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**BY EMAIL**

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

**Re: Comments on the FEC's 2016 Technological Modernization Rulemaking**

Dear Commissioners:

On behalf of CTIA,<sup>1</sup> we are submitting these comments to the Federal Election Commission's Notice of Proposed Rulemaking ("NPRM") on Technological Modernization, announced in the Federal Register on November 2, 2016.

CTIA is encouraged that the Commission is willing to update its regulations implementing the Federal Election Campaign Act, as amended ("FECA"), to reflect new technological developments. As more fully explained below, CTIA's comments in this rulemaking focus on a particular aspect of the NPRM that is of interest to the wireless industry and consumers: a payment process called direct carrier billing ("DCB") which enables consumers to purchase goods and services by charging them to a wireless bill. The concept behind DCB is similar to – but broader in scope than – the contribution-by-text-message process approved by the Commission in Advisory Opinion 2012-28 that was issued to CTIA.

Given the anticipated future growth of DCB here in the United States, combined with the Commission's express interest in facilitating technological innovation, CTIA urges the Commission to codify the following important principles into its regulations – many of which are rooted in existing advisory opinions – to eliminate

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<sup>1</sup> CTIA® ([www.ctia.org](http://www.ctia.org)) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association's members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry, and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

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potential barriers to innovation and expand Americans' ability to participate in political campaigns:

- The Commission must recognize the unique nature of DCB transactions for purposes of the contribution forwarding requirements in order for DCB to grow as a viable means of processing political contributions.
- Liability for making unlawful contributions via DCB must lie with individual contributors and the recipient campaign committees – not wireless carriers.
- Wireless carriers should continue to have the freedom to determine which candidates will participate in the DCB process.
- Wireless carriers should continue to have rate-related flexibility when providing DCB to political customers.
- Wireless carriers need not segregate political contributions processed by DCB from general corporate funds.

After providing some initial background about the DCB process and past Commission guidance in this area, the comments below explain why the FEC should incorporate each of the above five concepts into its regulations and how the FEC can do so.

## **BACKGROUND**

### **I. CTIA Supports the Commission's Role in Facilitating and Fostering Technological Innovation.**

Internet and wireless technologies have changed the way Americans learn about and participate in political campaigns. Seventy-four percent of Americans receive at least some news on their mobile devices, a figure that is up from 52 percent only three years ago.<sup>2</sup> Since the FEC last conducted a technology-focused rulemaking

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<sup>2</sup> Amy Mitchell et al., *The Modern News Consumer: News attitudes and practices in the digital era* 4, Pew Research Center (July 7, 2016), <http://www.journalism.org/2016/07/07/pathways-to-news/>.

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nearly a decade ago,<sup>3</sup> politicians and their campaigns have evolved to keep up with this fact. To take but a few examples, the number of congressional Twitter users jumped from 69 at the beginning of 2009 to 387 as of May 2011.<sup>4</sup> In 2016, Twitter became a driving force in the presidential election.<sup>5</sup> In addition, total spending on digital political advertising in the 2016 campaign is expected to jump 5,000 percent over 2008 levels.<sup>6</sup>

Consistent with these general trends, the Commission's NPRM correctly observes that citizens are now "increasingly using cards and electronic methods to contribute to political committees," often from digital platforms accessed online or by wireless device.<sup>7</sup> Given the "growing use of electronic transactions" to fund campaigns,<sup>8</sup> the FEC has rightly decided to pursue this technology rulemaking to update the Commission's regulations for today's environment, with a presumptive eye toward reducing barriers to technological innovation.<sup>9</sup>

## **II. Direct Carrier Billing Is a Growing, Accessible, and Efficient Means of Processing Small-Dollar Transactions.**

Direct carrier billing, also referred to as mobile content billing or direct operator billing, is a payment process whereby consumers pay for various goods and services by charging them to wireless bills. DCB was introduced several years ago as a mechanism for buying small items like ringtones and wallpaper for wireless

<sup>3</sup> See Internet Communications, 71 Fed. Reg. 18,589 (Apr. 12, 2006).

<sup>4</sup> See John Parmlee & Shannon Bichard, *Politics and the Twitter Revolution: How Tweets Influence the Relationship Between Political Leaders and the Public* 8 (2013).

