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September 27, 2022

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*
Acting General Counsel

Neven F. Stipanovic *NFS*
Associate General Counsel

Amy Rothstein *ALR*
Assistant General Counsel

Joanna Waldstreicher *ALR for JSW*
Attorney

Subject: AO 2022-20 (Maggie for NH) - Draft A

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 9am (Eastern Time) on September 29, 2022.

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 2022-20

2

3 Jacquelyn Lopez, Esq.

4 Varoon Modak, Esq.

5 Elias Law Group

6 10 G Street NE, Suite 600

7 Washington, DC 20002

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9

DRAFT A

10 Dear Ms. Lopez and Mr. Modak:

11 We are responding to the advisory opinion request that you submitted on behalf of
12 Maggie for NH, asking whether short code text messages containing links to “split-it”
13 fundraising pages would constitute in-kind contributions under the Federal Election Campaign
14 Act, 52 U.S.C. §§ 30101-45 (the “Act”), and Commission regulations. The Commission
15 concludes that the proposed text messages under the facts presented here would constitute in-
16 kind contributions when they contain any of the types of content described in the content
17 standards at 11 C.F.R. § 109.21(c)(2)-(5).

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on
20 September 19, 2022 (“AOR”).

21 Maggie for NH is the principal campaign committee of Maggie Hassan, U.S. Senator
22 from New Hampshire and candidate for re-election in 2022. Maggie for NH maintains a short-
23 code texting program to send text messages to its supporters on topics relevant to the campaign
24 and to solicit contributions.¹ Maggie for NH sends text messages only to individuals who have
25 affirmatively opted in to receive them, either by texting a keyword to the committee’s short code
26 number, or by providing their cell phone numbers to the committee through a form or webpage.

¹ For information on how short-code texting operates, *see, e.g.*, Advisory Opinion 2012-31 (AT&T).

1 Maggie for NH pays both per-message and flat fees to operate its short code program. The per-
2 message fees include a “pass-through fee” for each message that the committee sends, which is
3 paid to the vendor but passed along to the cellular carriers, and a per-message fee to the vendor
4 to cover the vendor’s overhead costs for transmitting the message. These per-message fees vary
5 by service and vendor, but are generally a few cents per message. The vendor also charges a fee
6 for access to the software that the Committee uses to draft and send messages. Finally, the
7 Committee pays a monthly fee to lease the short code number. These fees also vary by service
8 and vendor, but are generally up to a few hundred dollars per month. The costs to send text
9 messages linking to split-it fundraising pages are the same as the costs for sending text messages
10 linking to pages that allow contributions only to Maggie for NH.

11 Maggie for NH proposes to use its text messaging program to text links to its “split-it”
12 fundraising pages on ActBlue.com to its supporters. ActBlue’s “split-it” pages allow users to
13 make contributions to multiple federal political committees simultaneously.² Any political
14 committee that has an existing ActBlue account can create a split-it page listing any other
15 political committee that also has an existing ActBlue account, and users of the split-it page may
16 make simultaneous contributions to some or all of the listed political committees, at the users’
17 discretion. Split-it pages allow a user to enter the total amount the user wishes to contribute and
18 will automatically calculate the amount to be allocated to each recipient committee. Users can
19 change the amounts allocated to each listed political committee and can decide not to contribute
20 any amount to a listed committee. There is no additional cost to create or use a split-it page, and

² For an example of a split-it page, see <https://secure.actblue.com/donate/defendthesenate-hassan> (last visited Sept. 22, 2022). The Commission notes that ActBlue is not a party to the instant advisory opinion request, and the Commission is not opining on any of ActBlue’s activities. The Commission previously considered the application of the Act and Commission regulations to ActBlue’s split-it pages in Advisory Opinion 2014-13 (ActBlue).

