

## FEC Advisory Opinion Corner

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September 2012

The Federal Election Commission (FEC) recently took action on several advisory opinion requests. Four recent opinions are discussed in detail below.

### **Web Platform to Make Contributions: Advisory Opinion 2012-22 (Skimmerhat)**

In Advisory Opinion 2012-22, the FEC approved a web-based program (skimmerhat.com) whereby a person may search for federal candidates using different criteria, such as geographic location or positions on issues. In addition, people will be able to make campaign contributions to candidates through this web site. When making a contribution through this platform, Skimmerhat will charge users a processing and convenience fee of eight percent of any campaign contribution made.

In analyzing numerous aspects of Skimmerhat's proposal, the FEC concluded that the receipt of earmarked contributions will not be an in-kind contribution to a federal candidate since the processing of the political contributions will be a service to the contributors and not a service to the political committees. Moreover, the eight percent fee will not count against an individual's contribution limit to a candidate.

### **PAC Solicitation: Advisory Opinion 2012-23 (Snake River Sugar Company)**

In Advisory Opinion 2012-23, sought by Wiley Rein's Jan Witold Baran and D. Mark Renaud, the FEC considered whether seven sugarbeet growers associations' members, executive and administrative personnel and their families, as well as the shareholders and executive and administrative personnel of the corporate members and their families, may contribute to an agricultural cooperative's

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separate segregated fund (SSF).

After finding the seven sugarbeet growers associations (the Associations) to be trade associations under FEC regulations, the FEC examined whether the Associations and the agricultural cooperative (Cooperative) were affiliated. Noting several of the affiliation factors used by the FEC, *e.g.*, the governance of the organizations, shared officers and employees of the organizations and the funding of one organization by another, the FEC found the Associations and the Cooperative to be affiliated. In making this determination, the FEC found the “most striking indication” of affiliation to be the overlapping membership and governance of the Associations and the Cooperative.

Ultimately, the FEC concluded that a trade association affiliated with the connected organization of an SSF may solicit contributions to the SSF “in the same manner as if the trade association itself were the connected organization of the SSF.” Thus, the Associations' members, executive and administrative personnel and their families, as well as the shareholders and executive and administrative personnel of the corporate members and their families, were eligible to contribute to the Cooperative's SSF.

#### **Text Messages: Advisory Opinion 2012-26 (Cooper for Congress, m-Qube and ArmourMedia)**

In Advisory Opinion 2012-26, the FEC clarified the obligations of a congressional campaign committee when accepting political contributions by text message. (The FEC recently approved a proposal to process campaign contributions by text message. Additional information about this opinion is available in the July 2012 article, “Federal Campaign Contributions by Text Message,” in Wiley Rein's *Election Law News*, available [here](#).)

The FEC determined that the campaign committee would meet its requirements under federal campaign finance law to determine the eligibility of its contributors if it adopted certain safeguards, including:

- Registering only one short code (a five-or six-digit number to which wireless users may send a text message to access certain mobile content);
- Establishing a \$50 monthly limit on contributions from a single mobile telephone number; and
- Requiring contributors to certify their eligibility to make the contribution.

The advisory opinion also addressed the extent to which services related to text message contributions provided by vendors would constitute in-kind contributions to the campaign committee. Generally, the FEC determined that offering services to political committees on terms that reflect commercial considerations will not result in in-kind contributions to a campaign committee. As one example, the FEC stated that the campaign committee would not receive an in-kind contribution if vendors apply common commercial eligibility requirements before permitting a congressional campaign committee to participate in a text message contribution campaign. The FEC noted that this analysis would not change even if the application of such requirements permitted some—but not other campaign committees—to participate in a text message contribution campaign.

### **Text Messages: Advisory Opinion 2012-28 (CTIA–The Wireless Association)**

In Advisory Opinion 2012-28, the FEC issued another advisory opinion clarifying the requirements that apply when political contributions are made by text message. In the opinion, sought by Wiley Rein attorneys Jan Witold Baran and Caleb P. Burns, CTIA–The Wireless Association (CTIA) and its wireless service providers asked a number of questions concerning the responsibilities of CTIA and its member wireless service providers under federal campaign finance laws when processing text message political contributions.

The FEC considered several specific questions about campaign contributions made by text message. Notably, the FEC clarified that political committees—and not CTIA and wireless service providers—are responsible for determining whether a potential contributor is an eligible contributor under federal campaign finance laws and ensuring compliance with reporting and recordkeeping obligations. In addition, the FEC explained that while deviations from normal business practices that constitute in-kind political contributions when discounts are provided to a political committee because “of preferential treatment outside of a business relationship,” the use of usual and normal criteria to determine rates charged to process payments will not constitute an in-kind contribution. Finally, the FEC held that wireless service providers may use common commercial criteria to accept proposals to engage in text message contributions for some political committees, but not others.