<sup>5</sup> See Antoaneta Roussi, *The Twitter Candidate: Donald Trump's Mastery of Social Media Is His Real Ground Game*, Salon (Feb. 18, 2016), [http://www.salon.com/2016/02/18/the\\_twitter\\_candidate\\_donald\\_trumps\\_mastery\\_of\\_social\\_media\\_is\\_his\\_real\\_ground\\_game/](http://www.salon.com/2016/02/18/the_twitter_candidate_donald_trumps_mastery_of_social_media_is_his_real_ground_game/).

<sup>6</sup> See Issie Lapowsky, *Political Ad Spending Online Is about to Explode*, Wired (Aug. 18, 2015), <https://www.wired.com/2015/08/digital-political-ads-2016/>.

<sup>7</sup> Technological Modernization, 81 Fed. Reg. 76,416, 76,417 (Nov. 2, 2016).

<sup>8</sup> See *id.* at 76,416.

<sup>9</sup> See, e.g., Statement of Commissioner Ellen L. Weintraub on the Notice of Proposed Rulemaking on Certain Internet Communications (Mar. 24, 2005) (explaining that there is widespread agreement that "any regulatory efforts should proceed on a 'less is more' theory" when it comes to Internet regulation).

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devices. DCB has evolved in a number of different ways, including as a means to process charitable donations such as to address the 2010 earthquake in Haiti, Hurricane Sandy, the Japanese tsunami, and the BP oil spill in the Gulf of Mexico.<sup>10</sup>

DCB “is especially useful to people who lack access to basic financial services, such as consumers in developing markets or younger consumers without bank or credit accounts.”<sup>11</sup> DCB transactions are faster than other payment mechanisms – entry of credit card data is not required – and the transactions typically involve a simpler process by piggy-backing on a “significant core competency” of wireless carriers: billing for small charges.<sup>12</sup>

Three types of entities work together to bring DCB services to wireless users. They include (1) application providers, (2) connection aggregators, and (3) wireless service providers.

#### **A. Application Providers**

A customer request to add a charge to his or her wireless bill generally comes through a website or application, commonly referred to as an “app,” which is a user-friendly interface that processes the customer’s instructions. Application providers develop and maintain these interfaces.

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<sup>10</sup> See *SMS Donations Answer The Call For Gulf Oil Spill Relief*, Mobile Marketing Watch (June 7, 2010), <http://mobilemarketingwatch.com/sms-donations-answer-the-call-for-gulf-oil-spill-relief-7223/>; Derek Johnson, *20% of Donations For Hurricane Sandy Relief Comes From Text Messages*, Tatango Learning Center (Nov. 13, 2012), <https://www.tatango.com/blog/20-of-donations-for-hurricane-sandy-relief-comes-from-text-messages/>; see also Stephanie Strom, *A Deluge of Donations Via Text Messages*, N.Y. Times (Jan. 18, 2010), [http://www.nytimes.com/2010/01/19/us/19charity.html?\\_r=0](http://www.nytimes.com/2010/01/19/us/19charity.html?_r=0); Brad Knickerbocker, *Japan Tsunami: Here's How You Can Help*, Christian Science Monitor (Mar. 13, 2011), <http://www.csmonitor.com/USA/2011/0313/Japan-tsunami-Here-s-how-you-can-help>.

<sup>11</sup> *Direct Carrier Billing: The world[’s] most popular mobile payment*, Mobile Payments Today (Oct. 15, 2013), <http://www.mobilepaymentstoday.com/blogs/direct-carrier-billing-the-worlds-most-popular-mobile-payment-infographic/>.

<sup>12</sup> *Direct Carrier Billing*, PC Magazine, <http://www.pcmag.com/encyclopedia/term/63496/direct-carrier-billing> (last visited Dec. 1, 2016); John BaRoss, *The Global Ascension of Direct Carrier Billing (Part 1)*, Mobile Payments Today (June 24, 2016), <http://www.mobilepaymentstoday.com/articles/the-worldwide-ascension-of-direct-carrier-billing-part-1/>.

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### **B. Connection Aggregators**

The application providers must be connected to wireless service providers' networks to utilize the DCB process and to ensure that charges requested by a customer on an application provider's website or app are properly placed on the customer's wireless bill. Connection aggregators are the intermediaries that provide the connection to multiple wireless networks. Connection aggregators have authorized connections to multiple wireless networks and maintain the security, technical, and service level requirements of each wireless network.

