makes any contribution in excess of \$50, together with the
10 date and amount of such contribution by any person; [and] (3) the identification of any
11 person who makes a contribution or contributions aggregating more than \$200 during a
12 calendar year, together with the date and amount of any such contribution.” 2 U.S.C.
13 432(c)(1)-(3); *see also* 11 CFR 110.4(c).

14 In Advisory Opinion 2010-23 (CTIA – The Wireless Association), the requestor
15 proposed to satisfy these requirements by imposing a \$10 limit on the value of each
16 charge initiated by opt-in and an overall \$100 limit on the value of all opt-in charges to a
17 mobile phone in a billing cycle. *Id.* Under CTIA’s proposal, the Commission considered
18 contributions to be made at the time that a wireless subscriber pays the bill (as opposed to
19 the time a pledge is made), and rejected the proposal because a single user could make
20 repeated pledges in a billing cycle, up to \$100, and thus exceed the \$50 recordkeeping

¹⁰ The Commission responds only with respect to m-Qube’s proposed activities. The proposal in the advisory opinion request does not refer to “a specific transaction or activity” by Red Blue T and ArmourMedia. 2 U.S.C. 437f(a)(1); 11 CFR 112.1(b); *see also* Advisory Opinion 1989-25 (New Hampshire Republican State Committee) (serving as a recruiter of and advisor to Federal candidates and their committees does not meet the requirements of 11 CFR part 112).

1 threshold when paying a bill. *Id.* The requirements of section 432(c) would thus be
2 triggered but not met because the proposal did not provide for contributor names and
3 addresses to be transmitted to political committees when a contribution exceeded \$50.

4 m-Qube’s proposal, however, is materially distinguishable from the proposal
5 considered in Advisory Opinion 2010-23 (CTIA – The Wireless Association) and
6 satisfies 2 U.S.C. 432(c). Unlike the overall \$100 monthly cap proposed by CTIA, m-
7 Qube proposes to impose a \$50 limit on the amount that can be billed each month to a
8 mobile phone number for contributions pledged to a political committee. The \$50 cap, in
9 conjunction with the certifications that m-Qube will require users to make, is designed to
10 ensure that a contribution from a single wireless user will not trigger the recordkeeping
11 requirements of 2 U.S.C. 432(c)(2) by exceeding \$50. *See* Advisory Opinion 1980-99
12 (Republican Round-Up Committee) (political committees need not record the name and
13 address of every contributor when collecting small-dollar contributions less than \$50).
14 *But see* Advisory Opinion 1991-20 (Call Interactive) (distinguishing fundraising events
15 where small-dollar cash contributions are raised from other fundraising mechanisms that
16 “do not involve truly anonymous contributions”).

17 Moreover, under m-Qube’s proposed factoring arrangement, which is similar to
18 how credit card contributions are handled, the Commission considers the contributions to
19 be received at the time of the pledge, as opposed to when the bill is paid (as was the case
20 in CTIA). *See* Federal Election Commission Campaign Guide for Congressional
21 Candidates and Committees (“Candidates’ Guide”) 23, *available at*
22 <http://www.fec.gov/pdf/candgui.pdf> (“When the committee receives contributions
23 through credit card charges, the date of receipt is the date on which the committee

1 receives the contributor’s signed authorization to charge the contribution.”¹¹ Thus,
2 because each discrete pledge (which, as explained above, is treated as a contribution)
3 cannot exceed \$50 under m-Qube’s proposal, each transaction also would not exceed the
4 \$50 limit for anonymous contributions under 11 CFR 110.4(c).

5 Nor does m-Qube’s proposal violate 2 U.S.C. 432(c)(3). As explained by the
6 Commission in Advisory Opinion 1980-99 (Republican Round-Up Committee), the
7 requirements of section 432(c)(3) are triggered only “[i]f the committee retains
8 information on the names of its contributors” or if a committee receives a single
9 contribution in excess of \$50. Under m-Qube’s proposal, the former condition will not
10 be met because m-Qube will not transmit contributors’ names and addresses to political
11 committees; the latter condition also will not be satisfied because each wireless user must
12 attest that he or she will pay for his or her own pledges, and those pledges are capped at
13 \$50 to a single political committee per billing cycle.