1 no new account or entity is created as a result of setting up a split-it page. Funds contributed
2 through a split-it page are transmitted directly from the contributor to each recipient committee
3 according to the terms of the committee’s existing contractual relationship with ActBlue.³

4 Maggie for NH will create and administer split-it pages that list Maggie for NH and other
5 federal political committees as potential recipients of split contributions. Other recipient
6 committees could include federal candidate committees, party committees, or nonconnected
7 political committees; separate segregated funds and non-federal entities will not be included.
8 Maggie for NH asserts that it will solicit only funds that comply with the source prohibitions and
9 amount limitations of the Act and Commission regulations. Maggie for NH alone will decide
10 which political committees to list on the split-it pages.⁴ Maggie for NH further asserts that it will
11 create and administer split-it pages and solicit contributions through them, including in text
12 messages to its supporters, without the involvement of or coordination with other recipient
13 committees. Maggie for NH expects, however, to possess material, non-public information on the
14 projects, plans, activities and/or needs of the other listed committees and stipulates that “the conduct
15 prong [of the coordinated communications regulation] is met.”⁵

³ A political committee that receives contributions through a split-it page is responsible for paying any processing fees that it would ordinarily owe under the terms of its existing contractual relationship with ActBlue.

⁴ Maggie for NH states that it might separately engage in joint fundraising activities with other political committees, but any such activities would be conducted separately from the activity discussed here.

⁵ AOR004.

1 ***Question Presented***

2 *Are the costs associated with the sending of short code text messages as described in the*
3 *request in-kind contributions to the other federal political committees listed on the “split it”*
4 *fundraising pages in question?*

5 ***Legal Analysis***

6 Yes, the costs associated with the sending of short-code text messages as described in the
7 request will be in-kind contributions to other federal political committees listed on the split-it
8 fundraising pages when the text messages contain any of the types of content described in the
9 content standards at 11 C.F.R. § 109.21(c)(2)-(5).

10 Under the Act, expenditures that are coordinated with a candidate or political party
11 committee are treated as contributions to that candidate or political party committee.⁶
12 Specifically, Commission regulations provide that if a communication is “coordinated with a
13 candidate, an authorized committee, a political party committee, or an agent of any of the
14 foregoing,” the payment for the communication is an in-kind contribution to that candidate or the
15 political party committee from the payor.⁷ Commission regulations set forth a three-prong test to
16 determine whether a communication is a coordinated communication.⁸

17 The first prong is the payment prong, which requires that the communication be paid for
18 by a person other than the candidate to whom it would be a contribution.⁹ Here, this prong

⁶ 52 U.S.C. § 30116(a)(7)(B).

⁷ 11 C.F.R. § 109.21(a), (b)(1).

⁸ *Id.* § 109.21(a).

⁹ *Id.* § 109.21(a)(1).

1 would be satisfied because Maggie for NH would pay for the text messages that link to split-it
2 fundraising pages listing other political committees.

3 The second prong of the coordinated communication test is the content prong. The
4 content prong provides that a communication is a coordinated communication only if it is an
5 electioneering communication or a “public communication” that meets any of several criteria.¹⁰

6 An “electioneering communication” is defined as “any broadcast, cable, or satellite
7 communication” that refers to a clearly identified federal candidate, is publicly distributed within
8 certain time periods, and is targeted to the relevant electorate.¹¹ The proposed text messages are
9 not “broadcast, cable, or satellite communications” and, thus, are not electioneering
10 communications.

11 Therefore, only if the proposed text messages are “public communications” could they be
12 coordinated communications. A public communication is defined as “a communication by
13 means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor
14 advertising facility, mass mailing, or telephone bank to the general public, *or any other form of*
15 *general public political advertising.*”¹² In 2006, the Commission amended the definition of
16 “public communication” specifically to exclude communications made over the internet from the
17 scope of general public political advertising, “except for communications placed for a fee on
18 another person’s Web site.”¹³

¹⁰ *Id.* § 109.21(a)(2).

¹¹ 11 C.F.R. § 100.29(a).