### **C. Wireless Service Providers**

Referred to by many names (wireless carriers, mobile operators, wireless networks), these are the companies from which wireless subscribers purchase their mobile phone service.

To initiate a DCB transaction, the customer accesses an application to request that a charge be added to the customer's wireless bill. At the conclusion of the customer's billing period, the wireless carrier includes the charge on the customer's wireless bill and sends it to the customer. The customer typically has thirty days to pay the bill. Upon payment, the wireless carrier will deduct its fee for the DCB transaction and forward the remaining funds to the connection aggregator within approximately seven to ten days. The connection aggregator will accumulate the funds, deduct its fees, and, after a certain amount of time, transmit the remaining funds to the ultimate recipient that has contracted for the DCB services.

Importantly, wireless service providers often place spending limits on the amounts that may be processed by DCB. These limits are intended to avoid significant financial exposure in the event of billing disputes over the charges.

Finally, it is worth noting that the potential for DCB is enormous. "In 2016, direct carrier billing has expanded its global reach and is available to consumers in about 120 countries (representing over 90 percent of the world's population) and is supported by multiple carriers in each country."<sup>13</sup> Leading analysts approximate that DCB "globally supports \$12-to-\$16 billion in sales annually and is projected to grow to over to \$24 billion by 2019,"<sup>14</sup> with other sources highlighting that within

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<sup>13</sup> BaRoss, *supra* note 12.

<sup>14</sup> *Id.*

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just the past six months, direct carrier billing has expanded in countries such as Italy, Pakistan, Russia, Indonesia, Bahrain, Poland, Cambodia, and the United Kingdom.<sup>15</sup> Companies like Google also are indicating that they will accept payment by DCB, both here and abroad,<sup>16</sup> and people worldwide are using DCB to purchase everything from train tickets and taxi rides to groceries and concessions at sporting events.<sup>17</sup>

### **III. The Commission Has Already Approved Some Direct Carrier Billing Programs to Process Political Contributions.**

The Commission first considered the processing of political contributions utilizing a specific type of DCB program – one using text messages to initiate the transaction – in a 2010 advisory opinion issued to CTIA.<sup>18</sup> A wireless customer who sought to contribute to a campaign would initiate the transaction by texting a predetermined word or phrase to a five- or six-digit number, called a short code, which provides access to mobile content. The connection aggregator then sent a reply text to the customer, who would reply confirming his or her intent to contribute and make certain representations about the lawfulness of the pledged contribution. The pledged amount would then appear on the wireless customer's next bill. The customer would pay the bill and the portion that represented the pledged political contribution would be processed by the wireless carriers and connection

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<sup>15</sup> See *Boku Brings Windows 10 Carrier Billing to Russia, Poland*, DMEurope.com (Oct. 20, 2016); *Mobile Embrace Signs New Agreement with VIVA Bahrain*, MarketLine Ind. NewsWire (Oct 18, 2016); *Cellcard, Fortumo Launch Direct Carrier Billing in Cambodia*, DMAAsia (Aug. 26, 2016); Jason McGee-Abe, *Microsoft Launches UK, Italy Carrier Billing*, Global Telecoms Business (Aug. 11, 2016), <http://www.globaltelecomsbusiness.com/Article/3577693/DataPeople/26200/Microsoft-launches-UK-Italy-carrier-billing.html#.WEBc57IrJhE>; *Indosat Ooredoo, Fortumo Bring Direct Carrier Billing to Indonesia*, Telecom Asia (Aug. 11, 2016), <http://www.telecomasia.net/content/indosat-ooredoo-fortumo-bring-direct-carrier-billing-indonesia>; *Mobile Embrace Expands Carrier Billing Ops to Pakistan*, DMAAsia (July 15, 2016).

<sup>16</sup> See *Accepted payment methods*, Google Play Help, <https://support.google.com/googleplay/answer/2651410?hl=en> (last visited Dec. 1, 2016).

<sup>17</sup> See John BaRoss, *Direct Carrier Billing Makes the Transition from Digital Content to Physical Goods*, Mobile Payments Today (June 28, 2016), <http://www.mobilepaymentstoday.com/articles/direct-carrier-billing-makes-the-transition-from-digital-content-to-physical-goods-part-2/>.

