

PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS

Members of the public may submit written comments on draft advisory opinions.

DRAFT B of ADVISORY OPINION 2012-26 is now available for comment. It was requested by Craig Engle, Esq., and Brett Kappel, Esq., on behalf of Cooper for Congress, ArmonrMedia, Inc., and m-Qube, Inc. , and is scheduled to be voted by the Commission on August 13, 2012.

If you wish to comment on DRAFT B of ADVISORY OPINION 2012-26, please note the following requirements:

- 1) Comments must be in writing, and they must be both legible and complete.
- 2) Comments must be submitted to the Office of the Commission Secretary by hand delivery or fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel by hand delivery or fax ((202) 219-3923).
- 3) Comments must be received by 10 a.m. (Eastern Time) on August 13, 2012.
- 4) The Commission will generally not accept comments received after the deadline. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.
- 5) All timely received comments will be made available to the public at the Commission's Public Records Office and will be posted on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

FOR FURTHER INFORMATION

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Other inquiries:

To obtain copies of documents related to Advisory Opinion 2012-26, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at <http://saos.nictusa.com/saos/searchao>.

ADDRESSES

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

FEDERAL ELECTION COMMISSION
SECRETARIAT

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August 10, 2012

MEMORANDUM

TO: The Commission

FROM: Anthony Herman *AH by KS*
General Counsel

Kevin Deeley *KS*
Acting Associate General Counsel

Amy Rothstein *AR*
Assistant General Counsel

Theodore Lutz *AR for TL*
Attorney

Subject: AO 2012-26 (Cooper for Congress, ArmourMedia, Inc., and
m-Qube, Inc.) (Draft B)

Attached is a proposed draft of the subject advisory opinion. We have been asked to make this draft public prior to an August 13, 2012 Commission vote.

Attachment

1 ADVISORY OPINION 2012-26

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

DRAFT B

8
9 Robert A. Davidson, Treasurer
10 Cooper for Congress
11 223 Rosa L. Parks Blvd. #206
12 Nashville, TN 37203
13

14 Dear Messrs. Engle, Kappel & Davidson:

15
16 We are responding to your advisory opinion request on behalf of Cooper for Congress
17 (“the Committee”), m-Qube, Inc. (“m-Qube”), and ArmourMedia, Inc., concerning the
18 application of the Federal Election Campaign Act (the “Act”) and Commission regulations to the
19 proposed receipt and processing of contributions by text message. The Commission concludes
20 that the proposal is consistent with the Act and Commission regulations.

21 ***Background***

22 The facts presented in this advisory opinion are based on your letter received on July 18,
23 2012 and supplemental information that you provided on July 24 and August 2, 2012. Certain
24 facts have also been incorporated from Advisory Opinion 2012-17 (Red Blue T LLC,
25 ArmourMedia, Inc., and m-Qube, Inc.) (“m-Qube”) and Advisory Opinion 2010-23 (CTIA – The
26 Wireless Association).

27 The Committee is the principal campaign committee of Representative Jim Cooper.
28 Representative Cooper is a candidate in his party’s August 2, 2012, primary election to represent
29 Tennessee’s Fifth Congressional District. The Committee intends to receive contributions by
30 text message for the primary and general elections. M-Qube is an aggregator of business-to-

1 consumer messaging and merchant billing for public wireless service providers. ArmourMedia
2 is a political and media consulting firm that advises and represents political committees.

3 *1. Industry Overview*

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

16 Wireless service providers³ are the companies from which subscribers purchase their
17 mobile phone service. Content providers, such as the Committee, are typically vendors that use
18 short codes to disseminate content to, or collect information or funds from, wireless users.

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

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

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

1 Connection aggregators, such as m-Qube, link content providers, service providers, and users
2 together. M-Qube operates direct interconnection gateways with all of the nation's major public
3 wireless service providers.

