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December 13, 2021

MEMORANDUM

TO: The Commission

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

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Assistant General Counsel

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

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 15, 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

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Marc E. Elias, Esq.
Jacquelyn K. Lopez, Esq.
Rachel L. Jacobs, Esq.
Shanna M. Reulbach, Esq.
Elizabeth P. Poston, Esq.
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DRAFT C

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 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, your e-mail received
23 on December 1, 2021, AOR Supp. 001, and other publicly available information. The
24 Committees are “national party committees dedicated to electing Democrats to the U.S.
25 Senate and the U.S. House of Representatives.” *Id.* Both Committees maintain short
26 code texting programs “through which they send text messages to their respective
27 supporters to communicate on topics of importance and to solicit contributions” (the
28 “Texting Programs”). *Id.* The texts sent through these programs are sent to large groups

1 of recipients: “[T]he number of recipients of a text can differ widely depending on the
2 specific text and by committee – it may be as low as about a thousand or could be over a
3 hundred thousand.”¹

4 A short code is a “five- or six-digit number to which wireless users can send text
5 messages or opt in to access mobile content.” AOR001 n. 1.² All short codes are
6 maintained in a single database, the Short Code Registry (formerly known as the
7 “Common Short Code Administration”), which is administered by the wireless network
8 trade association, CTIA.³ CTIA oversees the registration, leasing, and technical
9 operations of short code messaging through the Short Code Registry.⁴ Content providers,
10 such as the Committees, lease short code numbers from the Short Code Registry to
11 disseminate messages to, or collect information or funds from, wireless device users.⁵
12 AOR001-02; *see also* Advisory Opinion 2012-31 (AT&T) at 2, n.1.

13 The implementation of the Texting Programs (and the use of short code
14 messaging in general) requires coordination between several entities. After registering

¹ AOR Supp. 001.

² 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.

³ 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.

⁴ *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.

⁵ 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 4.

1 and leasing short code numbers from the Short Code Registry, the Committees must
2 utilize a “web application provided by a vendor to distribute Committee-drafted content
3 via text message.” AOR002. That application vendor then forwards the Committees’
4 message content to a connection aggregator, who, in turn, sends the content to the various
5 wireless carriers (*e.g.*, AT&T, Verizon, and Sprint).⁶ Finally, the wireless carriers
6 distribute the messages to their wireless users who have affirmatively opted into the
7 Texting Programs.⁷ AOR002. According to the request, “[t]he vast majority of short
8 code messages are sent and received over cellular networks,” although there are “limited
9 exceptions” where “an individual user has opted to use software that allows them to
10 receive text messages over the Internet” using an application such as Google Voice. *Id.*
11 at n. 3.

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

⁶ 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.

⁷ 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.

1 Registry.⁸ *Id.* This fee is collected by the application vendor and paid to the Short Code

2 Registry. *Id.*

3 ***Question Presented***

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

6 ***Legal Analysis and Conclusion***

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

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

⁸ 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).

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

1 Text messages sent as part of a short code messaging program are not one of the
2 forms of mass communication expressly enumerated in the statutory or regulatory
3 definitions of “public communication.” Neither do the Texting Programs fall under the
4 exception to the regulatory definition of “general public political advertising” for
5 communications made over the internet. *See* 11 C.F.R. § 100.26. The Texting Programs
6 do not transmit any of their Short Message Service (“SMS”) or Multimedia Messaging
7 Service (“MMS”) messages over the internet. All Texting Programs messages are sent
8 through cellular networks.¹⁰

9 Accordingly, the Commission must determine whether text messages sent by the
10 Committees via the Texting Programs fall within the “catch-all” category of general
11 public political advertising.¹¹

12 The Explanation and Justification issued in connection with the 2006 Internet
13 Communications Rulemaking further clarifies the types of communications that fall
14 within the “catch-all” category of general public political advertising. Internet Comms
15 Rulemaking, 71 Fed. Reg. at 18,594. The Commission noted that “[b]y definition, the
16 word ‘advertising’ connotes a communication for which payment is required, particularly
17 in the context of campaign messages.” *Id.* (citing dictionary definitions of “advertising”

¹⁰ Recipients may have chosen to forward the cellular-network messages they receive to internet services such as Google Voice or Apple’s Text Message Forwarding service, AOR002 at n. 3, but those decisions and that internet activity fall outside the Texting Programs.