<sup>18</sup> See FEC Adv. Op. 2010-23 (CTIA I) (Nov. 19, 2010).

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aggregators, in the ordinary course of business, and then transmitted to the political committee.

The Commission concluded that while the contribution-by-text-message program CTIA proposed had some permissible elements, the program as a whole did not comply with several provisions of the FEC's regulations.<sup>19</sup> In particular, the Commission raised three principal concerns. First, the FECA indicates that contributions are to be forwarded to recipient political committees within either 10 or 30 days, depending on the size of the contributions. However, wireless carriers' billing cycles, coupled with the time necessary for connection aggregators to collect, process, and forward the political contributions, might exceed these 10- and 30-day timeframes. Second, the lack of dedicated accounts for political contributions risked commingling with other funds of the wireless carriers and connection aggregators which is something the FEC has warned against. Third, the Commission was concerned that representations sought by the connection aggregators regarding the lawfulness of the contributions may be insufficient to completely exempt from liability the companies involved in processing and forwarding the contributions.

Two years later, the FEC considered a request from a company called m-Qube that built upon the CTIA proposal. As before, an individual would text a short code, and m-Qube, as the connection aggregator, would follow-up with a text message asking the individual to confirm his or her eligibility to contribute. At that point, a charge would be placed on the individual's wireless bill. Under the program, contributions would be limited to \$50 per month for each wireless number, and a "factoring" program would be employed whereby the recipient political committee would sell its accounts receivable – *i.e.*, the total amount of the pledged contribution – to m-Qube in exchange for an expedited, discounted payout made on a weekly basis.

The Commission responded favorably to m-Qube's proposal, signaling to the regulated community that the Commission's attitude toward contribution-by-text programs had changed since CTIA I.<sup>20</sup> In approving m-Qube's program, the Commission observed that the \$50-per-month limit mitigated the Commission's

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<sup>19</sup> See *id.* at 7-9.

<sup>20</sup> See, *e.g.*, FEC Adv. Op. 2012-17 (m-Qube I) at 7 n.11 (June 11, 2012) (approving m-Qube's proposal but noting that "other proposals, by m-Qube or other vendors, would provide equally viable and compliant methods of raising campaign funds through text messaging").

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previous concern about processing unlawful contributions.<sup>21</sup> The Commission further noted that the use of “factoring” – which the Commission concluded was an extension of credit and not a contribution – meant that the 10-day and 30-day deadlines set by the federal campaign finance laws for forwarding contributions did not apply.<sup>22</sup> And the Commission overruled its earlier holding that political contributions had to be kept in dedicated accounts to separate them from other funds.<sup>23</sup>

Shortly after the m-Qube opinion, the Commission issued a second opinion to CTIA.<sup>24</sup> In contrast to CTIA I, which was issued two years earlier, the Commission emphasized in CTIA II that “responsibilities rest with political committees” when determining the eligibility of a contributor to make a political contribution,<sup>25</sup> that “political committees are solely responsible for . . . the recordkeeping obligations for contributions,”<sup>26</sup> and that vendors have the power, “for commercial reasons, to accept only [DCB-like] proposals from some political committees and not others.”<sup>27</sup>

The FEC followed up the CTIA II and m-Qube opinions by issuing a separate opinion to AT&T on pricing.<sup>28</sup> There, the Commission held that a wireless carrier could establish a different rate structure for processing political contributions by text message than it does when traditional commercial goods and services are sold via the same means. In so holding, the Commission acknowledged that customer responses to pricing structures – including knowledge that if the standard pricing structure applied, a “significant portion” of a customer’s funds would be going to fees rather than to the intended political committee recipient – meant that wireless carriers should have flexibility to set different rate structures for political committees than for transactions involving traditional business customers.

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<sup>21</sup> *See id.* at 6.

<sup>22</sup> *See id.* at 6-10.

<sup>23</sup> *Id.* at 11 n.15.

<sup>24</sup> FEC Adv. Op. 2012-28 (CTIA II) (Aug. 14, 2012).

<sup>25</sup> *Id.* at 5.

<sup>26</sup> *Id.* at 7.

<sup>27</sup> *Id.* at 8.

