



## State of Washington PUBLIC DISCLOSURE COMMISSION

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TO: Members, Public Disclosure Commission  
FROM: Nancy Krier, General Counsel  
DATE: February 20, 2013  
SUBJECT: Continued Discussion of Evolving Technology and Campaigns -  
Text Message Contributions Developments - Interpretations 95-05  
(*Fundraising Through 900 Telephone Numbers*) and 00-02 (*Guidelines  
for Internet Contributions*) – February 28, 2013 Meeting

### **Agenda Item**

At its February 28 meeting, the Commission is scheduled to receive more information on how text message contributions are processed. This information is part of the Commission's continued discussion of evolving technology and campaigns in its consideration of possible amendments to Interpretations 95-05 (*Fundraising Through 900 Telephone Numbers*), and 00-02 (*Guidelines for Internet Contributions*).

At the Commission's request, staff has arranged for two speakers to participate and provide more information to the Commission. They include Jared Najvar, an attorney from Houston, Texas; and, a representative from T-Mobile or the wireless industry. Mr. Najvar will participate by Skype or telephone. It is possible other speakers may wish to address the Commission as well. Background information for the discussion is provided in this memo. Staff will await further direction from the Commission before proceeding.

### **Background**

The Commission has been updating its interpretive statements after RCW 42.17 was recodified to RCW 42.17A in January 2012. The Commission has discussed possibly combining and standardizing Interpretations 95-05 and 00-02 to update the procedures for contributions made via 900 telephone numbers and the Internet, and perhaps adding procedures for text message contributions. See enclosed chart.

Beginning in May 2012, the Commission reviewed background materials and wireless text message campaign contributions information from the Federal Election Commission and two states (California and Maryland). The Commission also received stakeholder input including from CTIA – The Wireless Association, T-Mobile and others.

In December, staff informed the Commission that the Texas Ethics Commission (TEC) had recently been asked to approve text message campaign contributions. Following further discussion in December, the Commission asked staff to stay abreast of developments and explained that it will determine next steps at a future meeting. The Commission also noted that it would be useful to receive more information about the role of "aggregators" in the text message contribution process.

## **Developments**

**Texas.** In January, the TEC unanimously approved text message campaign contributions in an Advisory Opinion. The opinion was requested by Mr. Najvar, an attorney for the Harris County Republicans. The TEC was presented with two options: Option # 1 would have permitted small-dollar contributions without collecting the contributor identifying information; Option # 2 required that the committee use a series of reply text messages to collect the contributor's name, address and other information required under Texas law. The TEC approved Option # 2. See enclosed materials.

As part of that discussion, the TEC received information about the role of "aggregators." Those firms link content providers (such as political committees), wireless service providers, application providers (which convert text messages into data that can be used by content providers), and wireless consumers.

The TEC also received information about how "factoring" arrangements work. In those arrangements, the aggregator advances to the political committee a portion of the total contribution (a "factored" payment), less a fee owed to the aggregator. Then, once the cell phone bill is paid, the aggregator transfers the remaining amount of the contribution to the political committee (the "trailing" payment).

The issues identified by the TEC included:

- Whether the contributor information could be collected via text message in order to satisfy Texas reporting and recordkeeping requirements, and restrictions on anonymous contributions. (The TEC determined the information could be collected through a series of text messages – Option # 2).
- Whether the text message contributions process violated Texas law prohibiting political contributions from corporations when the aggregator advanced the factored portion of the contribution to the committee. (The TEC determined it did not violate the law under other Texas rules).
- Whether the text message contribution process included mechanisms to prohibit "overpayments" (excessive contributions) from being forwarded to a political committee. (The TEC determined there was a sufficient process proposed).

**FEC.** In late December, the FEC issued another Advisory Opinion concerning text message contributions. AO 2012-35. It addressed the interplay between text message contributions and payments made by credit and debit cards (rather than payment made through the cell phone bill). The FEC concluded that under federal laws and rules, an e-commerce transaction company may receive small-dollar contributions initiated via text message and paid for by credit or debit card, deduct its fee and forward the net amount to its political committee customers.

