

RECEIVED

By Office of General Counsel at 5:19 pm, Dec 01, 2021

RECEIVED

By Office of the Commission Secretary at 5:40 pm, Dec 01, 2021

December 1, 2021

BY ELECTRONIC MAIL DELIVERY

The Honorable Shana M. Broussard, Chairwoman
Federal Election Commission
1050 First Street NE
Washington, DC 20463

Re: Comment Regarding AO 2021-11 Draft Advisory Opinions

Dear Commissioners:

We submit these comments on behalf of the DSCC and DCCC (the “Committees”) regarding Advisory Opinion 2021-11.

For the reasons set forth below, the Committees strongly support the analysis set forth in Draft B, which acknowledges that the Committees’ short code texting programs fundamentally differ from the types of communications that qualify as “general public political advertising” under the Federal Election Campaign Act (the “Act”). In contrast, Draft A sets forth a legal test for determining whether a communication constitutes “general public political advertising” that ignores the plain text meaning of the term. Draft A asks only if a payment to a third-party vendor is involved, ignoring whether that payment is made to disseminate a communication to the general public. Such a test is a sharp departure from Commission precedent and will lead to an overbroad application of the scope of the definition of “public communication.” We therefore urge the Commission to adopt Draft B.

DISCUSSION

Citing the 2006 Internet Communications Rulemaking (the “2006 Rulemaking”), Draft A notes that the word “advertising” typically connotes a communication for which a payment is required and then concludes that if a paid intermediary is involved in distributing a communication, the communication falls within the scope of “general public political advertising.”¹ However, this analysis ignores the key phrase “general public.” In order for a payment to distribute a communication to turn the communication into general public advertising, that payment has to facilitate distributing the communication *to the general public*. Draft A ignores that fundamental,

¹ AO 2021-11 (DSCC & DCCC) Draft A at 5-6.

plain text requirement of the term and in doing so proposes an illogical, overbroad test that is at odds with Commission precedent.

First, to our knowledge, such a test has never been used by the Commission to determine whether a communication constitutes general public political advertising. In fact, this test is irreconcilable with the 2006 Rulemaking itself. The final regulation carves out from the scope of “general public political advertising” internet communications that are not placed for a fee on another person’s site, such as emails and a political committee’s own website.² Yet, these exact types of communications often involve a paid third-party intermediary that helps in distributing the communication. For example, in building out its own website, a committee typically buys a domain name and then pays a digital vendor to develop, publish and host the website. Understanding this reality, in Advisory Opinion 2011-14 (Utah Bankers Association) the Commission approved a PAC’s plan to pay for costs associated with maintaining a website without making an in-kind contribution to the benefitting candidates. The Commission found the posts were not public communications, even though the PAC intended to pay specific costs associated with the communications, including costs paid to third party intermediaries in the form of Internet vendor costs and server time.³

More importantly, the test proposed by Draft A ignores the plain text meaning of the term “general public political advertising” leading to an overbroad application of 11 C.F.R. 100.26. To provide a simple example, if a committee pays for video conferencing software to facilitate a virtual all-staff meeting, it has paid a third-party intermediary to help distribute a communication. Yet, basic logic tells us that this cannot be considered “general public political advertising.” The absurdity of this application of the test in Draft A results from ignoring whether the payment to the intermediary *is tied to accessing the general public as an audience*. Put differently, if a payment is required for something to constitute advertising, how can it be *general public* advertising if the payment that makes it advertising has no connection to distributing the communication to the general public?

Instead, the Commission should ask whether the payment to a third-party intermediary is made in order to access a general public audience. This is the test the Commission has laid out in the past, and it is the only one that makes sense given the plain text meaning of “general public political advertising.” As part of the 2006 Rulemaking, the Commission made clear that for a communication to be considered a public communication, the payor must pay the third-party intermediary “*for access to the public* through that form of media.”⁴ Further, that intermediary

² Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064-1, 49072 (July 29, 2002); Internet Communications, 71 Fed. Reg. 18589 (Apr. 12, 2006) (expressly noting that these types of internet communications still involve costs).

³ FEC Adv. Op. 2011-14 at 2, 5.

⁴ Internet Communications, 71 Fed. Reg. 18589, 18594 (Apr. 12, 2006).

must be “owned or controlled *by another person.*”⁵ Neither factor is true as applied to the Committees Texting Programs.

The Committees are not paying to access the general public. They are merely paying vendors to facilitate the sending of messages to members of their own short code list who have opted in to receive messages as part of the Texting Programs. Unlike what the Commission has previously characterized as “general public political advertising,” the Texting Programs are not a communication to the general public; they are a communication to the Committees’ own subscribers. Further, although multiple vendors are engaged to manage the technical aspects of the Texting Program, the content, timing, and audience of the messages are ultimately controlled entirely by the Committees. Though the Short Code Registry may technically “own” the short code numbers, they are leased to the Committees, and the Committees control all traffic and content that is sent via their respective short code numbers. Unlike a newspaper or television company, the vendors do not have the right to sell advertisements to the Committees’ short codes to any paying customer; only the Committees may communicate over their leased short code, meaning it is controlled entirely by the Committees and not any other person.

Finally, Draft A’s comparison to newspaper advertisements is inapposite. When a political committee pays to run an advertisement in a newspaper, it is paying to access *the newspaper’s* audience. In contrast, when the Committees send text messages using their short code, they are accessing an audience of *the Committees’ own* subscribers; individuals who opted in to receive those exact text messages, not members of the public who subscribed to a form of media that incidentally contains advertisements controlled by the newspaper. Subscribers do not “passively” encounter the text messages while reading a newspaper or turning on the television; they seek out and join the Committees’ membership lists with the affirmative knowledge that they will receive these communications.⁶

For the foregoing reasons, we urge the Commission to adopt Draft B of Advisory Opinion 2021-11.

⁵ *Id.*

⁶ Draft A’s reference to AO 2002-09 (Target Wireless) also does not apply here. In addition to failing to conclude whether text messages were public communications, it concerned payments to wireless carriers to directly advertise to their subscribers, not short code text message programs like the Committees’ communications. Thus, even if AO 2002-09 did stand for the proposition that text messages were public communications, it would not apply to the text messages at issue here.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jacquelyn Lopez". The signature is written in a cursive style with a prominent flourish at the end.

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

Counsel to DCCC and DSCC