14 In Advisory Opinion 2010-23 (CTIA – The Wireless Association), the
15 Commission also expressed concerns that a foreign national could circumvent the
16 prohibition on contributions from foreign nationals or that, in the context of group or
17 family plans, a single subscriber could pay charges incurred by multiple users on a single
18 bill and thus make a contribution in excess of \$50. These concerns, in conjunction with

¹¹ With credit card contributions, the recipient committees generally do not receive the funds from the credit card processors instantaneously, nor do the credit card holders immediately remit the funds at the time the contributions are charged. Similarly, here, the pledged contributions made via text messaging would not be transmitted instantaneously, nor would the wireless subscribers remit the funds at the time the pledges are made. Nonetheless, the similarities between the two methods of payment lead the Commission to conclude that the proposed contributions made by text messaging should be treated in the same manner as credit card contributions.

1 the fact that subscribers who *only* paid for their own charges could also exceed the \$50
2 threshold, informed the Commission’s decision to reject CTIA’s proposal. *Id.*

3 Here, however, the Commission’s concerns as to foreign nationals and group
4 plans are adequately addressed by the attestations, the \$50 cap, and the factoring
5 arrangement. Moreover, under m-Qube’s proposal, only users that obtain service through
6 U.S.-based service providers will be able to use a short code to complete an opt-in
7 because short codes are country-specific. Although this limitation does not prevent
8 foreign nationals who hold accounts with U.S.-based service providers from initiating an
9 opt-in, it does ensure that persons who access wireless services through foreign service
10 providers cannot initiate opt-ins via text message.

11 Accordingly, the proposal described above satisfies the recordkeeping and
12 reporting requirements of 2 U.S.C. 432(c).

13 2. *Does the proposed commercial transaction of factoring of political contributions,*
14 *when it is performed by an aggregator in its ordinary course of business, conform*
15 *with the requirements of 2 U.S.C. 441b?*

16 Yes, the proposed commercial transaction of factoring of political contributions,
17 when it is performed by an aggregator in its ordinary course of business, conforms with
18 the requirements of 2 U.S.C. 441b.

19 The Act and Commission regulations prohibit corporations from making a
20 contribution in connection with a Federal election. *See* 2 U.S.C. 441b(a);
21 11 CFR 114.2(b)(1). A contribution includes “any gift, subscription, loan, advance, or
22 deposit of money or anything of value made by any person for the purpose of influencing
23 any election for Federal office.” 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a); *see also*

1 2 U.S.C. 441b(b)(2); 11 CFR 114.2(b)(1). “Anything of value” includes all in-kind
2 contributions, including the provision of goods or services without charge or at a charge
3 that is less than the usual and normal charge. *See* 11 CFR 100.52(d)(1). “Usual and
4 normal charge” is defined as “the price of goods in the market from which they ordinarily
5 would have been purchased at the time of the contribution, or the commercially
6 reasonable rate prevailing at the time the services were rendered.” *See*
7 11 CFR 100.52(d)(2).

8 After wireless users have completed an opt-in to pledge funds to a political
9 committee, but prior to any receipt of a contribution, m-Qube will transmit funds from its
10 corporate treasury to the political committee. m-Qube proposes to recoup its funds once
11 subscribers have paid their bills and the wireless service providers have transmitted those
12 payments, net of fees, to m-Qube. m-Qube’s proposal to make factored payments is not
13 an exclusive service for its political committee customers; rather, m-Qube offers the same
14 service on the same terms to its non-political customers, except that, unlike non-political
15 committee customers who may elect not to avail themselves of factoring, factoring would
16 be mandatory for political committee customers.