## Text Message Contributions

### Washington Laws/Rules

#### RE QUESTION # 1:

Declaration of policy at RCW 42.17A.005:

- “Political campaign contributions are to be fully disclosed”;
- “The concept of attempting to increase financial participation by individual contributors” is supported by Congress and “as a consequence it is desirable to have state legislation;” and,
- “Small contributions by individual contributors are to be encouraged,” and “not requiring the reporting of small contributions may tend to encourage such contributions.”

#### RE QUESTIONS # 2, # 3

RCW 42.17A requires:

- Contributions must be **deposited** w/in 5 business days of **receipt**.
- **No bundling** by non-individuals.
- **Contributor information** must be collected (for all contributions except for a limited amount of anonymous contributions) & disclosed (name, address for contributions >\$25, occupation & employer for contributions > \$100).
- There are requirements for **reporting** contributions, pledges, maintaining records.
- Many contributions must be by **“written instrument.”**

### Questions

**1. Does the Commission want to consider addressing contributions made via wireless telephone text messages?**



← See declaration of policy at RCW 42.17A.005.

**2. If the answer to # 1 is yes, does the Commission want to take a similar approach it used for addressing contributions made through telephone 1-900 numbers or the Internet, to the extent possible?**

↓ See these interpretations, and RCW 42.17A provisions summarized at left.←



*Interpretation 95-05 (Contributions can be made via 1-900 numbers):*

- The **net amount** of the contribution is the net amount the campaign actually receives after the transaction.
- The date the contribution is **“made”** is the date the telephone call is placed; it is **“received”** is when the campaign receives the lump sum check from the carrier.
- The telephone carrier acts in some ways like a post office – it is **not “bundling”** contributions.
- All requirements of RCW 42.17 and Title 390 WAC must be satisfied.



*Interpretation 00-02 (Contributions can be made via the Internet using debit or credit cards):*

- The contribution is the **full amount donated**, even though transaction fees may be assessed. Transaction fees paid to vendors are reported on a C-4 report.
- A contribution is **“made”** when contributor sends electronic confirmation authorizing the expenditure; a contribution is **“received”** on date campaign receives notice of the contribution.
- All contributions must be **deposited** within 5 days of receipt.
- Contributions made over the Internet with a credit or debit card are made with a **“written instrument.”**
- **Names and addresses** of contributors must be obtained, plus occupation/employer where required.
- All requirements of RCW 42.17 and Title 390 WAC must be satisfied.

**3. If the answer to # 1 is yes, does the Commission also wish to consider procedures being implemented by the FEC, to the extent possible within Washington’s laws and rules?**



↓The FEC:

- Allows **2 methods** to contribute via mobile phones: (1) by a text message to and from the recipient, to a code registered to a campaign; or (2) by providing a mobile phone number to a committee’s website in lieu of a credit card number & the contributor receives a text message with a PIN # & enters it into the committee’s website.
- Requires a **contributor to confirm** it intends to engage in the transaction & certify eligibility to contribute.
- **Limits contributions to \$10-\$20/transaction** and \$50/month per phone (per campaign).
- Requires contributions (minus processing fees) to be **sent to campaign** within 10 days of **receipt**, through a “factoring” process with the carrier equivalent to an extension of credit.
- Provides that **no contributor names/addresses associated with a mobile phone are provided to the political candidate or committee for contributions less than \$50/month**, per current FEC law. However, committees will have access to a gateway where the tally of contributions is maintained, allowing committees to identify phone numbers with contribution totals of \$200+ (the FEC reporting threshold).

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### ETHICS ADVISORY OPINION NO. \_\_\_\_

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January 31, 2013

*Whether a general-purpose committee may accept political contributions by text message. (AOR-576)*

The Texas Ethics Commission (“commission”) has been asked about the permissibility of accepting political contributions by text message using two proposed methods.<sup>1</sup> The requestor of this opinion is a general-purpose committee that intends to contract with a third party to initiate a text message contribution campaign for political contributions to fund its activities under Texas law. The issues raised by the requestor involve compliance with reporting and recordkeeping requirements and the prohibition on political contributions from corporations.

