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Washington, DC 20463

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AGENDA ITEM
For meeting of December 2, 2021

November 22, 2021

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS by RMK*
Acting General Counsel

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Assistant General Counsel

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Subject: AO 2021-11 (DSCC & DCCC) - Draft B

Attached is a proposed draft of the subject advisory opinion. We have been asked to place this draft on the Agenda by one or more Commissioners.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00pm (Eastern Time) on December 1, 2021.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2021-11

2

3 Marc E. Elias, Esq.

4 Jacquelyn K. Lopez, Esq.

5 Rachel L. Jacobs, Esq.

DRAFT B

6 Shanna M. Reulbach, Esq.

7 Elizabeth P. Poston, Esq.

8

9 Elias Law Group

10 10 G Street NE, Suite 600

11 Washington, DC 20002

12 Dear Mr. Elias and Mses. Lopez, Jacobs, Reulbach, and Poston:

13 We are responding to your request for an advisory opinion on behalf of DSCC
14 and DCCC (collectively, the “Committees” and each, individually, a “Committee”)
15 concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45
16 (the “Act”), and Commission regulations to the Committees’ short code text messaging
17 programs. The Commission concludes that text messages sent as part of these programs
18 are not public communications under the Act and Commission regulations because they
19 do not constitute a form of general public political advertising.

20 ***Background***

21 The facts presented in this advisory opinion are based on your letter received on
22 October 1, 2021, Advisory Opinion Request (“AOR”) at AOR001, and other publicly
23 available information. The Committees are “national party committees dedicated to
24 electing Democrats to the U.S. Senate and the U.S. House of Representatives.” *Id.* Both
25 Committees maintain short code texting programs “through which they send text
26 messages to their respective supporters to communicate on topics of importance and to
27 solicit contributions” (the “Texting Programs”). *Id.*

1 A short code is a “five- or six-digit number to which wireless users can send text
2 messages or opt in to access mobile content.”¹ AOR001 n.1. All short codes are
3 maintained in a single database, the Short Code Registry (formerly known as the
4 “Common Short Code Administration”), which is administered by the wireless network
5 trade association, CTIA.² The Short Code Registry oversees the registration, leasing, and
6 technical operations of short code messaging.³ Content providers, such as the
7 Committees, lease short code numbers from the Short Code Registry to disseminate
8 messages to, or collect information or funds from, wireless device users.⁴ AOR001-02;
9 *see also* Advisory Opinion 2012-31 (AT&T) at 2, n.1.

10 The implementation of the Texting Programs (and the use of short code
11 messaging in general) requires coordination between several entities. After registering
12 and leasing short code numbers from the Short Code Registry, the Committees must
13 utilize a “web application provided by a vendor to distribute Committee-drafted content
14 via text message.” AOR002. That application vendor then forwards the Committees’
15 message content to a connection aggregator, who, in turn, sends the content to the various

¹ The request describes short code text messaging by reference to Advisory Opinion 2012-31 (AT&T) (addressing rate structures for short code messaging services provided to political committees). Certain facts explaining the technical aspects of short code technology have been incorporated from that opinion where indicated herein.

² Press Release, CTIA, Short Codes Get New Lease with Redesigned Website (Sept. 7, 2017), <https://www.ctia.org/news/short-codes-get-new-lease-with-redesigned-website>. *See also* Advisory Opinion 2010-23 (CTIA – The Wireless Association) at 1.

³ *See* Short Code Registry, Frequently Asked Questions, <https://www.usshortcodes.com/learn-more/faq> (last visited Oct. 26, 2021). *See also* Advisory Opinion 2012-31 (AT&T) at 2, n.1.

⁴ Companies, for example, take advantage of short codes’ “high deliverability” rates and “easy to remember” numbers to “bring customers into the branded experience through information updates, alerts, loyalty programs, surveys, sweepstakes, and coupon offers.” Short Code Registry: What is a short code?, *supra* note 3.

1 wireless carriers (e.g., AT&T, Verizon).⁵ Finally, the wireless carriers distribute the
2 messages to their wireless users who have affirmatively opted into the Texting
3 Programs.⁶ AOR002. According to the request, “[t]he vast majority of short code
4 messages are sent and received over cellular networks,” although there are “limited
5 exceptions” where “an individual user has opted to use software that allows them to
6 receive text messages over the Internet” using an application such as Google Voice.⁷ *Id.*
7 at n.3.

8 ***Question Presented***

9 *Are text messages sent as part of the Committees’ Texting Programs public*
10 *communications under the Act and Commission regulations?*

11 ***Legal Analysis and Conclusion***

12 No, text messages sent as part of the Committees’ Texting Programs are not
13 public communications under the Act and Commission regulations because they do not
14 constitute a form of general public political advertising.

⁵ Application vendors convert text messages received through short codes into data that can be interpreted by content providers, such as the Committees. Connection aggregators link together content providers, application vendors, wireless carriers, and wireless users. Advisory Opinion 2012-31 (AT&T) at 2, n.1.