¹² 52 U.S.C. § 30101(22) (emphasis added); *see also* 11 C.F.R. § 100.26.

¹³ 11 C.F.R. § 100.26; Internet Communications, 71 Fed. Reg. 18,589 (Apr. 12, 2006).

1 Because short-code text messages as proposed in the request are not expressly
2 enumerated in the statutory or regulatory definition of “public communication,” the Commission
3 must determine whether the proposed short code text messages constitute “general public
4 political advertising.”¹⁴ Based on the facts presented, the Commission concludes that they do.

5 The term “general public political advertising” is not defined by the Act or Commission
6 regulations.¹⁵ However, in the 2006 rulemaking concerning internet communications, the
7 Commission clarified the types of communications that qualify as “general public political
8 advertising.”¹⁶ The Commission noted that “[b]y definition, the word ‘advertising’ connotes a
9 communication for which a payment is required, particularly in the context of campaign
10 messages.”¹⁷ Additionally, there is no threshold payment amount that triggers the definition of
11 “general public political advertising”;¹⁸ even relatively low-cost paid advertising may qualify.

¹⁴ 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 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 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.”).

¹⁵ See 52 U.S.C. § 30101(22); 11 C.F.R. § 100.26.

¹⁶ Internet Communications, 71 Fed. Reg. at 18,594.

¹⁷ *Id.* (citing dictionary definitions of “advertising” that include a payment element).

¹⁸ *Id.* at 18,595 (“There is no stated threshold payment amount in the statutory definition of ‘public communication,’ and it is not clear on what statutory basis the Commission could establish one. Nor was the Commission able to establish a record that would justify a particular threshold. Congress could have chosen, but did not, to establish a specific threshold cost below which an advertisement would not be a ‘public communication.’ Thus, even late-night advertisements on small radio stations, low-cost classified ads in small circulation newspapers, and low-cost billboards in relatively remote areas are forms of ‘public communication’ under [the Act].”).

1 The Commission’s focus on whether a speaker paid to disseminate the communications
2 in question is closely related to the second key characteristic of public communications—
3 reliance on an intermediary to disseminate the message. The Commission reasoned that:

4 The forms of mass communication enumerated in the definition of “public
5 communication” in [52 U.S.C. § 30101(22)], including television, radio, and newspapers,
6 each lends itself to distribution of content through an entity ordinarily owned or
7 controlled by another person. Thus, for an individual to communicate with the public
8 using any of the forms of media listed by Congress, he or she must ordinarily pay an
9 intermediary (generally a facility owner) for access to the public through that form of
10 media each time he or she wishes to make a communication. This is also true for mass
11 mailings and telephone banks, which are other forms of “public communication” under
12 [52 U.S.C. § 30101(22)]. A communication to the general public on one’s own website,
13 by contrast, does not normally involve the payment of a fee to an intermediary for each
14 communication.¹⁹

15
16 Thus, the category of general public political advertising encompasses communications for
17 which the speaker must rely on and pay a third-party intermediary to access the speaker’s target
18 audience “for each communication.”

19 Based on the facts presented, the Commission concludes that the proposed short code text
20 messages constitute “general public political advertising.” To implement its short code text
21 messaging program, Maggie for NH relies upon and pays (directly or indirectly) multiple
22 intermediaries, including the entity from which it leases its short code, a text messaging vendor,
23 and cellular carriers. Each of these third parties provides critical technologies, infrastructure, and
24 expertise necessary for Maggie for NH to disseminate communications to its supporters using
25 short code messaging technology. In particular, Maggie for NH will pay a text messaging
26 vendor a per-message fee each time it wishes to disseminate a communication, similar to the way
27 a speaker using any of the forms of communication listed in the definition must pay a third-party

¹⁹ Internet Communications, 71 Fed. Reg. at 18,594.

