

Comment on AOR 2012-28

SANDLER, REIFF, YOUNG & LAMB, P.C.

August 1, 2012

Via E-Mail

Anthony Herman, Esq.
General Counsel
Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463

Re: Advisory Opinion Request

Dear Mr. Herman:

We are writing on behalf of our client, Revolution Messaging, LLC ("Revolution Messaging") to submit comments on Advisory Opinion Request 2012-28 (CTIA—The Wireless Association). Revolution Messaging has submitted a separate advisory opinion request for determinations relating to its own proposed provision of text messaging contribution services. That request is currently being processed by the Office of General Counsel. Several points included in Revolution Messaging's own advisory opinion request, however, are relevant to the Federal Election Commission's discussion of CTIA's advisory opinion request. Relevant excerpts of Revolution Messaging's recently submitted request are included here.

I. Revolution Messaging

Revolution Messaging, a District of Columbia limited liability company, is a full-service digital technology and strategy company, specializing in the provision of mobile communications strategies, content, and text messaging services to progressive non-profit organizations, labor organizations, and Democratic federal and state political committees and organizations. Revolution Messaging coordinates mobile messaging on behalf of its clients, providing a proprietary web-based platform allowing clients to obtain an SMS short code and customized keyword associations; allow individual wireless users to opt-in to receive SMS messages from the client; allow the client to send customized messages to such wireless users; and allow the client to maintain, analyze and manage data provided by wireless users and data relating to actions taken by them in the course of the text messaging program. Revolution Messaging also advises its clients on, and helps create, the content of websites, mobile applications and outgoing text messages.

II. Avoiding Impermissible Corporate Contributions by Wireless Carriers

In its consideration of AOR 2012-28, Revolution Messaging urges the Commission to confirm that a wireless carrier may charge fees to political committees for processing contributions that differ from those charged to commercial services, if the fee charged is negotiated at arm's length, if all political committees are charged approximately the same fees except for volume discounts in the ordinary course of business and if the fees fairly reflect the costs and value of the processing service.

In AO 2010-23, the Commission found that contribution processing services would be provided by wireless carriers “in the ordinary course of business” where “the wireless service providers and connection aggregators will deduct fees from the contributions transmitted to political committees based on amounts charged for processing non-political funds.” *Id.* at 6. As noted in that AO, CTIA acknowledged that wireless carriers have previously waived these processing charges entirely for non-profit organizations that are *not* political committees or organizations. *Id.* n. 4. See also, Consumerreports.org, Haiti Relief Update: What to Know About Text Donations, <http://news.consumerreports.org/money/2010/01/update-donating-haiti-relief-red-cross-text-donations-better-business-bureau-wise-giving-alliance.html> (“Verizon Wireless spokesman Jeffrey Nelson told us his company never charges a fee for text donations to charities.”).

It is not expected or appropriate, of course, that carriers will charge zero to political committees for processing contributions. As CTIA noted in AO 2010-23, “fees charged to political committees would not be based entirely on the charitable donation model because that model can at times include waivers of fees.” *Id.* at 6 n. 4. On the other hand, it should not be considered necessary for the carrier to charge, for use of a premium short code for processing contributions, the same 20 to 40% or more of the contribution that is charged to purveyors or daily horoscopes, sports scores, pornography and the like. The extraordinarily high fees charged by carriers for these services are not related to the risk of chargebacks, since the content providers do not get paid unless and until the carrier gets paid, by the wireless subscriber. Indeed, credit card companies processing contributions for nonprofit organizations and political committees—companies which do assume the risks of non-payment—typically charge about 1.5% of the amount of the contribution. Under the factoring arrangement approved in AO 2012-17, it is the aggregator—not the wireless service provider—that bears the risk of non-payment.

The wireless carriers do incur some additional costs in providing contribution processing services, such as call center staff time to handle questions and other issues arising from the additional charges placed on the user’s wireless bill. However, for a variety of reasons, the costs for servicing commercial services such as horoscopes, ringtones and pornography through a premium code are typically greater than servicing such a code for non-profit organizations—including dealing with copyright issues, the level of complaints from subscribers, and other factors. Revolution Messaging requests that the Commission confirm that charging a political committee less than the wireless carrier charges for commercial services would *not* result in an impermissible corporate contribution if the charge is negotiated at arm’s length; if all political committees are charged approximately the same fees except for volume discounts in the ordinary course of business; and if the fees charged fairly reflect the differences in costs and value involved in processing contributions to political committees.