¹¹ *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 that include a payment element). Additionally, there is no threshold payment amount that
2 triggers the definition of “general public political advertising”;¹² even relatively low-cost
3 paid advertising may qualify under Commission guidance.¹³ The Commission’s focus on
4 whether a speaker paid to disseminate the communications in question is closely related
5 to the second key characteristic of public communications—reliance on an intermediary
6 to disseminate the message. The Commission reasoned that:

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

19
20 Internet Comms Rulemaking, 71 Fed. Reg. at 18,594. Thus, the “catch-all” category of
21 general public political advertising encompasses communications for which the speaker
22 must rely on and pay a third-party intermediary to access the speaker’s target audience.

23 The Act’s definition of “public communication” identifies eight specific forms of
24 communication and then includes “any *other* form of general public political

¹² *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].”).

¹³ 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 advertising.” 52 U.S.C. § 30101(22) (emphasis added). The Commission has considered
2 other types of communications that are functionally of the same nature as the eight
3 specified forms of communication to be “general public political advertising” and thus
4 also public communications.¹⁴ In MURs 5401 & 5422 (Texans for Henry Cuellar
5 Congressional Campaign), a unanimous Commission found that a campaign’s robocall
6 program “functions like” a phone bank and held it to be general public political
7 advertising and therefore a public communication.¹⁵

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

10 First, the essential nature of the Texting Programs’ communications is that they
11 consist of a single text message sent to anywhere from a thousand to more than a hundred
12 thousand recipients.¹⁶ This makes the Texting Programs’ messages most closely akin to
13 a mass mailing, which is a public communications defined in the Act as “a mailing by
14 United States mail or facsimile of more than 500 pieces of mail matter of an identical or
15 substantially similar nature within any 30-day period.” 52 U.S.C. 30101(23).

¹⁴ These eight forms of communication are communications made by broadcast, cable, satellite, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public. 52 U.S.C. § 30101(22).

¹⁵ Factual and Legal Analysis at 3-4, MURs 5401, 5422 (Texans for Henry Cuellar Congressional Campaign) (Nov. 29, 2004) (“Although the regulations do not specifically describe automated telephone broadcast advertisements as a communication requiring a disclaimer, the regulations for telephone banks, and for general public political advertising, appear applicable. An automated telephone voice broadcast program functions like a ‘telephone bank,’ even if there was no use of live operators”); Certification, MURs 5401, 5422 (Texans for Henry Cuellar Congressional Campaign) (Nov. 24, 2004).

¹⁶ “[T]he number of recipients of a text ... may be as low as about a thousand or could be over a hundred thousand.” AOR Supp. 001.

1 The Texting Programs’ messages track especially closely to “facsimiles” (aka
2 “faxes”). While individual facsimiles and text messages may be sent for free, outside
3 vendors may be paid to conduct larger-scale fax or text-message campaigns, as is
4 described in the Request. AOR002. Both facsimiles and Texting Programs messages are
5 sent via phone systems rather than the internet. The means by which mass-mailing lists
6 are assembled (whether recipients have opted to receive the communications, for
7 example) is not a factor under the statute or the regulation.

8 Second, the Committees pay outside entities to transmit each individual Texting
9 Programs message. To implement the Texting Programs, the Committees rely upon and
10 pay (directly or indirectly) multiple intermediaries, including the CTIA and the Short
11 Code Registry, the owners of the short codes; application vendors; connection
12 aggregators; and various wireless carriers. AOR002-03. Each of these third parties
13 provides critical technologies, infrastructure, and expertise necessary for the Committees
14 to disseminate communications to their supporters using short code messaging
15 technology. The Committees pay a number of fees to operate the Texting Programs,
16 including two per-message fees, a fee for use of the web application to draft and send
17 messages, and a monthly fee to lease the short code number(s). AOR002.

18 Because text messages sent via the Texting Programs are functionally of the same
19 nature as those types of communications the Commission has previously described as
20 general public political advertising, *see* Internet Comms Rulemaking, 71 Fed. Reg. at

1 15,594-95,¹⁷ and because text messages sent through the Texting Programs rely on paid,
2 third-party intermediaries to access their target audiences, they are a form of general
3 public political advertising, and consequently are public communications under the Act
4 and Commission regulations.¹⁸

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

¹⁷ *See* 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).

¹⁸ 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 conclusions in this advisory opinion may be affected by subsequent developments in the

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

3 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