1 intermediary to disseminate each communication. Text messages sent via the short code
2 program as described in the request are therefore of the same nature as communications that the
3 Commission has previously described as general public political advertising.²⁰

4 Moreover, messages sent via Maggie for NH's short code text message program are
5 distinguishable from communications the Commission has concluded are not public
6 communications. Unlike email, which has "virtually no cost[s] associated" with it, even when
7 sending "thousands of e-mails to thousands of recipients,"²¹ Maggie for NH's text message
8 program incurs per message fees as well as flat fees for the entire short code text messaging
9 program.

10 Maggie for NH's text message program is similarly distinguishable from a political party
11 committee's website.²² After a website is created, its owner does not incur transactional fees or
12 require the material participation of intermediaries to communicate with visitors to the site. As
13 discussed above, this is not the case with short code messaging programs. Because the
14 committee must rely on paid, third-party intermediaries to access its target audience via short

²⁰ See *id.* at 15,594-95. This conclusion is consistent with Advisory Opinion 2002-09 (Target Wireless). In that opinion, the Commission applied the small items disclaimer exception, 11 C.F.R. § 110.11(a)(6)(i), to paid content distributed via text message. Although the Commission did not conduct a public communication analysis, the text messages in question would not have required an exception from the disclaimer requirement unless they were public communications that otherwise would have been subject to the disclaimer requirement. Advisory Opinion 2002-09 (Target Wireless) at 4; see 11 C.F.R. § 110.11(a). See also Factual & Legal Analysis at 3-4, MURs 5401, 5422 (Texans for Henry Cuellar Congressional Campaign) (Nov. 29, 2004) (finding that campaign's robocall program was general public political advertising).

²¹ Internet Communications, 71 Fed. Reg. at 18,596 ("The Commission does not consider e-mail to be a form of 'general public political advertising' ... All of the forms of 'public communication' expressly listed by Congress normally involve at least some charge for delivery, such as telephone charges or postage.").

²² *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.").

1 code text messages, they are a form of general public political advertising. Consequently, they
2 are public communications under the Act and Commission regulations.²³

3 Because the proposed text messages are public communications, they will satisfy the
4 content prong of the coordinated communication test when they contain any of the types of
5 content described in the content standards at 11 C.F.R. § 109.21(c)(2)-(5).²⁴ Further, Maggie for
6 NH has stipulated for purposes of this advisory opinion that its proposed activity will also satisfy
7 the third and final prong of the coordinated communication test: the conduct prong.

8 Accordingly, the Commission concludes that the short-code text messages described in
9 the request will be in-kind contributions from Maggie for NH to other political committees listed
10 on Maggie for NH's split-it fundraising pages when the text messages contain any of the types of
11 content described in the content standards at 11 C.F.R. § 109.21(c)(2)-(5).

12 This response constitutes an advisory opinion concerning the application of the Act and
13 Commission regulations to the specific transaction or activity set forth in your request.²⁵ The
14 Commission emphasizes that, if there is a change in any of the facts or assumptions presented,
15 and such facts or assumptions are material to a conclusion presented in this advisory opinion,
16 then the requestor may not rely on that conclusion as support for its proposed activity. Any
17 person involved in any specific transaction or activity which is indistinguishable in all its
18 material aspects from the transaction or activity with respect to which this advisory opinion is

²³ This advisory opinion addresses only the text messages sent as part of Maggie for NH's short-code texting program as described in the request. It does not address text messages in general or any disclaimer requirements that may apply.

²⁴ The Commission lacks sufficient information about the content of the text messages to determine whether they will or will not satisfy the content prong.

²⁵ See 52 U.S.C. § 30108.

1 rendered may rely on this advisory opinion.²⁶ Please note that the analysis or conclusions in this
2 advisory opinion may be affected by subsequent developments in the law including, but not
3 limited to, statutes, regulations, advisory opinions, and case law. Any advisory opinions cited
4 herein are available on the Commission's website.

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On behalf of the Commission,

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Allen J. Dickerson
Chairman

²⁶ See *id.* § 30108(c)(1)(B).