<sup>28</sup> *See* FEC. Adv. Op. 2012-31 (AT&T Inc.) (Sept. 20, 2012).



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## ARGUMENT

### **I. The Commission Must Recognize the Unique Nature of Direct Carrier Billing Transactions for Purposes of the Contribution Forwarding Requirements in Order for Such Transactions to Grow as a Viable Means of Processing Political Contributions.**

The NPRM proposes to treat all electronic contributions as “made” on the date when “the contributor authorizes the transaction.”<sup>29</sup> The practical result of the NPRM’s proposal would be that “payment processors must satisfy FECA’s forwarding requirement within 10 or 30 days of receiving a contributor’s authorization of a contribution, even if the processor has not yet received the contributor’s funds.”<sup>30</sup> While this proposal reflects how certain “modern transactions are conducted,”<sup>31</sup> it is not the way DCB services work. Wireless companies do not front – in the ordinary course of business – money to merchants, political committees, or other designated recipients of funds before the customer pays his or her wireless bill. Any regulatory requirement that would force money to be transferred to political committees sooner than standard business practices dictate will preclude wireless carriers from offering DCB as a means of processing political contributions. Doing so would also be a step backward and overturn the conclusion in the m-Qube advisory opinion – and preclude political contributions made by the processes approved therein – that offered a more flexible approach to determining when a contribution is “made.”

Similar flexibility for DCB is necessary here. Organizations and individuals from across the political spectrum have urged the Commission to make DCB-type programs available, and both politicians and the citizens they want to serve are benefiting as such programs are rolled out.<sup>32</sup> To serve this need, the Commission’s

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<sup>29</sup> Technological Modernization, 81 Fed. Reg. 76,416, 76,425 (Nov. 2, 2016).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 76,426.

<sup>32</sup> Adam Skaggs & David Earley, *Comment to FEC in Support of Text Message Contributions*, Brennan Center for Justice (June 4, 2012), <https://www.brennancenter.org/analysis/comment-fec-support-text-message-contributions>; see also Matea Gold & Anu Narayanswamy, *Trump Leans on Small Donors As Wealthy Givers Pull Back*, Wash. Post (Oct. 28, 2016), [https://www.washingtonpost.com/politics/trump-leans-on-small-donors-as-wealthy-givers-pull-back/2016/10/28/87ba7e64-9d1e-11e6-9980-50913d68eacb\\_story.html?utm\\_term=.6005cf3125f9](https://www.washingtonpost.com/politics/trump-leans-on-small-donors-as-wealthy-givers-pull-back/2016/10/28/87ba7e64-9d1e-11e6-9980-50913d68eacb_story.html?utm_term=.6005cf3125f9).

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regulation at 11 C.F.R. § 102.8(b) must recognize that a contribution by DCB is not “made” when a customer initially pledges to make a political contribution. Rather, the earliest stage in the DCB process that a contribution should be considered “made” is when the wireless service provider transfers funds from its accounts to the connection aggregator. It is only then that the funds are differentiated from other funds maintained by the wireless carriers and become a contribution. Otherwise, the length of the wireless carriers’ billing cycles will be too long to accommodate the 10- and 30-day forwarding requirements.

An allowance here would be consistent with the purposes of the 10- and 30-day forwarding rule, which “is designed to prevent individuals and entities from being able to influence or manipulate cash-on-hand figures by holding onto contributions for designated candidates.”<sup>33</sup> Here, rather than influencing a political committee’s understanding of its cash balances, the wireless carriers are simply following the same business procedures and processes for handling political contributions as they would for any other type of funds processed through DCB.

If the Commission were to conclude otherwise and hold that contributions processed by DCB are “made” at the time a customer expresses an intention to charge the contribution to his or her wireless bill, the FEC would be taking a regulatory step backward. First, such an approach could effectively end existing contribution-by-text message programs approved in the FEC’s previously described advisory opinions and, in particular, the m-Qube advisory opinion that did not rely on the date the wireless customer initiated the contribution request as the date the contribution was “made.”<sup>34</sup> Second, the length of the carriers’ billing cycles – and the fact that it could be up to 30 days (or more) for a wireless customer to receive his or her wireless bill listing the charge – would prevent carriers from processing political contributions by DCB in the future. These results would be contrary to the expressed intent of this rulemaking to conform the Commission’s rules to the technological realities of modern commerce and campaigns. Rather than stifle innovation and political participation, the Commission should recognize the distinct nature of DCB services and protect them here.

