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For meeting of December 2, 2021

November 22, 2021

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS by RMK*
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Subject: AO 2021-11 (DSCC & DCCC) - 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 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.

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

DRAFT A

12 Dear Mr. Elias and Mes. 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 public communications under the Act and Commission regulations because they
19 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.” AOR001 n. 1.¹ 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 CTIA oversees the registration, leasing, and technical
6 operations of short code messaging through the Short Code Registry.³ Content providers,
7 such as the Committees, lease short code numbers from the Short Code Registry to
8 disseminate messages to, or collect information or funds from, wireless device users.⁴
9 AOR001-02; *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, and Sprint).⁵ Finally, the wireless carriers
2 distribute the messages to their wireless users who have affirmatively opted into the
3 Texting Programs.⁶ AOR002. According to the request, “[t]he vast majority of short
4 code 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. *Id.*
7 at n. 3.

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

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 According to the Short Code Registry’s website, leasing “select short codes” (those where the lessee chooses the five- or six-digit short code number) costs \$1,000 per month. Short Code Registry, Short Code 101, <https://www.usshortcodes.com/about-short-codes/short-codes-101> (last visited Oct. 26, 2021).

1 ***Question Presented***

2 *Are text messages sent as part of the Committees' Texting Programs public*
3 *communications under the Act and Commission regulations?*

4 ***Legal Analysis and Conclusion***

5 Yes, text messages sent as part of the Committees' Texting Programs are public
6 communications under the Act and Commission regulations because they constitute a
7 form of general public political advertising.

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

17 Text messages sent as part of a short code messaging program are not one of the
18 forms of mass communication expressly enumerated in the statutory or regulatory
19 definitions of “public communication.” Neither do the Texting Programs fall under the
20 exception to the definition of “general public political advertising” for communications
21 made over the internet. As described in the request, “[t]he vast majority of short code

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

1 messages are sent and received over cellular networks.” *Id.* at n. 3. Accordingly, the
2 Commission must determine whether text messages sent by the Committees via the
3 Texting Programs fall within the “catch-all” category of general public political
4 advertising.⁹

5 The Explanation and Justification issued in connection with the 2006 Internet
6 Communications Rulemaking further clarifies the types of communications that fall
7 within the “catch-all” category of general public political advertising. Internet Comms
8 Rulemaking, 71 Fed. Reg. at 18,594. The Commission noted that “[b]y definition, the
9 word ‘advertising’ connotes a communication for which payment is required, particularly
10 in the context of campaign messages.” *Id.* (citing dictionary definitions of “advertising”
11 that include a payment element). Additionally, there is no threshold payment amount that
12 triggers the definition of “general public political advertising”;¹⁰ even relatively low-cost
13 paid advertising may qualify under Commission guidance.¹¹ The Commission’s focus on
14 whether a speaker paid to disseminate the communications in question is closely related

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.”).

¹⁰ *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].”).

¹¹ The Commission has also declined to impose a content requirement for public communications. *Id.* (“The Commission is not limiting the definition of ‘public communication’ by requiring any particular content, such as ‘express advocacy.’”).

1 to the second key characteristic of public communications—reliance on an intermediary
2 to disseminate the message. The Commission reasoned that:

3 [t]he forms of mass communication enumerated in the definition of “public
4 communication” in [52 U.S.C. § 30101(22)], including television, radio, and
5 newspapers, each lends itself to distribution of content through an entity
6 ordinarily owned or controlled by another person. Thus, for an individual to
7 communicate with the public using any of the forms of media listed by Congress,
8 he or she must ordinarily pay an intermediary (generally a facility owner) for
9 access to the public through that form of media each time he or she wishes to
10 make a communication. This is also true for mass mailings and telephone banks,
11 which are other forms of “public communication” under [52 U.S.C. § 30101(22)].
12

13 Internet Comms Rulemaking, 71 Fed. Reg. at 18,594. Thus, the “catch-all” category of
14 general public political advertising encompasses communications for which the speaker
15 must rely on and pay a third-party intermediary to access the speaker’s target audience.

16 By contrast, the Commission explained that “a communication to the general
17 public on one’s own website, by contrast, does not normally involve the payment of a fee
18 to an intermediary for each communication.” *Id.* The Commission further distinguished
19 the internet by noting that unlike television, radio, newspapers, magazines, or billboards,
20 the internet provides “relatively unlimited, low-cost capacity for communication of all
21 kinds.” *Id.* at 18,590.

22 Based on the facts presented, the text messages sent by the Committees via the
23 Texting Programs are general public political advertising.

24 To implement its Texting Programs, the Committees rely upon and pay (directly
25 or indirectly) multiple intermediaries, including CTIA and the Short Code Registry, the
26 owner of the short codes; application vendors; connection aggregators; and various
27 wireless carriers. AOR002-03. Each of these third parties provides critical technologies,
28 infrastructure, and expertise necessary for the Committees to disseminate

1 communications to their supporters using short code messaging technology. The
2 Committees pay a number of fees to operate the Texting Programs, including two per-
3 message fees, a fee for use of the web application to draft and send messages, and a
4 monthly fee to lease the short code number(s). AOR002. Text messages sent via the
5 Texting Programs are therefore of the exact nature as those types of communications the
6 Commission has previously described as general public political advertising. *See* Internet
7 Comms Rulemaking, 71 Fed. Reg. at 15,594-95.¹²

8 Additionally, the interaction between the Texting Programs and wireless users is
9 similar to the interaction between individuals and traditional forms of mass
10 communication. In the 2006 Internet Communications Rulemaking, the Commission
11 noted that individuals “passively” receive information from traditional forms of mass
12 communication. 71 Fed. Reg. at 18,590. By contrast, the Commission explained,
13 individuals must actively take steps to “find, visit, and view” websites. *Id.*

14 Like a newspaper subscription, a wireless user must opt in to the Texting Program
15 once; subsequently, the wireless user will passively receive text messages through the
16 Texting Program unless the wireless user takes steps to opt out. Moreover, the wireless
17 user does not need to “find [or] visit” the text messages once they have opted in; the text
18 messages appear on their phone. Accordingly, aside from the initial opt in, a wireless

¹² 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, one must infer that text messages are public communications for a disclaimer requirement to apply; if text messages are not public communications, application of a disclaimer exception would be unwarranted. Advisory Opinion 2002-09 (Target Wireless) at 4; *see* 11 C.F.R. § 110.11(a). *See also* Factual and 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).

1 user's interaction with the Texting Program is passive, akin to a traditional newspaper
2 subscription.¹³

3 Because text messages sent through the Texting Programs rely on paid, third-
4 party intermediaries to access their target audiences, they are a form of general public
5 political advertising, and consequently, are public communications under the Act and
6 Commission regulations.¹⁴

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

¹³ Similarly, messages sent via the Texting Program are distinguishable from email communications, which the Commission has concluded are not public communications. Internet Comms Rulemaking, 71 Fed. Reg. at 18,596 (“The Commission does not consider email 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.”). Unlike email, which has “virtually no cost[s] associated” with sending “thousands of emails to thousands of recipients,” *id.*, the Texting Programs incur per-message fees, AOR003.

¹⁴ 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. Furthermore, this advisory opinion does not address any disclaimer requirements that may apply to the communications in question because the requestors did not raise that issue in the request.

1 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

2 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