The requestor outlines the procedures by which political contributions are made by text message.<sup>2</sup> In essence, a person who uses a wireless (i.e. cellular) telephone service may make a contribution to an organization by using their telephone to send a text message to a designated five- or six-digit number, which is termed a “common short code.” Common short codes are leased from a wireless industry trade association called CTIA – The Wireless Association. A party, such as a charity or political committee, who wishes to interact with wireless telephone users, may register a common short code. In some cases, a wireless telephone user may also use a “keyword” in conjunction with a common short code to designate a specific contribution amount or a specific recipient.<sup>3</sup>

<sup>1</sup> The two methods are based on fundraising methods that have been approved by the Federal Election Commission (FEC) as compliant with federal campaign finance law. See FEC Advisory Opinions 2012-30 (2012) and 2012-17 (2012). Federal law does not compel a particular conclusion in this case.

<sup>2</sup> The requestor asks us to consider his request based on certain factual suppositions that were considered in several FEC advisory opinions that have addressed the issue of political contributions by text message. Our opinion is based solely on the facts as presented by the requestor and, where necessary, facts stated in FEC advisory opinions that the requestor has incorporated into his request.

<sup>3</sup> A commonly cited example provided by the requestor is the use of text messaging by the Red Cross to raise charitable contributions for earthquake relief efforts in Haiti in 2010. Wireless telephone users were able to send a text message containing the keyword “HAITI” to the short code “90999” to make a \$10 contribution per text message. See, e.g., FEC Advisory Opinion 2012-30, at n.1 (2012).

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The requestor explains that there are generally four separate parties involved in the processing and collection of contributions via text message:

1. Content providers (such as a charitable organization or a political committee) to whom contributions are given;
2. Application providers, which convert text messages received through common short codes into data that can be interpreted and used by content providers;
3. Connection aggregators (“aggregators”), which are firms that link content providers, wireless service providers, application providers, and wireless consumers; and
4. Wireless service providers, which are wireless companies that provide cellular telephone service to wireless consumers.<sup>4</sup>

The requestor states that, as described in a Federal Election Commission (FEC) opinion, an aggregator can provide services to a political committee to process political contributions.<sup>5</sup> In the proposed methods, the wireless user would send a keyword by text message to the political committee’s designated common short code. The aggregator would receive the message and then send a text message to the contributor requesting that the contributor respond (again by text) to (1) confirm their intent to make the contribution to the political committee, and (2) certify their eligibility to make a contribution under applicable law.<sup>6</sup> Upon completion of this process (called the “opt-in” process), a pre-determined charge (the amount of the intended contribution) would appear on the next wireless bill associated with that wireless user’s telephone number. The wireless

<sup>4</sup> Several FEC advisory opinions have included background information regarding text messaging contributions. *See, e.g.*, FEC Advisory Opinions 2012-26 (2012) and 2010-23 (2010).

<sup>5</sup> FEC Advisory Opinion 2012-17 (2012).

<sup>6</sup> For example, the contributor could be required to affirm that they are not a corporation and that they are using their own funds to make a contribution.

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subscriber<sup>7</sup> would be required to pay the charged amount to their wireless service provider. However, due to the lag time associated with wireless billing cycles, the political committee and the aggregator would enter into an agreement (the “factoring” arrangement described in more detail below), by which the aggregator would first advance to the political committee a *portion* of the total opt-in contributions received by the aggregator over a designated period of time (known as the “factored” payment), less a fee owed to the aggregator.<sup>8</sup>

Subsequently, after the wireless subscriber pays the telephone bill, the wireless service provider would transfer the contributed funds, less a transaction fee, to the aggregator. After the aggregator receives payment from the wireless service provider, the aggregator would transfer the remaining amount owed to the political committee (known as the “trailing payment”). This trailing payment would essentially consist of the amount of the contribution confirmed by the wireless user and paid to the wireless subscriber’s account, less the amount already advanced to the committee by the aggregator and the transaction fees charged by the aggregator and the wireless service provider. The requestor states that wireless service providers have limited contributions by text message to \$10 or \$20 per text message.