17 As m-Qube does with its non-political customers, it would employ extensive
18 safeguards to avoid making excessive factored payments. m-Qube will calculate and
19 transmit a “conservative” factor to political committees, and it will reevaluate the
20 potential risks of making factored payments on a weekly basis. Under the terms of its
21 service order, m-Qube may suspend or terminate factored payments at any time, with or
22 without notice to its customers, and may require its customers to provide a security
23 deposit to guard against overpayments before restarting the payments. m-Qube may also

1 require customers that receive overpayments to reimburse m-Qube. If a customer
2 receives factored payments that exceed the amount of outpayments due to it, the customer
3 may not terminate the service order or transfer services, programs, or short codes from m-
4 Qube until it has repaid m-Qube. Similarly, if m-Qube is charged an adjustment by a
5 Network Operator that exceeds the total amount owed by m-Qube to its customer, m-
6 Qube may require the customer to repay the factored payment to m-Qube.

7 The Commission concludes that m-Qube’s proposal to make factored payments
8 to its political committee customers on the same terms that it regularly offers to its
9 commercial customers would be a permissible extension of credit by m-Qube in the
10 ordinary course of business. Under the Act and Commission regulations, an incorporated
11 commercial vendor may extend credit to political committees under terms substantially
12 similar to those the vendor offers nonpolitical debtors. *See* 11 CFR 116.3(b), (c). m-
13 Qube is a “commercial vendor” because its usual and normal business involves the
14 provision of the same services that it proposes to provide to political committees.
15 11 CFR 116.1(c). An “extension of credit” includes, but is not limited to, “[a]ny
16 agreement between the creditor and political committee that full payment is not due until
17 after the creditor provides goods or services to the political committee.” 11 CFR
18 116.1(e).¹²

¹² The distinction between a purchase of assets and otherwise providing financing through a loan or extension of credit is not always readily apparent. *See generally Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co.*, 336 F.3d 410, 416 (5th Cir. 2003) (the lines between these transactions “can be blurred”). When addressing such questions, courts have tended to engage in highly fact- and transaction-specific analyses to determine whether the creditor or debtor has assumed the risk of non-payment. *See, e.g., Nickey Gregory Co. v. Agricap, LLC*, 596 F.3d 591, 600-03 (4th Cir. 2010) (holding that a transaction was not a true purchase of accounts receivable because the “substantive aspects of the transaction are inconsistent with an outright sale of the assets”); *Endico Potatoes, Inc. v. CIT Grp.*, 67 F.3d 1063, 1068 (2nd Cir. 1995) (analyzing “the substance of the transaction,” rather than “the label attached to the transaction”). Here, the recipient political committees appear to assume the risk of nonpayment because

1 The Commission approved a proposal similar to m-Qube’s factoring proposal in
2 the 900-line advisory opinions.¹³ In Advisory Opinion 1990-14 (AT&T), for example,
3 the Commission considered whether a proposal under which contributors would call a
4 900-line to make contributions to political committees, and AT&T would provide funds
5 to the political committees (through a service bureau) before the contributors paid their
6 phone bills, would “implicate [AT&T] in making an unlawful advance of corporate funds
7 to a political committee.” The Commission concluded that it would not, stating that,
8 “[a]s long as AT&T, or any other company providing service to AT&T in connection with its
9 . . . service, provides its usual and normal services at its usual and normal charges it will not,
10 in most circumstances, have made a prohibited corporate contribution.” To guard against
11 making an unlawful advance of corporate funds, the Commission stated that AT&T
12 “should not remit funds . . . if it appears that, because of an adverse event, callers may
13 refuse to make payments.” The Commission explained that this precaution was
14 consistent with AT&T’s service agreements, in which AT&T reserved the right to
15 terminate the agreement or billing services “if it determines, in its sole discretion, that its
16 image would be adversely affected or its reputation or goodwill damaged by the
17 continued offer of billing services.” *Id.*

the factoring agreement gives m-Qube broad discretion to suspend or terminate factored payments, to require deposits and to determine their amounts, to withhold overpayments, and to demand repayment from political committees when it is charged an adjustment by service providers or unexpected numbers of subscribers do not make payments. m-Qube's factoring proposal is thus an extension of credit from m-Qube to the recipient political committees rather than a sale of accounts receivable from the committees to m-Qube.

