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By Office of the Commission Secretary at 4:22 pm, Sep 27, 2022



FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 22-49-B
AGENDA ITEM
For meeting of September 29, 2022
SUBMITTED LATE

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 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 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

8

9

DRAFT B

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 not constitute in-
16 kind contributions.

17 ***Background***

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

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

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

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

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

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 through a split-it page are transmitted directly from the contributor to each recipient committee
2 according to the terms of the committee’s existing contractual relationship with ActBlue.³

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

14 ***Question Presented***

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

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.

1 ***Legal Analysis***

2 No, the costs associated with the sending of short-code text messages as described in the
3 request are not in-kind contributions to other federal political committees listed on the split-it
4 fundraising pages.

5 Under the Act, expenditures that are coordinated with a candidate or political party
6 committee are treated as contributions to that candidate or political party committee.⁵
7 Specifically, Commission regulations provide that if a communication is “coordinated with a
8 candidate, an authorized committee, a political party committee, or an agent of any of the
9 foregoing,” the payment for the communication is an in-kind contribution to that candidate or the
10 political party committee from the payor.⁶ Commission regulations set forth a three-prong test to
11 determine whether a communication is a coordinated communication.⁷

12 The first prong is the payment prong, which requires that the communication be paid for
13 by a person other than the candidate or party to whom it would be a contribution.⁸ Here, this
14 prong would be satisfied because Maggie for NH would pay for the text messages that link to
15 split-it fundraising pages listing other political committees.

16 The second prong of the coordinated communication test is the content prong. The
17 content prong provides that a communication is a coordinated communication only if it is an
18 electioneering communication or a “public communication” that meets any of several criteria.⁹

⁵ 52 U.S.C. § 30116(a)(7)(B).

⁶ 11 C.F.R. § 109.21(a), (b)(1).

⁷ *Id.* § 109.21(a).

⁸ *Id.* § 109.21(a)(1).

⁹ *Id.* § 109.21(a)(2).

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

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

14 Because short-code text messages as proposed in the request are not expressly
15 enumerated in the statutory or regulatory definition of “public communication,” the Commission
16 must determine whether the proposed short code text messages constitute “general public
17 political advertising.”¹³ Based on the facts presented here, the Commission concludes they do
18 not.

¹⁰ 11 C.F.R. § 100.29(a).

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

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

¹³ *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

1 The term “general public political advertising” is not defined by the Act or Commission
2 regulations.¹⁴ However, “the Commission interprets each term listed in the definition of ‘public
3 communication’ or in [52 U.S.C. § 30120(a)] as a specific example of one form of ‘general
4 public political advertising.’”¹⁵

5 The listed forms of “general public political advertising” share several common elements,
6 one of which is that they typically require the person making the communication to pay to use a
7 third party’s platform to gain access to the third party’s audience.¹⁶ For example, when a
8 political committee places an advertisement in a newspaper, it pays to convey its message to the
9 newspaper’s readers, many of whom may have little or no interest in receiving the committee’s
10 communications and do so only incidentally while reading the news.¹⁷ Similarly, in the online
11 context, a political committee pays to place a communication on a third party’s website to reach
12 the website’s users. Again, many of these people may have little to no interest in receiving the
13 communication and do so only because they wish to use the third party’s website.

14 In contrast, according to the request, supporters of Maggie for NH who elect to receive
15 information from the committee via text message “must affirmatively opt-in to receive short

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.”).

¹⁴ *Id.*

¹⁵ *See* Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 76,962, 76,963 (Dec. 13, 2002).

¹⁶ *See* Internet Communications, 71 Fed. Reg. at 18,594-95 (“[T]he advertiser 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.”)

¹⁷ *See id.* at 18,590 (“A number of commenters also noted that the Internet differs from traditional forms of mass communication because individuals must generally be proactive in order to access information on a website, whereas individuals receive information from television or radio the instant the device is turned on, or passively view a billboard while driving or walking down a street.”).

1 code text messages,”¹⁸ either by texting a specified keyword to Maggie for NH’s short code
2 number, or by providing their cell phone number through a form or webpage provided by the
3 committee. Maggie for NH “only sends text messages to Subscribers who have opted into
4 receiving messages from the Committee.”¹⁹ Participants in the committee’s short code program
5 therefore have sought out the speaker and speech through a forum controlled by the speaker (*i.e.*,
6 the short code number the committee leases). This contrasts with traditional forms of paid
7 advertising discussed above, where a speaker pays to disseminate a message through a medium
8 controlled, and to an audience established, by a third party. Thus, text messages sent to
9 subscribers as part of Maggie for NH’s text message program are similar to speech disseminated
10 through a political committee’s own website, which the Commission previously concluded is not
11 a public communication.²⁰ For these reasons, text messages sent as described in the request do
12 not constitute a form of general public political advertising and, therefore, are not public
13 communications.²¹

14 Accordingly, based on the facts presented, the Commission concludes that, because the
15 short code text messages described in the request are not “public communications,” the proposed
16 text messages do not satisfy the content prong of the coordinated communications test. Thus,

¹⁸ AOR002.

¹⁹ *Id.*

²⁰ Internet Communications, 71 Fed. Reg. 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.”).

²¹ This advisory opinion only addresses text messages sent as described in the request. 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 requestor did not raise that issue in the request.

1 they are not in-kind contributions to the other political committees listed on the split-it
2 fundraising pages.²²

3 This response constitutes an advisory opinion concerning the application of the Act and
4 Commission regulations to the specific transaction or activity set forth in your request.²³ The
5 Commission emphasizes that, if there is a change in any of the facts or assumptions presented,
6 and such facts or assumptions are material to a conclusion presented in this advisory opinion,
7 then the requestor may not rely on that conclusion as support for its proposed activity. Any
8 person involved in any specific transaction or activity which is indistinguishable in all its
9 material aspects from the transaction or activity with respect to which this advisory opinion is
10 rendered may rely on this advisory opinion.²⁴ Please note that the analysis or conclusions in this
11 advisory opinion may be affected by subsequent developments in the law including, but not
12 limited to, statutes, regulations, advisory opinions, and case law. Any advisory opinions cited
13 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

²² Because the text messages described in the request would not satisfy the content prong of the coordinated communication test, the Commission need not, and does not, address the third and final part of the test, the conduct prong. *See* 11 C.F.R. §109.21(a)(3), (d).

²³ *See* 52 U.S.C. § 30108.

²⁴ *See id.* § 30108(c)(1)(B).