4 Typically, a wireless user initiates a text message transaction by texting a predetermined
5 word or phrase to a short code. For example, in the aftermath of the 2010 earthquake in Haiti,
6 individuals texted the word "HAITI" to Code "90999" to make ten dollar donations to the Red
7 Cross. The connection aggregator then sends a reply text message that asks the user to confirm
8 his or her desire to engage in the specific transaction. Once confirmation has been received, the
9 user has completed the "opt-in" process and a charge will appear on the next wireless bill
10 associated with that wireless user's phone number. A wireless service provider will generally
11 forward payment to the connection aggregator about seven to ten days after receiving it. A
12 connection aggregator generally accumulates all funds designated for a specific content provider
13 from all wireless service providers over a 30-day period before forwarding the accumulated
14 funds to the content provider – in this example Red Cross. Both the wireless service provider
15 and the connection aggregator deduct fees from the payment; thus, the amount received by the
16 content provider is less than the amount paid by the wireless subscriber.

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

19 *2. Service Order Between m-Qube and the Committee*

20 The Committee intends to enter into a service order with m-Qube to enable the
21 Committee to receive contributions by text message. The terms of the service order will be
22 consistent with those approved by the Commission in Advisory Opinion 2012-17 (m-Qube):
23 The Committee must be registered "and in good standing" with the Commission and relevant

1 State authorities; the Committee may register only one short code; no mobile phone number may
2 make contributions exceeding \$50 per month to the Committee; and contributors must certify
3 their eligibility to make a contribution under the Act and Commission regulations. Because
4 common short codes are “country-specific,” only users who obtain service through U.S.-based
5 wireless service providers will be able to use a short code to complete an opt-in.

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

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

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

1 confirmation that the contributor certified his or her eligibility to make a contribution under the
2 Act and Commission regulations.

3 m-Qube will also give the Committee access to a running, real-time tally of the dollar
4 amount of contributions made via text message from each phone number and will configure its
5 gateway to inform the Committee if contributions from any one phone number equal or exceed
6 \$200 in a calendar year. Once alerted, the Committee will collect the contributor's identifying
7 information via text message by texting the contributor a web form to complete, or by other
8 legally permitted methods. The Committee will receive further contributions via text message
9 from that phone number only after it has obtained the contributor's identifying information. If
10 that information is not provided by the contributor, then the Committee will take steps to refund
11 any contribution over \$200 and prevent that number from making additional contributions via
12 text messaging. Further, if the Committee receives information about a contributor indicating
13 that the contributor is a prohibited source, the Committee will take steps to refund the
14 contribution and block the number from texting any further contributions. The Committee will
15 take these steps based only on the information that m-Qube makes available to the Committee in
16 m-Qube's ordinary course of business and without receiving any information from, or entering
17 into any contractual relationships with, wireless service providers.

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

19 After the Committee receives its short code and completes a service order with m-Qube,
20 m-Qube will work with the wireless service providers to gain access to their networks to
21 communicate with mobile phone users. Even after CTIA has leased a short code to the
22 Committee, the wireless service providers may permit or prohibit any type of text message
23 program, and the wireless service providers may establish the conditions or rules that govern the

1 manner in which a text message program may be operated. The requestors represent that the
2 wireless service providers will establish “objective and commercially reasonable” eligibility
3 criteria for determining whether to permit or prohibit the use of a text message program.

4 The Committee will have no direct contractual relationship with the wireless service
5 providers. Rather, m-Qube maintains its own contractual relationships with the wireless service
6 providers, and any agreement between m-Qube and a wireless service provider would be an
7 amendment to the standing master agreement between m-Qube and the wireless service provider.

8 Due to trade secret concerns and antitrust regulations, the rates in these agreements are
9 confidential and are not disclosed, including to the Committee. The requestors also represent
10 that, aside from charitable programs where service is provided for free, wireless service
11 providers do not offer different rates for specific types of text message programs.

12 ***Questions Presented***

- 13 1. *As between m-Qube, the carriers and the Committee, does the Committee bear the*
14 *responsibility to determine its contributors’ eligibility, which it would do by adopting the*
15 *necessary safeguards?*
16
17 2. *If the Committee performs several of its own tasks and employs several of its own*
18 *safeguards regarding the \$50 monthly limit on contributions; the recordkeeping*
19 *obligations for contributions that tally in excess of \$200; and the limitation of one short*
20 *code per campaign: will the Committee have fulfilled all the responsibilities for*
21 *compliance under the Act without any additional action by any carrier or aggregator*
22 *other than those set forth in this request?*
23
24 3.
25 a.
26 i. *If any given carrier offering this service is not offering a discount on these*
27 *services as provided in the ordinary course of business to all customers, is it*
28 *correct that if m-Qube received a special discount from a carrier for political*
29 *committees, and passed that savings on to the Committee, that the Committee*
30 *could be seen as receiving an in-kind contribution, since the discount was not*
31 *“usual and normal?”*
32