¹³ Advisory Opinion 1990-14 (AT&T) is part of a line of advisory opinions that analyzed the use of 900-lines for raising contributions for political committees. These advisory opinions involved complex transactions between corporations and political committees. *See, e.g.*, Advisory Opinion 1990-01 (Digital Corrections). Generally, political committees contracted with service bureaus to provide 900-line services. Callers dialed a 900-line number maintained by the service bureau. The service bureaus, in turn, contracted with telephone common carriers, such as AT&T, to receive access to telephone circuits and billing services. *Id.*

1 Similarly, in Advisory Opinion 1979-36 (Fauntroy), the Commission approved a
2 proposal in which an incorporated direct mail fundraising firm would incur initial
3 expenses in implementing a direct mail fundraising program for a political committee.
4 Funds generated by the direct mail campaign would be deposited in the political
5 committee's account, and the political committee would use those funds to pay the
6 corporation for its costs and fees. *Id.* If the campaign was less successful than
7 anticipated, the political committee would not be entitled to any funds until the
8 corporation had recouped its costs and fees. *Id.* The Commission approved the proposal,
9 provided that the financial agreement between the corporation and the political committee
10 "is of a type which is normal industry practice and contains the type of credit which is
11 extended in the ordinary course of [the corporation's] business with terms which are
12 substantially similar to those given to nonpolitical, as well as political, debtors of similar risk
13 and size of obligation," and the costs charged by the corporation to the political committee
14 "are at least the normal charge for services of that type." *Id.*

15 Accordingly, because m-Qube's factored payments will be extensions of credit
16 under 11 CFR part 116 and otherwise consistent with prior Commission interpretations of
17 2 U.S.C. 441b, the proposed commercial transaction of factoring of political
18 contributions, when as here it is performed by an aggregator in its ordinary course of
19 business, conforms with the requirements of 2 U.S.C. 441b.

20 3. *If the answer to Question 2 is "yes," does the proposed method of factoring*
21 *comply with the forwarding requirements of 2 U.S.C. 432(b)?*

22 The proposed method of factoring does not implicate the forwarding requirements
23 of 2 U.S.C. 432(b) because factoring does not involve the forwarding of contributions.

1 Any person who receives a contribution for an authorized political committee
2 must forward the contribution to the political committee's treasurer within ten days of
3 receipt. 2 U.S.C. 432(b)(1); 11 CFR 102.8(a). Any person who receives a contribution
4 for a political committee that is not an authorized committee must forward the
5 contribution to the political committee within 30 days of receipt if the contribution is \$50
6 or less, and within ten days of receipt if the contribution is in excess of \$50. 2 U.S.C.
7 432(b)(2)(A); 11 CFR 102.8(b); *see, e.g.*, Advisory Opinion 2010-23 (CTIA – The
8 Wireless Association); Advisory Opinion 2009-32 (Jorgensen). Any person who receives
9 a contribution in excess of \$50 for a political committee must also forward to the
10 recipient political committee the name and address of the contributor and the date of the
11 contribution. 2 U.S.C. 432(b)(1), (b)(2); 11 CFR 102.8(a), (b).