Under the first proposed method, the aggregator would provide to the political committee the ten-digit telephone number associated with each contribution, the amount and date of each contribution, and the fact that the contributor indicated their agreement to have the contribution charged to their wireless bill and indicated their eligibility to contribute. However, the aggregator would not provide contributors’ names and addresses to the political committee. The aggregator would also keep a “running, real-time tally” of the dollar amount of contributions made via text message from a particular telephone

<sup>7</sup> A wireless subscriber is a person whom a wireless service provider would bill. A wireless user is a person who uses a wireless telephone but would not be directly responsible for payment to a wireless service provider, such as a person on a family or group plan. See FEC Advisory Opinion 2010-23 at n.1 (2010). Thus, it is possible for a wireless user to send a text message that results in a charge applied to and ultimately paid by the person who subscribes to the wireless telephone service.

<sup>8</sup> For example, the aggregator may assess all of the opt-ins that it received between Day 1 and Day 7 and, based on that data, transmit a factored payment on Day 10.

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number, and the political committee would have “real-time secure access to the [aggregator’s] gateway where the tally of contributions will be maintained, allowing [the political committee] to identify [telephone] numbers that are associated with contributions and will display the aggregate amount contributed from each telephone number.” The requestor states that, through this gateway, it can block contributions from any telephone number for any reason (for example, the political committee can block further contributions from a telephone number once the contributions from that telephone number exceed \$50 in a reporting period).

The second proposed method would proceed as the first, but with additional steps added so that the campaign treasurer of the political committee would be able to collect additional identifying information from text message contributors. The additional identifying information would permit the contributions made by text message to be aggregated with contributions made by other means by the same contributor. Under this second method, after the contributor responds affirmatively to confirm the contribution and the contributor’s eligibility to contribute, the application provider (or third party aggregator, as suggested by the requestor) would send a series of text messages requesting required information, such as the contributor’s name, address, and occupation. The contributor could then submit the additional information by reply text messages. Alternatively, the contributor could submit the additional information by completing a form on the application provider’s website (a link to the webform would be provided by the application provider via text message). The application provider would then provide the contributors’ information to the political committee.

### **Recordkeeping and Reporting Requirements**

The first issue is whether the campaign treasurer of the political committee would be in compliance with the reporting and recordkeeping requirements of Title 15 of the Election Code by (1) monitoring incoming text contributions to block any contributions that would aggregate in excess of \$50 from any single telephone number in a reporting period and

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(2) reporting the total of all accepted contributions by text message as unitemized contributions.

Section 254.001 of the Election Code requires a campaign treasurer of a general-purpose committee to maintain a record of all reportable activity, which must contain the information that is necessary for filing required reports. Elec. Code §§ 254.001(b), (c). The information must be maintained for at least two years beginning on the filing deadline for the report containing the information in the record. *Id.* § 254.001(d). The campaign treasurer must also file periodic campaign finance reports that disclose, in part, the political contributions accepted by the committee. *Id.* § 254.031(a). Each campaign finance report must also include the amount of political contributions from each person that in the aggregate exceed \$50 and that are accepted during the reporting period by the committee required to file the report, the full name and address of the person making the contributions, and the dates of the contributions. *Id.* § 254.031(a)(1). A report must also include the total amount or a specific listing of the political contributions of \$50 or less accepted during the reporting period. *Id.* § 254.031(a)(5). In addition, a report filed for a general-purpose committee must include the principal occupation of each person from whom political contributions that in the aggregate exceed \$50 are accepted during the reporting period. *Id.* § 254.151(6).<sup>9</sup>

We previously considered the issue of anonymous political contributions in Ethics Advisory Opinion No. 207. Ethics Advisory Opinion No. 207 (1994). We held that a filer, including the campaign treasurer of a political committee, must know the name of each contributor and the amount of each contribution, regardless of the amount, in order to report the required information because of (1) the requirement to itemize political contributions if they singly or in the aggregate exceed \$50 within a reporting period and (2) the prohibition against acceptance of political contributions from corporations and labor organizations. *Id.* Thus, we determined that a political committee could not accept anonymous political contributions. *Id.*

<sup>9</sup> For a political committee filing monthly, a campaign finance report must include this information for political contributions that exceed \$10 in the aggregate. Elec. Code § 254.156. Certain other political committees must disclose this information for political contributions that exceed \$100 in the aggregate. *Id.* § 254.1541.