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

6
7 b. *Please confirm the Treasurer will not be receiving an impermissible “in-kind”*
8 *contribution from the carriers when the carriers follow their normal business*
9 *practices with respect to administering premium SMS programs, and that if any*
10 *changes are made it is because normal practices are not relevant to, or are*
11 *impracticable for, political committees.*

12
13 4. *Can the Committee avoid receiving an “in-kind” contribution if it or any other political*
14 *committee is subjected to eligibility requirements established by the aggregators and the*
15 *wireless carriers for determining whether a committee may participate in a text*
16 *messaging contribution campaign?*

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

21
22 ***Legal Analysis and Conclusions***

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

26
27 2. *If the Committee performs several of its own tasks and employs several of its own*
28 *safeguards regarding the \$50 monthly limit on contributions; the recordkeeping*
29 *obligations for contributions that tally in excess of \$200; and the limitation of one short*
30 *code per campaign: will the Committee have fulfilled all the responsibilities for*
31 *compliance under the Act without any additional action by any carrier or aggregator*
32 *other than those set forth in this request?*

33
34 Yes, as between the Committee, m-Qube, and the wireless service providers, the
35 Committee is solely responsible for determining the eligibility of its contributors. The
36 Committee will satisfy its responsibilities under the Act by employing the safeguards described
37 below.⁵

⁵ See Advisory Opinion 2012-28 (CTIA – The Wireless Association)(“CTIA II”).

1 The Act and Commission regulations impose certain requirements on treasurers of
2 political committees. A treasurer of a political committee “must keep an account of (1) all
3 contributions received by or on behalf of such political committee; (2) the name and address of
4 any person who makes any contribution in excess of \$50, together with the date and amount of
5 such contribution by any person; [and] (3) the identification of any person who makes a
6 contribution or contributions aggregating more than \$200 during a calendar year, together with
7 the date and amount of any such contribution.” 2 U.S.C. 432(c)(1)-(3); *see* also 11 CFR
8 101.4(c). Commission regulations also state that “[t]he treasurer shall be responsible for
9 examining all contributions received for evidence of illegality and for ascertaining whether
10 contributions received, when aggregated with other contributions from the same contributor,
11 exceed the [Act’s] contribution limitations.” 11 CFR 103.3(b).

12 In Advisory Opinion 2012-17 (m-Qube), the Commission approved a proposal very
13 similar to the one proposed here.⁶ As in that advisory opinion, the requestors propose to enter
14 into a service order that will require: (1) the Committee to register only one short code; (2) a
15 monthly limit of \$50 for contributions to the Committee from any single mobile phone number;⁷
16 (3) contributors to certify their eligibility to make a contribution under the Act and Commission
17 regulations; (4) the Committee to have real time access to m-Qube’s running tally of
18 contributions made from mobile phone numbers; and (5) the Committee to use m-Qube’s
19 factoring services. In addition, only wireless users who obtain service through U.S.-based

⁶ Because no political committee was a party to that request, the Commission did not comment as to political committees’ recordkeeping and reporting requirements.

⁷ As explained further in the text, the \$50 monthly limit on contributions ensures that the requirement in 2 U.S.C. 432(b) and 11 CFR 102.8(a) to forward to the Committee the contributor’s name and address and the date of receipt of the contribution will not be triggered.

1 wireless service providers will be able to complete an opt-in. The Committee will take
2 additional steps to comply with the Act's reporting and recordkeeping provisions if the
3 Committee receives information that a contributor has made contributions aggregating in excess
4 of \$200 in a calendar year.⁸ Under this proposal, the m-Qube gateway will alert the Committee
5 when the value of contributions made from any one mobile phone number meets or exceeds
6 \$200, which will prompt the political committee to collect the information necessary to identify
7 the contributor before accepting additional contributions. The Commission determines that all of
8 these safeguards, taken together, will enable the Committee to satisfy its requirements under the
9 Act and Commission regulations.⁹