⁶ The request states that “[a]n individual can opt-in by either texting a specific keyword to the Committee’s short code (e.g., by texting BLUE to 34531) or by providing their cell phone number to the Committee on a form or webpage that requests opt-ins to a Committee’s Texting Program.” AOR002.

⁷ The Committees must pay various fees to operate their Texting Programs. Two of these fees are paid per message to the application vendor: (1) a “pass-through fee” that is eventually paid to the various wireless carriers and (2) a separate fee to cover the application vendor’s overhead costs of transmitting the messages. AOR002. The Committees additionally pay the application vendor “a fee for access to the web application that the Committees use to draft and send their [text] messages.” *Id.* Finally, the Committees pay a monthly fee to lease short code number(s) from the Short Code Registry. *Id.* This fee is collected by the application vendor and paid to the Short Code Registry. *Id.*

1 A public communication is defined as “a communication by means of any
2 broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising
3 facility, mass mailing, or telephone bank to the general public, or any other form of
4 general public political advertising.” 52 U.S.C. § 30101(22); 11 C.F.R. § 100.26. The
5 term “general public political advertising” is not defined by the Act or Commission
6 regulations. *Id.* In 2006, however, the Commission amended the definition of a “public
7 communication” to specifically exclude communications made over the internet from the
8 scope of general public political advertising, “except for communications placed for a fee
9 on another person’s Web site.”⁸

10 Because text messages sent as part of a short code messaging program are not one
11 of the forms of mass communication expressly enumerated in the statutory or regulatory
12 definitions of “public communication,” the Commission must determine whether text
13 messages sent by the Committees via the Texting Programs constitute general public
14 political advertising.⁹ Based on the facts presented, the Commission concludes they do
15 not.

16 According to the request, individual supporters of the Committees who elect to
17 receive information from the Committees via the Texting Programs affirmatively “opt-in

⁸ 11 C.F.R. § 100.26; Internet Communications, 71 Fed. Reg. 18,589 (Apr. 12, 2006) [hereinafter “Internet Comms Rulemaking”].

⁹ *See Shays v. FEC*, 337 F. Supp. 2d 28, 70 (D.D.C. 2004), *aff’d sub nom. Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (“What constitutes “general public political advertising” in the world of the Internet is a matter for the FEC to determine.”); Advisory Opinion 2012-35 (GTSG) (concluding Commission has authority to interpret the Act and its regulations with respect to emerging technologies like short codes so long as use of such new technologies does not compromise intent of the Act or regulations). *See also* Advisory Opinion 1995-09 (NewtWatch) at 2 (“The term ‘general public political advertising’ ... may be applied on a case-by-case basis to forms of communication not specifically listed in 11 C.F.R. § 110.11.”).

1 by either texting a specified keyword to the Committee’s short code ... or by providing
2 their cell phone number to the Committee on a form or webpage that requests opt-ins to a
3 Committee’s Texting Program.” AOR002. This distinguishes the communications from
4 “general public political advertising” because individuals have affirmatively consented to
5 receiving messages from the Committees through the Texting Programs, and recipient
6 information is maintained by the content provider (*i.e.* the Committees), not the wireless
7 carriers or other vendors. *Id.* Communications through the Texting Programs are
8 therefore not directed “to the general public,” but to a specific audience that has sought
9 out the communications.¹⁰ This contrasts with traditional forms of paid advertising
10 where a speaker pays to disseminate a message through a medium controlled, and to a
11 target audience established, by another party. Thus, text messages sent as part of the
12 Texting Programs are similar to speech disseminated through a political party
13 committee’s own website, which requires viewers to affirmatively access the
14 communications and which the Commission previously concluded is not a public
15 communication.¹¹ For these reasons, text messages sent as part of the Texting Programs
16 do not constitute a form of general public political advertising and, therefore, are not
17 public communications.¹²

¹¹ *Id.* at 18,598 (“[A] political party committee’s Web site cannot be a form of ‘public communication’ any more than a Web site of an individual can be a form of ‘public communication.’ In each case, the Web site is controlled by the speaker, the content is viewed by an audience that sought it out, and the speaker is not required to pay a fee to place a message on a Web site controlled by another person.”).

¹² This advisory opinion only addresses text messages sent as part of the Texting Programs. It does not address whether text messages in general are public communications under the Act and Commission regulations.

1 This response constitutes an advisory opinion concerning the application of the
2 Act and Commission regulations to the specific transaction or activity set forth in your
3 request. *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change
4 in any of the facts or assumptions presented, and such facts or assumptions are material to
5 a conclusion presented in this advisory opinion, then the requestors may not rely on that
6 conclusion as support for its proposed activity. Any person involved in any specific
7 transaction or activity which is indistinguishable in all its material aspects from the
8 transaction or activity with respect to which this advisory opinion is rendered may rely on
9 this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B). Please note that the analysis or
10 conclusions in this advisory opinion may be affected by subsequent developments in the
11 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
12 Any advisory opinions cited herein are available on the Commission’s website.

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On behalf of the Commission,

Shana M. Broussard
Chair