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Under the first proposed method, a general-purpose committee would accept political contributions from sources that are identified to the committee's campaign treasurer only by a telephone number. The telephone number information would not sufficiently identify the sources of the political contributions made by text message or allow the campaign treasurer to determine whether itemization of the contributions is required.<sup>10</sup> Therefore, the campaign treasurer would be unable to comply with the title 15 recordkeeping and reporting requirements.

Under the second proposed method, the campaign treasurer collects additional identifying information from text message contributors such that the contributions made by text message can be aggregated with other contributions made by the same contributor. If the campaign treasurer is able to obtain the name, address, and occupation information for all of the contributions made by text message, as proposed by the requestor, and properly report the contributions, then the campaign treasurer would be in compliance with these recordkeeping and reporting requirements.

### **Corporate Contribution Prohibition**

The requestor also asks whether certain payments made by an incorporated aggregator to the political committee would constitute political contributions by the aggregator to the political committee. According to the requestor's proposal, the political committee would enter into a contract with the aggregator that includes a "factoring agreement."<sup>11</sup> Under this agreement, the aggregator would first advance a portion of the total opt-ins received by the aggregator over a designated period of time, less a fee owed to the aggregator. The initial portion paid by the aggregator to the committee up-front is referred to as a "factored" payment. Factored payments could, for example, be made on a

<sup>10</sup> For example, a contributor could make a \$50 political contribution to the political committee by check in addition to five separate \$10 political contributions by text message during a single reporting period. In such circumstances, the campaign treasurer would be unaware that the contributor made political contributions in excess of \$50 during the reporting period and that all of the contributions from that contributor must therefore be itemized.

<sup>11</sup> FEC Advisory Opinion 2012-17 (2012) describes the factoring process in detail.

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weekly basis. Once the wireless telephone subscriber pays their wireless telephone bill, the wireless service provider would remit payment to the aggregator (less its transaction fee). The aggregator would then transfer the remaining balance due to the political committee as a “trailing payment,” which would represent the rest of the contribution amount (less the aggregator’s own transaction fee and the amount already advanced as a factored payment). A trailing payment could be made, for example, within 10 days of receiving payment from the wireless service provider. The aggregator would not establish a segregated account for the trailing payments, but would make the payments to the political committee from its general corporate treasury funds.

Under the stipulated facts, the aggregator would require contractual provisions in its agreement with the political committee designed to protect against overpayments through its factoring arrangement (for example, to account for the possibility of contributors refusing to pay the charges on their wireless bills). First, the aggregator would determine the amount of the factored payment based on certain variables in the ordinary course of business, including perceived risk on liabilities associated with text message programs, and the availability of funds. The aggregator may also include additional safeguards, such as reserving the right to suspend or terminate the payments at any time, require the political committee to provide a security deposit to guard against overpayments, or require that the political committee repay a factored payment in the event that a wireless telephone subscriber refuses to pay for a contribution.<sup>12</sup> These additional controls on the factored payments are intended to prevent the factored payments from being excessive. The requestor notes that this factoring arrangement would be performed in return for consideration in the form of the aggregator’s transaction fee deducted from the contribution amount.

The requestor asks whether the factored payments from the aggregator to the political committee, made in accordance with the described factoring agreement and made as part

<sup>12</sup> The requestor references the factoring agreement that was considered in FEC Advisory Opinion 2012-17. The FEC opinion noted that the aggregator offered the same service of factored payments to its non-political customers, except that factoring was mandatory for political committee customers. The requestor of this opinion did not indicate whether the aggregator, in the proposed scenario, would require factoring for all political committee customers.

