



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**MEMORANDUM**

**TO:** The Commission

**FROM:** Office of the Commission Secretary *LC*

**DATE:** September 28 2022

**SUBJECT:** AO 2022-20 (Maggie for NH) Comment on  
Draft A and B

**Attached is AO 2022-20 (Maggie for NH) Comment on Draft A and B. This will be discussed on the Open Meeting of September 29, 2022.**

**Attachment**



September 28, 2022

**BY ELECTRONIC MAIL DELIVERY**

The Honorable Allen Dickerson, Chair  
Federal Election Commission  
1050 First Street NE  
Washington, DC 20463

**Re: Comments Regarding Advisory Opinion 2022-20 Drafts A and B**

Dear Chair Dickerson:

We submit these comments on behalf of Maggie for NH (the “Committee”) regarding Drafts A and B of Advisory Opinion 2022-20. The conclusion reached by Draft B is consistent with the plain text and purpose of 11 C.F.R. §§ 100.26 and 109.21, as well as with the Commission’s precedent regarding general public political advertising. We urge the Commission to vote to adopt Draft B.

Both Draft A and Draft B agree that the crux of the question presented is whether short-code text messages constitute “general public political advertising.” Draft B analyzes the question by beginning with the plain text meaning of the term and, consistent with Commission precedent, asking whether in sending the text messages the Committee is *paying to advertise to the general public*. As Draft B accurately describes, participants in the Committee’s short code text messaging program opt into receiving text messages from the Committee, and therefore “have sought out the speaker and speech through a forum controlled by the” Committee.<sup>1</sup> This contrasts with communications the Commission has generally found to constitute general public political advertising, which are disseminated “through a medium controlled, and to an audience established, by a third party.”<sup>2</sup> Participants in the Committee’s short code program are not part of an audience established or controlled by an intermediary (e.g., subscribers to a newspaper or viewers of a television show), and they are not receiving communications targeted to the general public. Instead, the participants have each elected to receive communications from the Committee on an *individual* basis. For these reasons, as Draft B correctly concludes, the short code text messages described in the request cannot constitute general public political advertising, and in turn also cannot constitute public communications under the Act and Commission regulations.

In contrast to this approach, Draft A does not ask whether the text messages are being advertised to the general public; rather, it asks whether there is any payment to an intermediary involved.

---

<sup>1</sup> FEC Adv. Op. 2022-20, Draft B at 7.

<sup>2</sup> *Id.*

This has never been the Commission’s test, and in fact, such a test directly contradicts existing Commission regulations. Furthermore, Draft A is premised on a fundamental misconception regarding internet communications. The draft asserts that:

[t]o implement its short code text messaging program, Maggie for NH relies upon and pays (directly or indirectly) multiple intermediaries, including the entity from which it leases its short code, a text messaging vendor, and cellular carriers. Each of these third parties provides critical technologies, infrastructure, and expertise necessary for Maggie for NH to disseminate communications to its supporters using short code messaging technology.<sup>3</sup>

The draft then contrasts the use of these intermediaries with websites, which purportedly “do[] not incur transactional fees or require the material participation of intermediaries to communicate with visitors to the site.”<sup>4</sup> However, this statement is fundamentally inaccurate. Contrary to Draft A’s assertions, very similar intermediaries are required to make websites accessible to recipients:

- Just as short code numbers must be leased from vendors, website domain names must be leased or purchased from vendors.<sup>5</sup>
- Just as short code messages require a text messaging vendor in order to be sent from a campaign through carrier networks,<sup>6</sup> websites require a hosting service in order to be made accessible by a campaign to visitors on the internet, and ongoing software and coding support to adjust content.<sup>7</sup>
- And just as short code messages require cellular carrier networks and infrastructure to be disseminated to individual recipients, websites require DNS servers<sup>8</sup> that “point[]...website visitors toward the correct IP address,” and internet service providers that allow visitors to actually access those websites.<sup>9</sup>

Each of these “third parties [also] provides critical technologies, infrastructure, and expertise necessary for” a campaign to make its website accessible to visitors. And yet a website is plainly

---

<sup>3</sup> FEC Adv. Op. 2022-20, Draft A at 7

<sup>4</sup> *Id.* at 8.

<sup>5</sup> See, e.g., HP, What Is Web Hosting and How Does It Work? (Sept. 18, 2020), <https://www.hp.com/us-en/shop/tech-takes/what-is-web-hosting>; Google Domains, <https://domains.google/> (listing annual fees to lease a domain name); BlueHost, Buy Domain Name, <https://www.bluehost.com/domains> (same).

<sup>6</sup> See, e.g., What U.S. wireless carriers support Tatango?, <https://help.tatango.com/en/articles/1678960-what-u-s-wireless-carriers-support-tatango>; Twilio, What carriers are supported on Twilio short codes?, <https://help.tatango.com/en/articles/1678960-what-u-s-wireless-carriers-support-tatango>.

<sup>7</sup> See, e.g., HP, What Is Web Hosting and How Does It Work? (Sept. 18, 2020), <https://www.hp.com/us-en/shop/tech-takes/what-is-web-hosting>.

<sup>8</sup> See Dave Johnson, What is a DNS Server, Business Insider (Feb. 16, 2021), <https://www.businessinsider.com/guides/tech/what-is-a-dns-server> (“A Domain Name System (DNS) server is a fundamental part of the backbone of the internet — without it, it would be impossible to use a web browser to find websites...[w]hen you ask your computer to load a website, the DNS server matches the website's name with the right IP address. This lets your computer find and load it properly.”).

<sup>9</sup> *Id.*; see also What is a DNS and how does it affect my internet use?, <https://www.plus.net/broadband/discover/what-is-dns-and-how-does-it-affect-my-internet/>.

*not* general public political advertising under the law – so the mere use of the basic technological infrastructure that is necessary for any type of cellular or digital communications cannot, as Draft A suggests, be sufficient to render such communications general public political advertising.

Rather, per Commission precedent, the key question in determining whether a communication constitutes general public political advertising is whether a committee “is paying for access to an established audience using a forum controlled by another person, rather than using a forum that he or she controls to establish his or her own audience.”<sup>10</sup> Here, the use of short code text messaging falls squarely into the latter category; the Committee is sending messages to a list that it owns, consisting of recipients who have proactively elected to receive the Committee’s message on an individual basis.

For the reasons described above, we respectfully request that the Commission approve Draft B and confirm that the short code text messages described in the AOR are not public communications, and therefore under the Act and Commission regulations would not constitute in-kind contributions to the other committees listed on the Committee’s “split-it” fundraising pages.

Very truly yours,



Jacquelyn Lopez  
Varoon Modak  
*Counsel to Maggie for NH*

---

<sup>10</sup> FEC, Internet Communications, 71 Fed. Reg. 18589, 18594-95 (Apr. 12, 2006).