



FEDERAL ELECTION COMMISSION

Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Office of the Commission Secretary ^{VFV}

DATE: December 15, 2021

SUBJECT: Comments on AO 2021-11 (DSCC & DCCC)

Attached are comments received from Elias Law Group.

Attachment

RECEIVED

By Office of the Commission Secretary at 3:48 pm, Dec 15, 2021

December 15, 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 DSCC and DCCC (the “Committees”) regarding Draft C of Advisory Opinion 2021-11, which the Commission issued after we submitted comments on December 1, 2021. We once again urge the Commission to adopt Draft B.

Draft C reaches the same conclusion as Draft A, using slightly different but equally flawed reasoning. Draft C ignores the plain text meaning of Commission regulations when concluding that the Committees’ texting programs (the “*Texting Programs*”) constitute “general public political advertising.” It seeks to classify the Texting Programs as such because of an apparent discomfort with the idea that a communication in the modern era can be received by large numbers of individuals without constituting “general public political advertising.” This discomfort led to an incorrect legal analysis anchored in an outdated world where political committees relied on traditional forms of advertising to reach large numbers of supporters.

We urge the Commission to adopt Draft B, which analyzes the question by looking to the actual meaning of the relevant term and not outdated notions of how political communication works.

DISCUSSION

In evaluating whether the Texting Programs constitute “general public political advertising” Draft C focuses on the size of the Committees’ text message list, noting that the “essential nature of the Texting Programs’ is that they consist of a single text message sent to anywhere from a thousand to more than a hundred thousand recipients.”¹ The Draft then goes on to compare text messages to mass mailings and faxes and notes that “[t]he means by which mass-mailing lists are assembled (whether recipients have opted to receive the communications, for example) is not a factor under the statute or the regulation.”² In other words, according to Draft C, because the

¹ FEC Advisory Opinion 2021-11 (DSCC & DCCC), Draft C at 7.

² *Id.* at 8.

Committees' Texting Programs are so popular, the Texting Programs must be "general public political advertising."

The fact that the Committees' Texting Programs reach a large number of recipients does not make them "general public political advertising." Draft C's opposite conclusion is based entirely on an outdated understanding of technology and modes of communication. In the past, to reach large numbers of individuals, committees had to rely on third party advertisers or mediums like mass mailings. That is no longer the case, as demonstrated by the Committee's ability to build its own audience.

The relevant consideration about the Committees' Texting Programs that the Commission needs to consider is not the number of recipients of the texts, but rather whether the texts are being sent to the general public. Here, they are not. And as a result, they cannot possibly be *general public* political advertising. Thanks to developments in short code technology, individuals all over the country are now able to specifically opt-in to join the Committees' Texting Programs, allowing the Committees to create *their own audience* separate and apart from the *general public*. These opt-ins, unlike a mailing list, cannot be swapped or sold.

If the Texting Programs are analogous to any other form of communication, it would be social media where individuals can decide to "follow" a political committee's social media account and opt-in to be part of the entity's audience for ongoing posts. Like a social media account that builds followers, the reason the Committees' Texting Programs sometimes reach hundreds of thousands of individuals is due to the time investment the Committees have made in recruiting their audiences and in the nationwide interest in the Committees' messages. The same is not true of mass faxes or mass mailings.

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

Very truly yours,



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