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<sup>33</sup> FEC Adv. Op. 2003-23 (WE LEAD) at 4 (Nov. 7, 2003).

<sup>34</sup> See FEC Adv. Op. 2012-17 (m-Qube I) at 10.

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## **II. Liability for Making Unlawful Contributions Via Direct Carrier Billing Must Lie with Individual Contributors and the Recipient Campaign Committees – Not Wireless Carriers.**

Federal campaign finance laws limit the ability of individuals to make political contributions in several ways. For example, there are monetary limits on the amount that an individual may contribute to a particular candidate.<sup>35</sup> Federal law also prohibits contributions from foreign nationals as well as contributions made using another's funds.<sup>36</sup> Further, corporate funds may not be used to make contributions to candidates.<sup>37</sup>

However, liability for violations of these requirements falls to the contributors,<sup>38</sup> and recipient political committees. In particular, the FECA requires the treasurer of a political committee to "keep an account of . . . all contributions received by or on behalf of such political committee."<sup>39</sup> Consequently, in its regulations and past advisory opinions, the Commission has emphasized that a "political committee, not the vendor, is responsible for determining the legality of contributions, as well as determining whether contributions, when aggregated with other contributions from the same contributors, exceed the contribution limits."<sup>40</sup>

Like other vendors, wireless carriers are not experts in federal campaign finance laws; rather, their areas of specialty are wireless technologies and processing transactions in an automated fashion. That is why the Commission has recognized that while "CTIA and the wireless service providers provide political committees with means to raise contributions[,] it is the political committees that are solely responsible for ensuring that the contributions are lawful under the Act and

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<sup>35</sup> See 52 U.S.C. § 30116(a)(1).

<sup>36</sup> See *id.* §§ 30121, 30122.

<sup>37</sup> See *id.* § 30118.

<sup>38</sup> *Id.* § 30109.

<sup>39</sup> *Id.* § 30102(c).

<sup>40</sup> FEC Adv. Op. 2009-32 (Jorgensen) at 4 n.5 (Jan. 29, 2010) (emphasis added); see also 11 C.F.R. § 103.3(b) (noting that a political committee's "treasurer shall be responsible for examining all contributions received for evidence of illegality").

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Commission regulations.”<sup>41</sup> Similarly, “the responsibility to forward to a recipient political committee” certain information, including information designed to help the political committee comply with its recordkeeping obligations, is an obligation for which the recipient political committee remains “solely responsible.”<sup>42</sup>

In recognition of the Commission’s prior, unanimous determinations about DCB initiated by text message, and to avoid discouraging wireless carriers from providing other DCB services to their customers, the FEC should affirm in its regulations that wireless carriers are not subject to liability under the FECA when providing DCB services. Importantly, as the above analysis reflects, placing liability on the individual contributors or recipient committees – but not wireless carriers – will not remove meaningful deterrents or incentivize actors to violate the campaign finance laws. It will merely place liability on those persons substantively opting into the political process rather than burdening commercial vendors who routinely process these kinds of transactions just like any other line item on a customer’s wireless bill.

### **III. Wireless Carriers Should Continue to Have the Freedom to Determine Which Candidates Will Participate in the Direct Carrier Billing Process.**

In Advisory Opinion 2012-28, the Commission recognized that wireless companies need not provide donate-by-text services to every candidate or committee. Instead, wireless providers “may decide, for commercial reasons, to accept only proposals from some political committees and not others.”<sup>43</sup>

To guide a vendor’s decision-making in this area, one option proffered by the Commission was for wireless carriers to “establish and apply eligibility criteria . . . in order to protect the commercial viability of the vendor’s program.”<sup>44</sup> In addition to criteria such as the “number of potential customers, potential for long-term

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<sup>41</sup> FEC Adv. Op. 2012-28 (CTIA II) at 7 (emphasis added); *see also* FEC Adv. Op. 2012-26 (m-Qube II) at 5-6 (Aug. 14, 2012) (as between wireless carriers, other vendors, and the political committee, the political committee “is solely responsible for determining the eligibility of its contributors”).

