



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**STATEMENT OF
COMMISSIONERS SHANA M. BROUSSARD AND ELLEN L. WEINTRAUB
REGARDING ADVISORY OPINION 2022-20 (MAGGIE FOR NH)**

On October 4, 2022, the Commission approved an advisory opinion in response to a request from Maggie for NH (the “Committee”), the principal campaign committee of Maggie Hassan, the U.S. Senator from New Hampshire and a candidate for re-election in 2022. The request asked, in essence, whether short code text messages¹ sent to supporters who have affirmatively opted in to receive them are “public communications” under the Act and Commission regulations. The Commission concluded that they are not. We did not vote to approve Draft B, which was ultimately adopted. We write separately to explain our votes.

A public communication is defined as “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, *or any other form of general public political advertising.*”² Because short code text messages as proposed in the request are not expressly enumerated in the statutory or regulatory definition of “public communication,” the question before the Commission was whether the proposed short code text messages constitute “general public political advertising.”³

The term “general public political advertising” is not defined by the Act or Commission regulations.⁴ However, in the 2006 rulemaking concerning internet communications, the Commission clarified the types of communications that qualify as “general public political advertising.”⁵ These types of communications share two key characteristics. First, they are all

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

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

³ *See* Advisory Opinion 2012-35 (GTSG) at 4 (concluding Commission has authority to interpret Act and its regulations with respect to emerging technologies like short codes, “where the use of the technology would not compromise the 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.”).

⁴ *See* 52 U.S.C. § 30101(22); *see also* 11 C.F.R. § 100.26.

⁵ Internet Communications, 71 Fed. Reg. 18,589, 18,594 (Apr. 12, 2006). In this rulemaking, the Commission also amended the definition of “public communication” specifically to exclude communications made over the internet from the scope of general public political advertising, “except for communications placed for a fee on another person’s Web site.” 11 C.F.R. § 110.26; Internet Communications, 71 Fed. Reg. at 18,593-95.

communications for which a payment is required.⁶ There is no threshold payment amount that triggers the definition of “general public political advertising”; even relatively low-cost paid advertising may qualify.⁷ Second, all general public political advertising communications rely on an intermediary to disseminate the message. The Commission reasoned that:

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

Thus, the category of general public political advertising encompasses communications for which the speaker must rely on and pay a third-party intermediary to access the speaker’s target audience “each time he or she wishes to make a communication.”⁹

As described in the request, the proposed short code text messages share these two characteristics with the types of communications that constitute “general public political advertising.” First, to implement its short code text messaging program, the Committee pays (directly or indirectly) multiple intermediaries, including the entity from which it leases its short code, a text messaging vendor, and cellular carriers. Second, the Committee relies upon each of these third parties to provide critical technologies, infrastructure, and expertise necessary for the Committee to disseminate communications to its supporters using short code messaging technology. In particular, the Committee pays a text messaging vendor a per-message fee each time it wishes to disseminate a communication, similar to the way a speaker using any of the types of communication listed in the definition must pay a third-party intermediary to disseminate each communication. Text messages sent via the short code program as described in the request are therefore of the same

⁶ “By definition, the word ‘advertising’ connotes a communication for which a payment is required, particularly in the context of campaign messages.” Internet Communications, 71 Fed. Reg. at 18,594 (citing dictionary definitions of “advertising” that include a payment element).

⁷ *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].”).

⁸ *Id.* at 18,594.

⁹ *Id.*

nature as the types of communications that the Commission has previously described as general public political advertising.¹⁰

Moreover, messages sent via the Committee’s short code text message program are distinguishable from communications the Commission has concluded are not public communications. Unlike email, which has “virtually no cost[s] associated” with it, even when sending “thousands of e-mails to thousands of recipients,”¹¹ the Committee’s text message program incurs per message fees as well as flat fees for the entire short code text messaging program.¹²

The Committee’s text message program is similarly distinguishable from a political party committee’s website.¹³ After a website is created, its owner does not incur transactional fees or require the material participation of intermediaries to communicate with visitors to the site. As discussed above, this is not the case with short code messaging programs. Because the committee must rely continuously on paid, third-party intermediaries to access its target audience via short code text messages, they are a form of general public political advertising. Consequently, they are public communications under the Act and Commission regulations.

In the advisory opinion, our colleagues argue that the listed types of communications share an additional requirement: “[The listed types of communications] typically require the person making the communication to pay to use a third party’s platform to gain access to the third party’s audience.”¹⁴ In contrast, the advisory opinion goes on, “supporters of Maggie for NH who elect to receive information from the committee via text message ‘must affirmatively opt-in to receive short code text messages...’”¹⁵ “Participants in the committee’s short code program therefore have sought out the speaker and speech through a forum controlled by the speaker (*i.e.*, the short code number the committee leases).”¹⁶

¹⁰ 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).

¹¹ 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.”).

¹² AOR002.

¹³ 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.”).

¹⁴ Advisory Opinion 2022-20 (Maggie for NH) at 4.


¹⁵ *Id.* at 5 (citing AOR002).

¹⁶ Advisory Opinion 2022-20 (Maggie for NH) at 5.

But the advisory opinion ignores a glaring deviation from this ostensible “shared common element”: the Act includes “mass mailing” in its enumerated list of types of public communications.¹⁷ The Act defines “mass mailing” as “a mailing by United States mail or facsimile of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period.”¹⁸ Neither the definition of “public communication” nor the definition of “mass mailing” exclude mailings or faxes sent to individuals who have assented to receive them, such as by providing their mailing address or fax number to the political committee through an online or paper form. Our colleagues do not address this apparent inconsistency between their claim that “public communication” can only be one in which the speaker pays to access a third party’s audience and the plain language of the statute which includes all mass mailings with no limitation based on how the audience was assembled.¹⁹ And exempting text messages that may go to thousands or even millions of recipients from the definition of “public communication” is fundamentally inconsistent with a statutory scheme that defines more than 500 substantially similar communications as “public.”


Our role as commissioners is to enforce the laws as they are written. In our view, the text message program as described falls within the statutory definition of “public communication.” Because our colleagues were unable to persuasively harmonize their desired interpretation with the language of the statute, we were unable to vote to approve Draft B.

November 4, 2022
Date



Shana M. Broussard
Commissioner

November 4, 2022
Date



Ellen L. Weintraub
Commissioner

¹⁷ 52 U.S.C. § 30101(22) (“The term ‘public communication’ means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.”); 11 C.F.R. § 100.26.

¹⁸ 52 U.S.C. § 30101(23); 11 C.F.R. § 100.27.

¹⁹ It is also worth noting that as described in the request, the Committee would be sending text messages soliciting contributions to other political committees and would be doing so in coordination with those other political committees. AOR003-04 (“the payment and conduct standards for a coordinated communication would be met” because “the Committee will be in possession of material, non-public information on the projects, plans, activities and/or needs of the other listed committees”). Thus, even if the definition of “public communication” was limited to situations in which one entity paid to access another entity’s audience, those are not the facts presented here. As described in the request, the Committee would not solely be accessing its own audience through the text messaging program. Instead, the Committee would be providing, for free, access to the Committee’s audience *to other political committees* – the same political committees with which it stipulates it would be coordinating – for the purpose of soliciting contributions to those political committees.