

Comment on ADR 2012-28

Arent Fox LLP / Washington, DC / New York, NY / Los Angeles, CA

Arent Fox

July 31, 2012

Anthony Herman
General Counsel
Federal Election Commission
999 E St. NW
Washington, DC 20463

Craig Engle

Partner
202.775.5791 DIRECT
202.857.6395 FAX
engle.craig@arentfox.com

Brett Kappel

Counsel
202.857.6494 DIRECT
202.857.6395 FAX
kappel.brett@arentfox.com

Re: Comment to Advisory Opinion Request 2012-28 (CTIA 2) and
Advisory Opinion Request 2012-26 (m-Qube 2)

Dear Mr. Herman:

On July 26th, the Commission published Advisory Opinion Request 2012-28 (CTIA 2) by the CTIA Wireless Association, which provided helpful technical and operational details regarding the premium SMS political contribution programs proposed and approved in Advisory Opinion 2012-17 (m-Qube 1). We respectfully submit the following observations and requests:

- 1) We drafted the questions we presented in our pending Advisory Opinion Request (m-Qube 2) to coincide with any similar questions the wireless carriers may have regarding their responsibilities in processing a text messaging program for political contributions. As the Commission can see, the revised Questions Presented in our Supplemental Letter of July, 24, 2012 are substantively the same as the Questions Presented in the CTIA Letter of July 26, 2012.

Accordingly, we request the Commission issue similar and expedited Advisory Opinions in both CTIA 2 and m-Qube 2 so the carriers, aggregators and most importantly, the candidate committee may reliably and promptly commence the transactions for processing campaign contributions by text messaging.¹

- 2) In our question 3(b), we requested clarification that m-Qube will not make, and a candidate committee will not receive, an in-kind contribution when adjustments are made to the wireless industry's normal business practices when m-Qube, or a carrier m-Qube

¹ At this time m-Qube is not offering its services to connected or non-connected committees.
GENBUS/881193.1

Arent Fox

serves, reasonably believes those business practices are not strictly applicable or practical for candidate committees.

In particular, a number of carriers normally require the words "text HELP for help" appear in all opt-in confirmation messages. The CTIA 2 advisory opinion request refers to this type of requirement in their supplemental letter when they state, "These standards require, for example, that text messages follow a certain protocol to assist wireless users with obtaining help in connection with their transactions." CTIA 2 Request, July 26, 2012, pages 5-6.

At the Commission's request, our June 4th supplemental information letter to Advisory Opinion Request 2012-17 (m-Qube 1) provided the Commission with specific eligibility attestation language, fitting into the confines of a 160-character text message. In that supplemental information (footnote 2) we explained that it is impracticable to make such a short message contain both a clear attestation of FECA eligibility and also include the words "text HELP for help." Following this, the Commission specifically included our proposed attestation language in m-Qube 1 at footnote 4.²

In order to now combine the contributor attestation and the "text HELP" instruction, the attestation of eligibility may need to be so truncated to a point where the FEC attestation language may no longer be clear and a safe harbor. Additionally, requiring m-Qube to include the "text HELP for help" may actually prejudice candidates or committees with longer names and longer web addresses.

For example, by further truncating the attestation language set forth in Advisory Opinion 2012-17, the following formulation could comprise exactly 160 characters, and includes a truncated version of the "text HELP" instruction in a sample message for a contribution, but only to a candidate with a short last name such as Smith and without naming his committee. It may be impossible to fit a longer candidate and committee name (such as "Johnson" or even "Cooper") in such a message, since the length would exceed 160 characters:

"To give \$XX to Johnson4Sen reply YES.u certify ur 18+ & donatng ur own funds, not foreign national or Fed contractor.Info? JFS.g>/F or txt HELP.Msg&Data rates may aply"

² The recommended text messages do, however, include a helpful URL link to the programs full terms and conditions, which are another carrier-required method of providing users with easy access to that additional program information.

Arent Fox

A variety of types of goods and services are now marketed and sold through premium SMS programs from charitable contributions to mobile phone content. Aggregators and the carriers in their normal and usual business practices, tailor specific requirements for each program type, as they need to do here. The unique attestation aspects the Commission approved for political contribution programs will require some customization of the industry's business practices.

Fortunately, whether a text HELP message appears will not cause an in-kind contribution to occur because no corporate financial contribution will be made by a carrier or aggregator depending on whether the language is included. Instead, adding additional language outside that written by the Commission in m-Qube 1 may dilute the clarity of the all-important attestation and the safe harbor the candidate committees rely on.

Therefore, we request the Commission include in its Advisory Opinion language that m-Qube may make this type of business adjustment for candidate committees without an in-kind contribution being made.

Sincerely,



Craig Engle



Brett Kappel