



**FEDERAL ELECTION COMMISSION**  
Washington, DC 20463

**MEMORANDUM**

**TO:** The Commission  
**FROM:** Commission Secretary's Office  
**DATE:** August 13, 2012  
**SUBJECT:** Comments on Draft AO 2012-28  
(CTIA – The Wireless Association)

*Ref*

**Attached is a timely submitted comment from Jan Witold Baran and Caleb P. Burns, counsel, on behalf of CTIA – The Wireless Association.**

**Attachment**



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August 13, 2012

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**BY HAND DELIVERY AND FAX (202.208.3333)**

Federal Election Commission  
Office of the Commission Secretary  
999 E Street, NW  
Washington, DC 20463

Re: Comments to Draft Advisory Opinion 2012-28

Dear Commissioners:

On behalf of CTIA – The Wireless Association® (“CTIA”), we are submitting these comments to Draft Advisory Opinion 2012-28 (the “Draft”). Our client is concerned that the Draft fails to clearly affirm that CTIA and wireless services providers have the necessary discretion to decide with which political committees to do business. As explained in the CTIA August 7, 2012, comments to Draft Advisory Opinion 2012-26 (“m-Qube II Comments”) that we attach and incorporate here by reference, without such discretion, the resulting advisory opinion could force CTIA and wireless service providers to refrain from providing text messaging services for political contributions to any political committees.

As previously explained, CTIA and wireless service providers need to have discretion to look at a wide variety of criteria to determine the eligibility of political committees seeking access to common short codes or wireless service providers’ billing and collection services. CTIA has provided several examples of eligibility criteria, such as permitting participation only by committees with the potential for a large volume of transactions, limiting participation to only certain types of campaigns such as the major presidential campaigns, limiting participation only to viable campaigns as suggested in polling data, refusing participation to candidates who are not on the ballot, or refusing participation to candidates who espouse views that may harm wireless service providers’ brands.

However, these are just examples intended to illustrate the fact that CTIA and wireless service providers will need to consider a wide array of criteria in order to make sound business judgments. CTIA and wireless service providers are concerned that by employing such criteria to refuse to sell services to political committees, CTIA and wireless service providers might be exposed to complaints for violating the Federal Election Campaign Act, as amended, (the “Act”). While CTIA is confident that these complaints would be without merit, CTIA and its members do not want to be unnecessarily exposed to any such complaints which



Federal Election Commission  
August 13, 2012  
Page 2

could bring significant cost and reputational harm. Accordingly, it is critically important that the Commission provide a clear statement that the Act does not impose liability on CTIA and wireless service providers if they exercise their discretion to refuse to sell services to any particular political committee.<sup>1</sup>

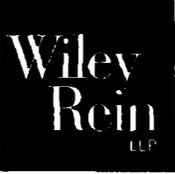
The Draft improves on the language addressed in the CTIA m-Qube II Comments by removing the reference to eligibility requirements based on political considerations. However, the Draft fails to provide the clarity that CTIA and the wireless service providers may need. While CTIA has cited numerous types of eligibility criteria, the Draft cites only one: "accept[ing] only proposals from 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).'" Draft at page 13, lines 10-14; see also page 14, lines 7-8 ("such as projected volume of transactions or demonstrated approval ratings").

We request that the Commission edit the Draft to specifically incorporate the other possible commercial considerations raised by CTIA throughout the Commission's consideration of this Advisory Opinion Request. We recommend that the Commission edit the factual recitation on page 3 by inserting the following at line 19 prior to the new sentence that begins at the end of the line:

In addition, the wireless service providers may refuse to sell services to candidates who, based on the wireless service providers' business judgments, espouse views that may harm the wireless service providers' brands.

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<sup>1</sup> We note that the Draft recognizes on the last line of page 3 and through line 3 of page 4 that wireless service providers may refuse to sell services to all political committees. In its various filings in these proceedings, CTIA has sought to identify the issues most relevant to wireless service providers. However, each wireless service provider will still independently assess not just the Commission's guidance, but also many other legal and operational considerations specific to that provider and, indeed, there may be some that simply are not comfortable with the fundamental premise of using their text messaging platforms in this way. Thus, regardless of the Commission's final advisory opinion here, CTIA reasonably expects that some of its service provider members will choose not to offer political contribution text messaging services to any political committees.



