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December 4, 2012

MEMORANDUM

AGENDA ITEM

TO: The Commission

FROM: Anthony Herman
General Counsel

For Meeting of 12-6-12

Kevin Deeley *NFS for KD*
Acting Associate General Counsel

SUBMITTED LATE

Robert Knop *NFS for RMK*
Assistant General Counsel

Esther D. Heiden *NFS for EDH*
Attorney

Subject: AO 2012-35 (Global Transaction Services Group, Inc.) – Draft B

Attached is a proposed draft of the subject advisory opinion (Draft B). We have been asked to have this draft placed on the Open Session agenda for December 6, 2012.

Attachment

1 ADVISORY OPINION 2012-35

2
3 Michael R. Wofford
4 Global Transaction Services Group, Inc.
5 11235 Davenport Street, Suite 111
6 Omaha, NE 68154
7

DRAFT B

8 Dear Mr. Wofford:

9
10 We are responding to your advisory opinion request on behalf of Global Transaction
11 Services Group, Inc. (“GTSG”), concerning the application of the Federal Election Campaign
12 Act (the “Act”) and Commission regulations to the proposal to initiate contributions to political
13 committees by text message and then process them using credit or debit cards. GTSG asks
14 whether it may process the proposed small-dollar contributions using the wireless user’s credit or
15 debit card and forward them to recipient political committees. The Commission concludes that
16 GTSG’s proposed process for receiving and forwarding small-dollar contributions to political
17 committees is not permissible under the Act and Commission regulations.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter and supplementary
20 information received on October 24, 2012.

21 GTSG is an incorporated technology company that provides services in a number of
22 areas, including mobile payments, transaction fraud security, and e-commerce. GTSG wishes to
23 allow wireless users to initiate contributions of \$50 or less via text message and then charge them
24 to the wireless user’s credit or debit card. GTSG currently offers a similar process for donations
25 to charitable organizations; this is the first time that GTSG proposes to make this process
26 available to candidates and political committees.

1 GTSG has credit and debit card transaction relationships with card processors. Under
2 GTSG's proposed plan, GTSG will act as manager for the transaction between the contributor,
3 the credit or debit card companies, and the recipient political committees.

4 GTSG will offer its services to political committees and will enter into service contracts
5 with its political committee customers. GTSG will only accept potential political committee
6 customers if they are "in good standing" with the Commission and with appropriate State
7 election authorities. Additionally, GTSG may develop eligibility criteria based upon commercial
8 considerations and therefore may decide to accept only proposals from some political
9 committees and not others.

10 GTSG will charge its political committee customers a fee for using its services, to be
11 deducted from the total amount of the contribution before GTSG forwards the contribution to the
12 political committee. GTSG will evaluate market data to determine a competitive fee schedule
13 for its political committee customers. Although GTSG anticipates a lower fee for services
14 provided to political committees relative to its non-political or commercial customers, it does not
15 expect that the difference in fees will be substantial.

16 Once GTSG accepts a political committee as a customer, GTSG will assign the candidate
17 or political committee a unique keyword. To initiate a contribution, a contributor will send a text
18 message using a pre-assigned "keyword" to a "common short code."¹ After sending the text
19 message, the contributor will verify by text that he or she intends to make the contribution, and
20 that he or she is eligible to make contributions.

¹ For example, to make a contribution to U.S. Senate candidate John Smith, a wireless user would text the keyword "Smith" to a common short code. A common short code is a five- or six-digit number to which wireless users can send text messages to access mobile content, such as "313131." See Advisory Opinion 2010-23 (CTIA – The Wireless Association) ("CTIA I").

1 GTSG will next send a text message to the wireless user with a link to GTSG's
2 contribution web page. To make a contribution, the contributor will enter his or her credit or
3 debit card information and the amount of the contribution onto a web form on the page. GTSG's
4 proposed process will reject any single contribution over \$50 and will reject a contribution of
5 any amount that will result in the wireless user making contributions that, in the aggregate,
6 exceed \$50.² GTSG states that the only credit or debit card information requested of the
7 contributor will be the card number, expiration date, and the three- or four-digit security code.
8 The credit or debit card information will then be transmitted securely to the card processor for
9 authorization. The contribution will appear on the contributor's credit or debit card statement.
10 The credit or debit card information and the two contribution text message verifications
11 described above are the only information that GTSG will request from the contributor. The
12 contributor's name and address will not be requested and will not be available to GTSG -- or to
13 the political committee.