10 As compared to political committees, the Act and Commission regulations impose
11 comparatively fewer obligations on persons who receive and forward political contributions.
12 *Compare* 2 U.S.C. 432(b) (requiring persons who receive contributions for political committees
13 to forward the contributions and certain information to the political committees' treasurers within
14 either ten or 30 days) *with* 2 U.S.C. 432(c) (recordkeeping requirements) *and* 2 U.S.C. 433
15 (filing requirements) *and* 2 U.S.C. 434(a)-(b) (reporting requirements). *See also* Advisory
16 Opinion 2009-32 (Jorgensen) ("Contributions from foreign nationals, corporations, labor

⁸ m-Qube's agreement with the Committee will include all of the terms discussed in Advisory Opinion 2012-17 (m-Qube). The Committee will thus also be required to refund to m-Qube any factored contributions that it receives in excess of the amounts later received by m-Qube from wireless service providers, to post deposits to guard against such overpayments, or to have any overpayments offset against future factored payments. *See* Advisory Opinion 2012-17 (m-Qube).

⁹ This conclusion does not relieve the Committee of the obligation to return or refund any contributions that it receives if it subsequently learns that they came from a prohibited source. *See generally* 11 CFR 103.3(b), 110.20(a)(4), (g).

1 organizations, and [F]ederal contractors are prohibited. The political committee, *not the vendor*,
2 is responsible for determining the legality of contributions.”) (emphasis added).¹⁰

3 Although persons who receive and forward contributions in excess of \$50 to political
4 committees must also forward the contributors’ names, addresses, and other identifying
5 information, 2 U.S.C. 432(b); 11 CFR 102.8(a), (b), none of the contributions under the proposal
6 here will exceed \$50. The Commission determined in Advisory Opinion 2012-17 (m-Qube) that
7 on these facts, contributions will be made when the user completes an opt-in. Because of the \$50
8 monthly cap, no single opt-in will exceed \$50. Therefore, the obligation under 2 U.S.C.
9 432(b)(1)-(2) to forward the contributors’ names, addresses, and other identifying information to
10 the Committee will not be triggered. The Committee, however, will be able to satisfy its
11 obligations under 2 U.S.C. 432(c)(3) regarding persons who will make a contribution
12 aggregating more than \$200 during a calendar year.

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

15 3.

16 a.

- 17 i. *If any given carrier offering this service is not offering a discount on these*
18 *services as provided in the ordinary course of business to all customers, is it*
19 *correct that if m-Qube received a special discount from a carrier for political*
20 *committees, and passed that savings on to the Committee, that the Committee*
21 *could be seen as receiving an in-kind contribution, since the discount was not*
22 *“usual and normal?”*
- 23
- 24 ii. *If any given carrier concludes that it could offer m-Qube a discount consistent*
25 *with its ordinary course business practices, and m-Qube passed that savings on to*
26 *the affected political committees, would the Committee be safe in receiving those*

¹⁰ Similarly, in Advisory Opinion 1978-68 (Seith for Senate), the Commission premised its conclusion that contributions by credit card were permissible on the “assum[ption] that the credit card issuers (BankAmericard and Master Charge) will follow their usual and normal collection procedures with respect to obtaining payment from persons who used their credit cards to make political contributions to the Committee.” *Id.*

1 *savings without being viewed as having accepted an in-kind corporate*
2 *contribution?*

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

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

22 The Commission has previously determined that a political committee’s “purchase of
23 goods or services at a discount does not result in a contribution if the discounted or
24 complimentary goods were available to others on equal terms or as part of a pre-existing

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

11 m-Qube, therefore, may pass on discounts that it negotiates with wireless service
12 providers to the Committee as part of m-Qube’s plan for all committees on an “equal, non-
13 partisan basis” without the amount of discounts constituting corporate in-kind contributions to
14 the Committee if: (1) m-Qube receives discounts from wireless service providers for their
15 services in processing contributions by text message that are consistent with the discounts that
16 m-Qube receives from wireless service providers in connection with similar services rendered to
17 customers that are not political committees; or (2) the discounts otherwise reflect commercial
18 considerations, such as volume of messages, refund rates, customer satisfaction, and technical
19 level of effort, and do not reflect considerations “outside of a business relationship.”¹¹

20 *b. Please confirm the Treasurer will not be receiving an impermissible “in-kind”*
21 *contribution from the carriers when the carriers follow their normal business*
22 *practices with respect to administering premium SMS programs, and that if any*

¹¹ In reaching this conclusion, the Commission assumes that *m-Qube*’s normal commercial practice is to pass negotiated discounts to its customers that are not political committees or that passing on such a discount reflects commercial considerations and not considerations “outside of a business relationship.”