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of the aggregator's usual and normal business, would constitute political contributions to the political committee. A contribution is a direct or indirect transfer of money, goods, services, or any other thing of value and includes an agreement made or other obligation incurred, whether legally enforceable or not, to make a transfer. Elec. Code § 251.001(2). The term includes a loan or extension of credit and a guarantee of a loan or extension of credit, but does not include a loan made in the due course of business by a corporation that is legally engaged in the business of lending money and that has conducted the business continuously for more than one year before the loan is made. *Id.* A political contribution is a campaign contribution or an officeholder contribution. *Id.* § 251.001(5). A campaign contribution is a contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office or on a measure. *Id.* § 251.001(3). An officeholder contribution is a contribution to an officeholder or political committee that is offered or given with the intent that it be used to defray expenses that are incurred by the officeholder in performing a duty or engaging in an activity in connection with the office and are not reimbursable with public money. *Id.* § 251.001(4).

We have previously held that, in order to avoid making a prohibited political contribution to a candidate, a corporation must ensure that the terms of any transaction with the candidate reflect the usual and normal practice of the industry and be typical of the terms the commercial party offers to its political and non-political customers. *See* Ethics Advisory Opinion Nos. 398 (1998) and 143 (1993). The same standard applies in considering whether a corporation makes a prohibited political contribution to a political committee such as the requestor of this opinion.<sup>13</sup>

The requestor has stipulated that the factored payments from the aggregator to the political committee would be undertaken pursuant to the aggregator's usual and normal business practice. We cannot determine in an advisory opinion what the usual and normal business practice is in the text message industry. However, if the terms of the

<sup>13</sup> A contribution does not include a transfer for consideration of anything of value pursuant to a contract that reflects the usual and normal business practice of the vendor. Ethics Commission Rules § 20.1(3).

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factoring agreement between the aggregator and the political committee reflect the usual and normal practice of the industry and are typical of the terms of agreements offered by the aggregator to other political and non-political customers, then the factored payments made in accordance with that agreement would not constitute political contributions by the aggregator to the political committee. Thus, the political committee would not be prohibited from accepting the factored payments from the aggregator.

### **SUMMARY**

A general-purpose committee may accept political contributions by text message if the committee's campaign treasurer is able to obtain the contributor information necessary to comply with the reporting requirements of Title 15 of the Election Code. A general-purpose committee would not be prohibited from accepting certain factored payments described in this opinion from a connection aggregator if the terms of the factoring agreement between the aggregator and the political committee reflect the usual and normal practice of the industry and are typical of the terms of agreements offered by the aggregator to other political and non-political customers.

Contributor texts "DONATE" (keyword) to "12345" (committee's designated short code)

OPTION 1

If the contributor responds affirmatively, the "opt-in" process is complete; the contribution amount is added to the contributor's next cell phone bill

Aggregator will provide the committee with:

- (i) the ten-digit phone number associated with the contribution,
- (ii) amount and date of the contribution,
- (iii) the fact that the contributor clicked "YES" or "Y" in response to the question regarding whether they agreed to have the contribution charged to their wireless bill, and
- (iv) the fact that the contributor clicked "YES" or "Y" in response to the affirmation question indicating their eligibility to contribute.

Aggregator receives the text message and responds, asking contributor to respond by text to (1) confirm intent to make a contribution to the committee and (2) certify eligibility to make a contribution under applicable law.

OPTION 2

Contributor responds affirmatively

Aggregator then sends another text, which could be as follows:

**Thx for contributing! State law reqs best effort 2 get&report name, address & occupation 4 political contributions. Visit <http://rev.ms/info> or reply OK**

If the contributor clicks the link, he will be presented with a webform where he can submit the required recordkeeping information (name, address and occupation).

If the contributor instead replies "OK" by text, he will receive a series of follow-up texts to which he would respond with the recordkeeping information.

**Contributor provides the information:** the contribution is processed and recordkeeping data is provided to the committee

**Contributor fails to provide the information:**

(1) If permitted by the Commission, the aggregator may still process the *first* contribution from any unique phone number and block any future contributions until that contributor provides the information.

(2) Alternatively, if the Commission decides the recordkeeping information must be provided to process even the first contribution from any unique phone number, the aggregator can refuse to process the contribution, and indicate such to the contributor unless he responds with the requested information.