14 After receiving the funds from the credit or debit card company, GTSG will place the
15 contribution in its general corporate treasury account. GTSG employs an accounting structure
16 that tracks funds as they are received. As part of its standard operating procedure, GTSG will
17 receive a data file that indicates which funds are designated for a particular project or political
18 committee. GTSG will match that file with the actual contributions received to determine the
19 distribution of funds to recipient political committees. The accounting structure will use the
20 keyword, short code, date-time stamp, and card verification data from the data file to complete
21 the match. GTSG will then transmit the contribution to the political committee customer, less

² The \$50 limit is a representation of the requestor. The Commission presumes this is a per-cycle limit, however it is not central to the analysis in this opinion.

any associated fees (discussed above), along with the amount and date of the contribution, the contributor's ten-digit phone number, and the fact that the contributor attested to his or her intent and eligibility to make the contribution. GTSG will also maintain a tally of contributions made from each mobile phone number, and will make this information available to the recipient political committee customer.

Question Presented

Would the proposed process outlined in the request allow Global Transaction Services Group, Inc. to process small-dollar donations and distribute them to the recipient political committee customers?

Legal Analysis and Conclusion

No, GTSG's proposal to receive small-dollar donations and distribute them to recipient political committee customers, as outlined in its request, is not permissible under the Act and Commission regulations because it does not comply with the requirements to forward contributor information and to segregate contributions from general treasury funds. The requestor has characterized its proposal as similar to recent "text-to-give" processes considered by the Commission. Although the transaction is initiated by a text message, the contribution is ultimately made via a credit or debit card transaction and must be analyzed as such.

Contributor Information and Excessive Contributions

The Act and Commission regulations require that any person who receives a contribution in excess of \$50 for a political committee must forward to the recipient political committee the name and address of the contributor and the date of the contribution. 2 U.S.C. 432(b)(1), (2); 11 CFR 102.8(a), (b). Further, treasurers of political committees must "keep an account of (1) all contributions received by or on behalf of such political committee; (2) the name and

1 address of any person who makes any contribution in excess of \$50, together with the date and
2 amount of such contribution by any person; [and] the identification of any person who makes a
3 contribution or contributions aggregating more than \$200 during a calendar year, together with
4 the date and amount of any such contribution.” 2 U.S.C. 432(c)(1)-(3); *see also* 11 CFR
5 110.4(c). Commission regulations also require that treasurers of political committees “examin[e]
6 all contributions received for evidence of illegality and for ascertaining whether contributions
7 received, when aggregated with other contributions from the same contributor, exceed the
8 [Act’s] contribution limitations.” 11 CFR 103.3(b).

9 In prior advisory opinions, the Commission has approved arrangements designed to
10 ensure that corporations do not forward illegal contributions to political committees and thereby
11 enable treasurers to comply with the Commission’s regulations. *See* 11 CFR 103.3(b); Advisory
12 Opinion 2009-32 (Jorgenson); Advisory Opinion 2007-04 (Atlatl); Advisory Opinion 2004-19
13 (DollarVote); Advisory Opinion 2002-07 (Careau). Although “it is ultimately the responsibility
14 of the political committee to obtain the identity of contributors and to prevent excessive and
15 prohibited contributions,” to ensure the committee can meet its obligations, it is incumbent upon
16 the service provider to forward “the appropriate information.” *See* Advisory Opinion
17 1991-26 (Versatel) and Advisory Opinion 1991-20 (Call Interactive).