<sup>42</sup> FEC Adv. Op. 2012-28 (CTIA II) at 6-7.

<sup>43</sup> *Id.* at 8.

<sup>44</sup> *Id.*

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customer commitment, strength of trademark, and credit rating,”<sup>45</sup> the Commission recognized that “the protection of [a wireless carrier]’s brand and relationship with its wireless customers” is a legitimate commercial consideration.<sup>46</sup>

The reason for this is simple and well-documented: servicing controversial clients can harm a business. Last year, for example, one of the world’s largest public relations firms had a major contract terminated because the firm worked with fossil fuel industry clients, a concern echoed by firm clients Nike and Unilever.<sup>47</sup> As the editors of *PR Week* wrote some years ago:

[T]here are . . . sound business reasons for erring on the side of caution [in choosing whether to] work[] for certain types of client[s, including] staff’s qualms about working on the account[,] and a hard commercial consideration for the views of other clients, existing and prospective.<sup>48</sup>

The Commission should now affirm in its regulations the same conclusion reached in its earlier advisory opinions: wireless carriers have the flexibility to determine which candidates and committees to service based on commercial considerations, including those that relate to possible reputational harm. This regulatory recognition by the Commission would be relatively limited. Indeed, the Commission has previously gone further and held that commercial vendors could exclude wholesale sets of clients based on ideological criteria.<sup>49</sup> In fact, the Commission has recognized that “[c]ompanies often determine to direct their business activities toward one type of political orientation,” and this fact “does not, by itself, negate the merely commercial nature of an activity.”<sup>50</sup>

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<sup>45</sup> *Id.* (citing FEC Adv. Op. 2006-34 (Working Assets, Inc.) (Feb. 9, 2007)).

<sup>46</sup> FEC Adv. Op. 2012-31 (AT&T Inc.) at 4.

<sup>47</sup> Marc Gunther, *Edelman loses executives and clients over climate change stance*, The Guardian (July 7, 2015), <https://www.theguardian.com/sustainable-business/2015/jul/07/pr-edelman-climate-change-lost-executives-clients>.

<sup>48</sup> *Comment: Editorial; The cost of a moral stand*, PR Week (Nov. 8, 1996), <http://www.prweek.com/article/94054/comment-editorial-cost-moral-stand>.

<sup>49</sup> *See, e.g.*, FEC Adv. Op. 1991-32 (CEC, Inc.) (Mar. 13, 1992) (approving for-profit corporation’s business model even though it was targeted to conservative candidates only).

<sup>50</sup> FEC Adv. Op. 1994-30 (Conservative Concepts) at 6 (Oct. 28, 1994).

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**IV. Wireless Carriers Should Have Rate-related Flexibility When Providing Direct Carrier Billing to Political Customers.**

Commission precedent generally requires that goods and services be provided to political customers on the same terms as non-political customers. As the Commission summarized in a past advisory opinion issued to CTIA, “deviations from normal business practices could constitute ‘in-kind’ contributions, where CTIA and the wireless service providers provide . . . a discount to a political committee as a result of preferential treatment outside of a business relationship.”<sup>51</sup>

Even though the Commission has expressed concerns about discounts motivated by certain considerations, the Commission has nevertheless recognized that there are legitimate business reasons why wireless companies may want to establish a different rate structure for processing political contributions by text message than when traditional commercial goods and services are sold via the same means.<sup>52</sup> Evaluating the “volume of messages, refund rates, customer satisfaction, and technical level of effort” can all lead to the conclusion that wireless companies should charge different rates for political committees using DCB.<sup>53</sup>

An additional – and equally important – factor is the customer’s expectation. While some customers may not worry, for example, how much of the \$3.99 purchase price for a particular app goes to the wireless company versus the app developer, customers who give to particular causes or candidates often want to make sure that most of their money makes it to that individual or organization.<sup>54</sup> This point was expressly recognized by the Commission when it noted in the text-to-donate context that “customers who contribute via text message to political committees reasonably will expect that most of their contribution is going to the political candidate or committee of their choice and do not want a significant portion of their [contributions] siphoned off to the aggregators and wireless [service] providers.”<sup>55</sup>

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<sup>51</sup> FEC Adv. Op. 2012-28 (CTIA II) at 7.