Federal Election Commission  
August 13, 2012  
Page 3

We recommend the following similar edit to page 13, line 14<sup>2</sup> as a new sentence at the end of the paragraph:

Alternatively, the wireless service providers may refuse to sell services to candidates who, based on the wireless service providers' business judgments, espouse views that may harm the wireless service providers' brands.

We also urge the Commission to insert the following on page 14, line 7 after the comma and delete the remainder of the language in the paragraph:

such as, but not limited to, projected volume of transactions, demonstrated approval ratings, or harm to the wireless service providers' brands caused by a candidate's views. Accordingly, the wireless service providers may establish commercial eligibility requirements.

CTIA and the wireless service providers are entitled, as a matter of law, to a blanket affirmation that the Act does not impose liability on CTIA or wireless service providers if they, for whatever reason, exercise their discretion not to sell services to a particular political committee. For all the reasons stated in the m-Qube II Comments, the conclusion that CTIA and wireless service providers may exercise such discretion is fully consistent with the Act. Furthermore, the Commission would not break any new ground by making that point explicit here. Most recently in Advisory Opinion 2012-17 (m-Qube I), the Commission approvingly noted in another context that "AT&T reserved the right to terminate [its] agreement or billing services if it determines, in its sole discretion, that its image would be adversely affected or its reputation or goodwill damaged by the continued offer of billing services." (Emphasis added, internal quotations omitted.) Our client requests similar affirmation that it and all wireless service providers have sole discretion to issue common short codes and decide whether to sell billing and collection services to a political committee for use in political contribution text message campaigns.

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<sup>2</sup> We note that the Draft contains a footnote 9, but no accompanying text.



Federal Election Commission  
August 13, 2012  
Page 4

Sincerely,

A handwritten signature in black ink, appearing to read "Ian Baran". The signature is written in a cursive style with a large initial "I".

Ian Witold Baran  
Caleb P. Burns

cc: Office of General Counsel (FAX 202.219.3923)

Attachment



**FEDERAL ELECTION COMMISSION**  
Washington, DC 20463

**MEMORANDUM**

**TO:** The Commission

**FROM:** Commission Secretary's Office 

**DATE:** August 7, 2012

**SUBJECT:** Comments on Draft AO 2012-26  
(Cooper for Congress, ArmourMedia,  
Inc., and m-Qube, Inc.)

**Attached is a timely submitted comment from Jan Witold Baran and Caleb P. Burns, counsel, on behalf of CTIA – The Wireless Association.**

**Attachment**



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August 7, 2012

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**BY HAND DELIVERY AND FAX (202.208.3333)**

Federal Election Commission  
Office of the Commission Secretary  
999 E Street, NW  
Washington, DC 20463

Re: **Comments to Draft Advisory Opinion 2012-26**

Dear Commissioners:

On behalf of CTIA – The Wireless Association® (“CTIA”), we are submitting these comments to Draft Advisory Opinion 2012-26 (the “Draft”) in response to questions raised by the Commission during its August 2, 2012, meeting.

1. Requested Edits to the Draft

First, we reiterate our request from the meeting that the Commission revise the Draft to explicitly state that the responsibility for determining the eligibility of a contributor, and any resulting liability, rests solely with the political committees who receive contributions by text message. This can be accomplished by inserting the word “solely” between the words “is” and “responsible” on line 28, page 7 of the Draft. Furthermore, we request that the Draft explicitly state that Advisory Opinion 2010-23 (CTIA I) is superseded and the requirements stated therein do not apply when contributions by text message are made pursuant to the terms of Advisory Opinion 2012-17 (m-Que I).

Second, we understand that the Commission will follow the reasoning of the Draft when the Commission issues its response to our Advisory Opinion Request 2012-28 (CTIA II). Because the questions presented in the Draft differ in certain respects from those in our Advisory Opinion Request, it is our hope that the Commission will respond directly to our specific questions presented.

2. A Vendor’s Refusal to Sell Services is not a “Contribution” Regulated by the Campaign Finance Law

At the August 2, 2012, meeting, the Commission raised questions about the criteria that CTIA and wireless service providers would use to determine which political committees would be granted common short codes and access to the billing and collection services of wireless service providers to collect contributions by text



**Federal Election Commission**

August 7, 2012

Page 2

message. The CTIA II Advisory Opinion Request represented that the wireless service providers will permit or deny access based on various commercial considerations. Examples of relevant commercial considerations used by wireless service providers are listed on pages 83, 90, and 160 of the industry standards for consumer best practices at [www.nmmlab.com/files/bestpractices.pdf](http://www.nmmlab.com/files/bestpractices.pdf).