18 Although the \$50 ceiling for each text, or for multiple texts from the same phone number,
19 would not trigger the recordkeeping requirement of 2 U.S.C. 432(c)(2) and 11 CFR 102.8(a), the
20 contributor may make (or have made) other contributions to the committee using the same credit
21 or debit card; other contributions may occur (or may have occurred) in response to different
22 solicitations; or a contribution may be made (or may have been made) through a contributor’s
23 use of another phone number. In those circumstances, the same individual’s contributions could

1 aggregate in excess of \$200, triggering further recordkeeping requirements as well as the
2 requirement to report the date and amount of the contribution and the name, address, employer,
3 and occupation of the contributor. 2 U.S.C. 431(13), 432(c)(3), 434(b)(3)(A); 11 CFR 100.12,
4 102.9(a)(2), 104.3(a)(4)(i). GTSG proposes to provide a running tally of contributions made by
5 each phone number. Under its proposal, however, neither GTSG nor the recipient political
6 committees will be able to track when an individual has made contributions through a single
7 credit or debit card that aggregate in excess of \$200 in a calendar year.

8 Prior advisory opinions in which the Commission has approved arrangements in which
9 the requestor did not collect information about contributors making one-time contributions less
10 than \$50 are distinguishable. Several of these advisory opinions concerned cash contributions
11 under \$50. *See* Advisory Opinion 1981-48 (Muskegon County Republican Party); Advisory
12 Opinion 1980-99 (Republican Round-up Committee). In those opinions, although the
13 Commission decided that a political committee receiving cash contributions less than \$50 could
14 comply with the recordkeeping requirements without collecting contributor information, it also
15 determined that where contributions less than \$50 were made by check, the committee could
16 easily satisfy the recordkeeping requirement by maintaining an account of the name and address
17 of the contributor, along with the date and amount of the contribution. *Id.*

18 In more recent advisory opinions, the Commission approved the processing of
19 contributions made by text message. *See, e.g.,* Advisory Opinion 2012-28 (CTIA – The Wireless
20 Association) (“CTIA II”); Advisory Opinion 2012-17 (Red Blue T LLC, ArmourMedia, Inc., and
21 m-Qube, Inc.) (“m-Qube I”). In those cases, the source of payment for the contribution was the
22 contributor’s wireless billing account, not the contributor’s credit or debit card. The
23 Commission therefore permitted the vendors to satisfy the requirements to obtain and forward

1 contributor information by tallying contributions by phone number and providing this
2 information to the political committees.

3 Unlike contributions billed to a contributor's wireless account, GTSG's proposal simply
4 proposes to process contributions by credit or debit card. Although the contributor initiates the
5 transaction via text message, the actual contribution is made by the contributor entering his or
6 her credit or debit card information into a web form, just as he or she might do on the political
7 committee's website. Contributions made using credit and debit cards have long been the
8 subject of advisory opinions. *See, e.g.,* Advisory Opinion 1995-09 (NewtWatch); Advisory
9 Opinion 1978-68 (Seith for Senate Committee); *see also* Explanation and Justification for Final
10 Rules on Matching Credit Card and Debit Card Contributions in Presidential Campaigns, 64 FR
11 32394 (June 17, 1999). Like contributions less than \$50 made by check discussed by the
12 Commission in Advisory Opinion 1981-48 (Muskegon County Republican Party) and Advisory
13 Opinion 1980-99 (Republican Round-up Committee), GTSG can easily maintain a record of the
14 contributor's name and address, as well as his or her credit card number. GTSG's proposal,
15 however, would aggregate contributions by phone number only and not by the source of
16 payment, namely the credit or debit card. Because GTSG's proposal would not provide the
17 information necessary for the treasurer of a recipient political committee to accurately report
18 contributions that in the aggregate exceed \$200 in a calendar year, its proposal is impermissible
19 under the Act and Commission regulations.

20 *Segregation of Contributions*

21 The Act and Commission regulations prohibit corporations from making a contribution in
22 connection with a Federal election. *See* 2 U.S.C. 441b(a); 11 CFR 114.2(b)(1). A "contribution"
23 includes "any gift, subscription, loan, advance, or deposit of money or anything of value made

1 by any person for the purpose of influencing any election for Federal office.”

2 2 U.S.C. 431(8)(A)(i) and 11 CFR 100.52(a); *see also* 2 U.S.C. 441b(b)(2) and 11 CFR

3 114.2(b)(1).