<sup>52</sup> See FEC. Adv. Op. 2012-31 (AT&T Inc.).

<sup>53</sup> *Id.* at 4.

<sup>54</sup> See, e.g., Kyle Iboshi, *Oregon for-profit fundraisers pocketing bulk of charity donations*, KGW.com (Oct. 27, 2016), <http://www.kgw.com/news/oregon-for-profit-fundraisers-pocketing-charity-donations/343243658>.

<sup>55</sup> FEC Adv. Op. 2012-31 (AT&T Inc.) at 2 (internal quotations omitted).

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Given these facts, the Commission should codify in its regulations the basic principle that wireless carriers have the flexibility they need – again, consistent with commercially reasonable practices – to set different pricing structures for political DCB programs.

**V. Wireless Carriers Need Not Segregate Political Contributions Processed by Direct Carrier Billing from General Corporate Funds.**

In CTIA I, the Commission expressed concern – as it has in other contexts – that individual funds designated for political committees need to be kept separate from a wireless company’s other revenues.<sup>56</sup> In the m-Qube opinion, however, the Commission superseded prior advisory opinions on this point<sup>57</sup> and held that the segregation of funds is unnecessary for wireless carriers and connection aggregators that routinely track customer payments and ensure “that political contributions are properly accounted for and that [corporate] treasury funds will not be inadvertently transmitted to political committees.”<sup>58</sup>

As noted above, a core competency of wireless carriers is their ability to manage, track, and account for everything from data usage on mobile phones to small charges on phone bills. Accordingly, the Commission should affirm that establishing a burdensome, multi-layered system of accounts is unnecessary for wireless carriers providing DCB services. Codifying this is particularly important here given the possible uncertainty caused by the two conflicting advisory opinions issued by the Commission on this point.

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<sup>56</sup> See FEC Adv. Ops. 2010-23 (CTIA I), 2006-34 (Working Assets, Inc.).

<sup>57</sup> See FEC Adv. Op. 2012-17 (m-Qube I) at 11 n.15.

<sup>58</sup> *Id.* at 11.

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**VI. Recommended Regulatory Language.**

NEW SECTION

- (a) “Direct Carrier Billing” means the process by which, in the ordinary course of a wireless company’s business practices, a customer pays for goods and services (including the making of political contributions) by charging such items to that individual’s bill issued by the wireless company.
- (b) A “connection aggregator” accumulates funds from wireless companies for processing and forwarding to the ultimate recipient (including a political committee) as part of a direct carrier billing arrangement between the connection aggregator and the recipient.
- (c) A “wireless service provider” or “wireless company” provides customers with wireless services for mobile devices and bills customers for those services.
- (d) Notwithstanding any other provision of law, when providing direct carrier billing services
  - (i) A contribution that is transmitted by direct carrier billing is only “made,” for purposes of 11 C.F.R. § 102.8(b), when a wireless company transfers funds from its accounts to a connection aggregator.
  - (ii) Wireless companies are not subject to liability under The Federal Election Campaign Act of 1971, as amended (52 U.S.C. § 30101 *et seq.*), nor any corresponding FEC regulations, when providing direct carrier billing services to wireless customers in a manner consistent with standard business practices.
  - (iii) Wireless companies may decide, for commercial reasons, to provide direct carrier billing services to some political committees but not others, and such decision will not result in a prohibited contribution or expenditure.
  - (iv) Wireless companies have the flexibility to set pricing structures for direct carrier billing of political contributions that differ from other direct



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carrier billing transactions, provided that the pricing structure reflects commercial principles.

(v) A wireless company need not segregate political contributions initiated by direct carrier billing from other funds provided that, as an ordinary part of its business, the wireless company has a system for tracking customer payments to ensure that only funds designated for political contributions are transmitted to a political committee.

\* \* \*

As an alternative to inserting the language above directly into the regulation, CTIA respectfully requests that the Commission insert language into the Explanation and Justification reflecting these principles.

### CONCLUSION

Direct carrier billing of political contributions has the potential to further democratize the political process by making it easier for millions of Americans to support the candidates and causes of their choice. CTIA believes that the Commission should adopt the principles expressed and recommendations made in these comments to ensure the viability of DCB programs as a means to further political participation.

Sincerely,



Caleb P. Burns  
Andrew G. Woodson