III. Arbitrary Denial of Text Messaging Services

In AOR 2012-28, CTIA asks the Commission to confirm that wireless service providers are required to follow their normal business practices when implementing text messaging contribution campaigns, with specific reference to MMA’s Consumer Best Practices industry

standards. AOR 2012-28 at 3. The Commission be aware that, in requesting such confirmation, CTIA may be in effect asking the Commission to approve CTIA's current practice of arbitrarily and inconsistently applying self-imposed industry standards in a way which may make it impossible, as a practical matter, for federal political committees to avail themselves of the text messaging contribution system approved by the commission in Advisory Opinion 2012-17 (mQube).

Each wireless carrier has established its own arbitrary rules for using and promoting premium messaging services, including the advertisement of common short codes. The CTIA has a Guidebook, setting out a complex web of rules for promoting common short codes. The Mobile Marketing Association has its own Guidebook, setting out its own rules for such promotion. These guidebooks are frequently revised.

In practice, the wireless carriers have used these rules arbitrarily to deny text messaging services to advocacy and political organizations based on the content of the proposed messaging. In 2007, for example, Verizon denied a pro-choice group an application for a common short code, citing an internal policy; the company later reversed its decision. A Liptak, "Verizon Reverses Itself on Abortion Messages," *New York Times* (Sept. 27, 2007), available at http://www.nytimes.com/2007/09/27/business/27cnd-verizon.html?_r=3. Similarly, in September 2010, for example, T-Mobile blocked its subscribers from signing up for messages from an organization offering information about dispensaries of medical marijuana legal under state law. T-Mobile cited the content provider's alleged non-compliance with the "Mobile Marketing Association's U.S. Consumer Best Practices Guidelines for Cross-Carrier Mobile Content Programs, as well as other regulations applicable to the mobile content business." See *T-Mobile Sued Over Blockade of Text Messages*, *New York Times*, Sept. 20, 2010, available at <http://bits.blogs.nytimes.com/2010/09/20/t-mobile-blocks-text-messages/>

In any opinion issued in response to AOR 2012-28, the Commission should confirm that the wireless carriers cannot arbitrarily pick and choose among political committees in deciding to what organizations they will make common short codes and text messaging services available.

IV. Wireless Carrier Responsibilities

AOR 2012-28 asks the Commission to address the questions of who is responsible for determining the eligibility of a contributor and who is ensuring compliance with the \$50 monthly limit on contributions and for recordkeeping obligations for contributions in excess of \$200. In this regard, Revolution Messaging wants to make the Commission aware that, in its own recently submitted advisory opinion request, Revolution Messaging recently submitted advisory opinion provides a proposal under which an application provider collects and provides the information required pursuant to the FECA and Commission reporting and recordkeeping requirements. This process would be conducted independently of the wireless carriers. Under this proposal, the wireless carriers would not be responsible for determining contributor eligibility or for providing contributor information to committees.

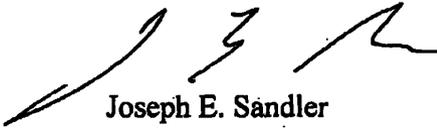
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As noted by m-Qube, the proper processing of contributions by text message should be viewed as analogous to the processing process applied to contributions by credit card. Advisory Opinion Request 2012-26 at 6 ("In the case of mobile-carrier-billed transactions like premium SMS, the wireless carrier is analogous to the credit card issuer.") To that end, just as credit card issuers, such as Visa or Mastercard, are not responsible for ensuring eligibility or providing billing information to committees, wireless carriers should not bear this responsibility.

CONCLUSION

In consideration of AOR 2012-28, the Commission should clarify that: wireless carriers are not responsible for either determining the eligibility of a contributor or the recordkeeping and reporting requirements of the FECA and Commission regulations; an impermissible in-kind contribution will not result in a wireless carrier charges less to a political committee than to its commercial customers; wireless carriers may not arbitrarily prohibit committees from obtaining or using short codes; and, wireless providers are not required to change in any way the manner in which payments are processed to aggregators.

Sincerely yours,



Joseph E. Sandler
Elizabeth L. Howard