1 *changes are made it is because normal practices are not relevant to, or are*
2 *impracticable for, political committees.*

3
4 As discussed above, the definition of contribution includes “any gift . . . of . . . anything
5 of value made by any person for the purpose of influencing any election for Federal office.”
6 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a); *see also* 2 U.S.C. 441b(b)(2); 11 CFR 114.2(b)(1).
7 “Anything of value includes all in-kind contributions.” 11 CFR 100.52(d)(1).

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

17 While the requestors expect CTIA and wireless service providers to conform to these
18 normal business practices in connection with the Committee’s text message program, the
19 requestors also note that the Committee is different from content providers with which CTIA and
20 the wireless service providers have previously done business. Specifically, the Committee is
21 regulated under the Act and Commission regulations, and public documents pertaining to the
22 Committee may facilitate the vetting process. The requestors expect, therefore, that CTIA and
23 the wireless service providers may tailor their business practices accordingly. CTIA and the
24 wireless service providers may, for example, search the Commission’s website for available

1 information on the Committee and contact the Committee's treasurer, rather than directly
2 contacting Representative Cooper.

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

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

12 *4. Can the Committee avoid receiving an "in-kind" contribution if it or any other political*
13 *committee is subjected to eligibility requirements established by the aggregators and the*
14 *wireless carriers for determining whether a committee may participate in a text*
15 *messaging contribution campaign?*
16

17 The Committee would not receive an in-kind contribution if it participates in text
18 message fundraising programs under criteria established by wireless service carriers, as
19 described below.

20 A vendor may establish and apply eligibility criteria to political committees in order to
21 protect the commercial viability of the vendor's program. In Advisory Opinion 2006-34
22 (Working Assets), for example, the Commission approved an affinity program that a corporate
23 vendor proposed to make available to any political party committee and nonconnected committee
24 that asked to participate, "without regard to party affiliation or ideological orientation, 'but
25 subject to each particular program's commercial viability, determined by common commercial

1 principles,' including, for example, size of membership and hence number of potential
2 customers, potential for long-term customer commitment, strength of trademark, and credit
3 rating of membership." Further, in finding the program to be commercially reasonable, the
4 Commission "assume[d] that *the commercial viability of the vendor's relationship with each*
5 *political committee would stand or fall on its own,*" and thus that the vendor "would not depend
6 on profitability from its relationship with other [non-political committee] clients to sustain the
7 arrangement with a particular [political] committee sponsor." *Id.* (emphasis added).

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

16 5. *Please confirm that nothing in Advisory Opinion 2012-17(m-Qube) prevents treasurers*
17 *from being subject to the methods wireless service providers normally process payments*
18 *to connection aggregators.*
19

20 In Advisory Opinion 2012-17 (m-Qube) the Commission approved m-Qube's proposal to
21 process contributions by text message for political committees. To the extent the proposal here
22 is "indistinguishable in all its material aspects," 2 U.S.C. 437f(c), from that proposal, the

¹² Supplement to Advisory Opinion Request 2012-26 (m-Qube II) (August 2, 2012). *See also* Advisory Opinion 2012-28 (CTIA II) ("[The wireless service providers] propose to establish objective business criteria that are specific to political contribution text messaging campaigns. The wireless service providers may decide, due to commercial considerations, to accept only those proposals by political committees with the potential for a large volume of transactions, such as presidential campaigns and political committees that can 'demonstrate significant fundraising ability (e.g., candidates with approval ratings over a certain threshold or with a strong record of past fundraising.').")

1 Committee's treasurer may rely upon it when accepting contributions by text message. *See also*
2 Advisory Opinion 1978-68 (Seith for Senate), *supra* n.10. To the extent the proposal here
3 differs, none of those changes affects the permissibility of m-Qube's planned payment
4 arrangements with the wireless service providers.¹³

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

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On behalf of the Commission,

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Caroline C. Hunter
Chair

¹³ *See* Advisory Opinion 2012-28 (CITA II).