12 The requirements of 2 U.S.C. 432(b) apply to any person that receives a
13 contribution for a political committee. Because, as explained in response to Question 2,
14 the factored payments are extensions of credit by m-Qube in the ordinary course of
15 business and are not contributions that m-Qube has received and forwarded, the factored
16 payments do not trigger the forwarding requirements of 2 U.S.C. 432(b) and 11 CFR
17 102.8. Moreover, although the proposed trailing payments may not necessarily be made
18 within the applicable ten- or 30-day forwarding requirement,¹⁴ the Commission views the
19 trailing payments as (the reconciliation) part of the same transaction as the extension of
20 credit for the factored payments. Thus, for the same reasons discussed above, the trailing

¹⁴ The request represents that the trailing payments will be made within 10 days after receipt of payment from the wireless subscriber, which may be in addition to up to 30 days of a billing cycle from when a contribution pledge is made.

1 payments do not implicate the forwarding requirements of the Act and Commission
2 regulations.

3 Accordingly, for the reasons stated above, the proposed method of factoring does
4 not implicate the requirements of 2 U.S.C. 432(b).

5 4. *Does the proposal described above satisfy the segregation requirements that the*
6 *Commission has placed on commercial vendors that process political*
7 *contributions?*

8 m-Qube’s proposal satisfies the requirements of the Act and Commission
9 regulations.

10 In previous advisory opinions, the Commission has required vendors to maintain
11 separate accounts for political contributions that are to be transmitted to candidates. *See,*
12 *e.g.,* Advisory Opinion 2010-23 (CTIA – The Wireless Association). The Commission
13 explained that this requirement is rooted in the Act’s prohibition on contributions by
14 corporations and labor organizations. *See* 2 U.S.C. 441b; 11 CFR 114.2(b); Advisory
15 Opinion 2010-23 (CTIA – The Wireless Association). The use of separate accounts by a
16 corporation that forwards contributions to political committees prevents a “commingling
17 of corporate funds and campaign funds prohibited by [2 U.S.C.] 441b.” Advisory
18 Opinion 1999-22 (Aristotle Publishing).

19 m-Qube’s proposal ensures that corporate funds will not be transmitted to
20 political committees. Because, as explained in response to Question 2, the factored
21 payments are extensions of credit by m-Qube in the ordinary course of business and are
22 not contributions that m-Qube has received and forwarded, the factored payments do not

1 trigger the requirement that vendors maintain separate accounts for political contributions
2 that are to be transmitted to candidates.

3 The manner in which m-Qube proposes to receive and transmit the trailing
4 payments also satisfies the segregation requirement. The trailing payments that m-Qube
5 will receive from service providers and forward to political committees will be linked to a
6 common short code that is unique to each political committee. This mechanism, which
7 m-Qube regularly employs with all of its customers' funds, ensures that political
8 contributions are properly accounted for and that m-Qube's treasury funds will not be
9 inadvertently transmitted to political committees. Indeed, m-Qube's entire business
10 model depends upon its ability to use the short codes to ensure that it transmits the proper
11 funds to its customers. Because m-Qube proposes to apply these same processes to
12 political committees, m-Qube's proposal satisfies the requirements of the Act and
13 Commission regulations.¹⁵

14 This response constitutes an advisory opinion concerning the application of the
15 Act and Commission regulations to the specific transaction or activity set forth in your
16 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
17 of the facts or assumptions presented, and such facts or assumptions are material to a
18 conclusion presented in this advisory opinion, then the requestor may not rely on that
19 conclusion as support for its proposed activity. Any person involved in any specific
20 transaction or activity which is indistinguishable in all its material aspects from the
21 transaction or activity with respect to which this advisory opinion is rendered may rely on

¹⁵ To the extent that this conclusion supersedes prior Commission advisory opinions, those advisory opinions are now superseded.

1 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
2 conclusions in this advisory opinion may be affected by subsequent developments in the
3 law, including, but not limited to, statutes, regulations, advisory opinions, and case law.
4 The cited advisory opinions are available on the Commission's website, www.fec.gov, or
5 directly from the Commission's Advisory Opinion searchable database at
6 <http://www.fec.gov/searchao>.

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8 On behalf of the Commission,

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Caroline C. Hunter
Chair