4 Corporate vendors must generally maintain separate accounts to segregate contributions
5 that are to be transmitted to candidates from the vendors’ corporate treasury funds. *See, e.g.,*
6 Advisory Opinion 2010-23 (CTIA I); Advisory Opinion 2007-04 (Atlatl); Advisory Opinion
7 2006-34 (Working Assets); Advisory Opinion 2004-19 (DollarVote); Advisory Opinion 2002-07
8 (Careau); Advisory Opinion 1999-22 (Aristotle Publishing). This requirement is rooted in the
9 Act’s prohibition on contributions by corporations and labor organizations. *See* 2 U.S.C. 441b;
10 11 CFR 114.2(b); Advisory Opinion 2010-23 (CTIA I). As the Supreme Court has explained,
11 this prohibition requires a “strict segregation” between general treasury funds and political
12 contributions. *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 414 (1972). The
13 use of separate accounts by a corporation that forwards contributions to political committees
14 prevents the “commingling of corporate funds and campaign funds prohibited by [2 U.S.C.]
15 441b.” Advisory Opinion 1999-22 (Aristotle Publishing).

16 The Commission has found that a connection aggregator³ using unique short codes or
17 unique keywords with shared short codes to track contributions made via text messages ensured
18 that contributions would be properly accounted for and that the aggregator’s treasury funds
19 would not be inadvertently transmitted to political committees. *See* Advisory Opinion 2012-30

³ The mechanics of the wireless industry are described in Advisory Opinion 2010-23 (CTIA I). 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.

(Revolution Messaging); Advisory Opinion 2012-17 (m-Qube I). In Advisory Opinion 2012-17 (m-Qube I), the trailing payments that the connection aggregator proposed to receive from service providers and forward to political committees were linked to common short codes that were unique to each political committee. Similarly, in Advisory Opinion 2012-30 (Revolution Messaging), the connection aggregator proposed to use unique keywords to ensure that each contribution will be associated with a political committee when funds were received from a wireless service provider. The Commission found that both proposals satisfied the requirements of the Act and Commission regulations – including the “segregation requirement.” Advisory Opinion 2012-17 (m-Qube I).

GTSG’s proposal is similar to these two previous advisory opinions in the respect that it proposes to have the contribution process initiated via a text message with a unique keyword to a shared short code. Unlike these two advisory opinions, however, the funds will not be transmitted through the wireless service provider that is involved with the text message transmission. GTSG will instead have funds transmitted through credit/debit card processors that are not involved in the text message transmission. While GTSG proposes to create an accounting system that will match the keyword and short code to contributions received after the funds are transmitted, the card processors do not account for the funds using the keyword and short code. The funds will thus be transmitted to GTSG in a manner unrelated to that portion of its proposed accounting system. GTSG’s proposal thus fails to adequately ensure that the proper funds will be transmitted to political committees and that none of GTSG’s funds will be inadvertently transmitted to them.⁴

⁴ Some of the funds at issue in recent advisory opinions involved factored payments, which are extensions of credit and not contributions received and forwarded subject to the segregation requirement. *See, e.g.*, Advisory Opinion 2012-17 (m-Qube, I). Factored payments are not at issue here.

1 Lacking adequate safeguards, GTSG may not deposit the contributions in its general
2 treasury account before forwarding them to the recipient political committee. Creating a separate
3 account for contributions would thus be necessary to satisfy the segregation requirement.
4 *See, e.g.*, Advisory Opinion 2007-04 (Atlatl); Advisory Opinion 2004-19 (DollarVote); Advisory
5 Opinion 2002-07 (Careau); Advisory Opinion 1999-22 (Aristotle Publishing); Advisory Opinion
6 1991-20 (Call Interactive).⁵

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

⁵ Advisory Opinion 2012-17 (m-Qube I) (at n.15) superseded earlier advisory opinions regarding the segregation requirement only to the extent that adequate accounting mechanisms were in place. As explained above, GTSG's proposal fails to include sufficient guarantees of accurate transmission of funds.

1 opinions, and case law. The cited advisory opinions are available on the Commission's website,
2 www.fec.gov, or directly from the Commission's Advisory Opinion searchable database at
3 <http://www.fec.gov/searchao>.

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5 On behalf of the Commission,
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9 Caroline C. Hunter
10 Chair
11
12