Page 90 indicates that a wireless service provider will prohibit a text message campaign that promotes hate toward groups.<sup>1</sup> During the August 2, 2012, meeting, Commissioner McGahn used the example of a candidate from the American Nazi Party. A wireless service provider might very well refuse to sell text message contribution services for the benefit of such a candidate in order to avoid promoting hatred.

Commissioner Bauerly and Vice Chair Weintraub expressed concern over -- and the Draft, itself, questions -- whether such a refusal to sell services by a commercial vendor to a political committee would be prohibited by the Federal Election Campaign Act, as amended, (the "Act") as an in-kind contribution to opposing political committees. However, the Act does not define a contribution to include the refusal of a vendor to sell any goods or services.

A "contribution" is "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). The Commission's regulations further provide that "anything of value" includes "in-kind contributions" defined as "the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services." 11 C.F.R. § 109.52(d)(1). Accordingly, a "contribution" only results when a service is provided to a political committee without full payment in return. A "contribution" does not include, as a matter of law, the refusal of a vendor to sell goods or services.

In fact, the Act does not contain any provision that would require vendors to sell their goods or services to any or all political committees. By contrast, Congress has been clear in other laws when it requires vendors to provide goods or services to political committees. For example, the communications laws administered by the Federal Communications Commission require that if a broadcaster "shall permit any

<sup>1</sup> These types of distinctions are often made by commercial service providers. You can view, for example, the New York Times advertising guidelines at: <http://nytimes.com/mediareference/Advertising-Acceptability-Standards.pdf>.



## Federal Election Commission

August 7, 2012

Page 3

person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station." 47 U.S.C. § 315(a). No such mandate exists in the Act. As Commissioner McGahn noted at the August 2, 2012, meeting, vendors can, and often do, service political committees based on partisan affiliation. With no basis in the campaign finance laws, the Commission does not have the authority to condition the ability of a vendor to decide the political committees to which it will sell goods or services.

When deciding whether to provide any entity access to common short codes or the use of their billing services, CTIA and the wireless service providers must be able to exercise their discretion to make sound business decisions. When determining the eligibility of political committees, they will need to look at a wide variety of criteria, which may include factors such as a candidate's viability, whether a candidate is on the ballot, or whether the candidate's views may cause harm to the wireless service provider's brand. While they will be making these determinations for commercial reasons, the comments submitted by Revolution Messaging, LLC demonstrate that commercial judgments can be misconstrued as political judgments.<sup>2</sup> By stating that eligibility decisions must be based on "commercial, rather than political, considerations," the Draft establishes unnecessary and ill-defined limits on discretion. Without the discretion to decide the political committees with which to do business, the resulting advisory opinion could force CTIA and the wireless service providers to refrain from providing these services to any political committees.

CTIA and the wireless service providers require affirmation that the Act does not impose liability on a vendor that, for whatever reason, decides not to offer services to a political committee. This can be easily accomplished in the Draft by deleting the language beginning on line 11 of page 14 and on line 6 of page 15 that states "so long as the requirements are based on commercial, rather than political,

<sup>2</sup> The Revolution Messaging, LLC comments pejoratively refer to decisions by the wireless service providers as "arbitrary" and imply on page 3 that the wireless service providers have been politically motivated when applying their commercial standards "arbitrarily to deny text message services to advocacy and political organizations." Ironically, if the Commission requires the equal treatment espoused by Revolution Messaging, LLC, it will have unwittingly forced itself to decide between revising the business model described on page 1 of providing "text messaging services to progressive non-profit organizations, labor organizations, and Democratic federal and state political committees and organizations" or risk violating the law. (Emphasis added).



Federal Election Commission  
August 7, 2012  
Page 4

considerations" and replacing it with the phrase "regardless of the eligibility criteria used." A similar unqualified response will also be necessary in the CTIA II Advisory Opinion.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Baran".

Jan Witold Baran  
Caleb P. Burns

cc: Office of General Counsel