

October 1, 2021

BY ELECTRONIC MAIL DELIVERY

Office of General Counsel
Attn: Lisa J. Stevenson, Esq.
Acting General Counsel
Federal Election Commission
1050 First Street NE
Washington, DC 20463

Re: Advisory Opinion Request

Dear Ms. Stevenson:

Pursuant to 52 U.S.C. § 30108 we seek an advisory opinion on behalf of DSCC and DCCC (collectively, the “Committees” and individually a “Committee”) to confirm that short code text messages sent by the Committees are not “public communications” for purposes of the Federal Election Campaign Act of 1971 (the “Act”) and Federal Election Commission (“FEC” or the “Commission”) regulations.

I. FACTUAL DISCUSSION

DSCC and DCCC are national political party committees dedicated to electing Democrats to the U.S. Senate and the U.S. House of Representatives, respectively. The Committees currently maintain short-code texting programs¹ through which they send text messages to their respective supporters to communicate on topics of importance and to solicit contributions (the “Texting Program(s)”). An individual must affirmatively opt-in to receive short-code text messages from a Committee’s Texting Program.

¹ As explained in Advisory Opinion 2012-31 (AT&T), a short code is the five- or six-digit number to which wireless users can send text messages or opt in to access mobile content. The Common Short Code Administration oversees the technical and operational aspects of short codes, and leases short code numbers to content providers (such as the Committees). Content providers use short codes to disseminate content to wireless users who have opted to receive the messages. FEC Adv. Op. 2012-31 at 2, n. 1 (AT&T).

An individual can opt-in by either texting a specified 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. In either instance, the individual is clearly instructed that by texting the short code or by providing their phone number, they are agreeing to receive text messages from the specific Committee. An example of the language used by DSCC to obtain this consent is as follows: "By providing your cell phone number you consent to receive recurring updates from DSCC by automated text message. Txt HELP for help, STOP to end. Msg & Data rates may apply."² The format of the opt-in request varies, but it is always clear and conspicuous. For example, on an online form, this language is typically displayed directly underneath the box where the individual is asked to enter their cell phone number. In some online forms, similar language is accompanied by a box that an individual must check in order to opt in. In communications that ask individuals to text the short code number to opt-in to the Texting Program, the disclaimer language is generally provided under the request to text that number.

The Committees do not send short code text messages as part of their Texting Programs to any individuals that did not affirmatively opt-in to receive messages. The Committees use a web application provided by a vendor to distribute Committee-drafted content via text message. The vendor then sends the message to a connection aggregator, which sends it to the wireless carriers, who distribute the message to wireless users who have opted into the Texting Program.³

There are generally two types of short code messages – Short Message Service ("SMS") and Multimedia Messaging Service ("MMS"). SMS messages are text-only and are character limited; generally, a single SMS message cannot be longer than 160 to 165 characters. MMS messages are multimedia messages and can include images and video components. They are also technically character limited, but this limit is much higher (about 5,000 characters).

The Committees pay to send each message to an individual who has opted-in to receive messages through their Texting Program. There are two types of per-message fees. First, Committees pay a "pass-through fee" for each message that they send, which is paid to the vendor but passed along to the cellular carriers. Second, the Committees pay the vendor a per-message fee to cover the vendor's overhead cost of transmitting the message. The vendors also charge a fee for access to the web application that the Committees use to draft and send their messages. Finally, the Committees pay a monthly fee to lease the short code number from the

² DCCC uses similar language to obtain consent for its Texting Program.

³ The vast majority of short code messages are sent and received over cellular networks. There are limited exceptions, whereby an individual user has opted to use software that allows them to receive text messages over the Internet. For example, a cell phone user may connect their cell phone text messages to a Mac computer, or an individual may use a Google Voice phone number to sign up for the Texting Program, and will then receive the messages over the Internet.

Common Short Code Administration. This fee is collected by the vendor and then paid to the Common Short Code Administration.

II. QUESTION POSED

The Committees ask the Commission to confirm that the text messages sent as part of the Texting Programs are not “public communications” for purposes of the Act and Commission regulations.

III. LEGAL ANALYSIS

Text messages sent through the Texting Programs fall outside the scope of a “public communication” because the Committees are sending messages to their own audiences they established by collecting opt-ins from specific individuals who want to receive those messages, not by paying to access an audience controlled by a third party.

The Act defines a “public communication” to include “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.”⁴ A communication that does not fit within one of those enumerated categories is not a public communication. Text messages sent through the Texting Programs are not sent by means of a broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing,⁵ or telephone bank to the general public.⁶ Therefore, the text messages can only be a public communication if they fall within the scope of “general public political advertising.”

The term “general public political advertising” is not defined under the Act or Commission regulations. However, as part of the 2006 rulemaking on internet communications, the Commission set forth guidelines for interpreting the scope of the term and amended the definition of a “public communication” in 11 C.F.R. § 100.26 to exclude “communications over the Internet, except for communications placed for a fee on another person’s Web site.”⁷ In the accompanying Explanation and Justification for the rulemaking, the Commission explained that the word “advertising” by definition “connotes a communication for which a payment is

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

⁵ A “mass mailing” means “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.” 52 U.S.C. § 30101(23); 11 C.F.R. § 100.27.

⁶ A “telephone bank” means “more than 500 telephone calls of an identical or substantially similar nature within any 30-day period.” 52 U.S.C. § 30101(24); 11 C.F.R. § 100.28. The definition of a telephone bank on its plain text does not apply to text messages, only to telephone calls, and the FEC has not interpreted the scope of “telephone bank” to include text messages.

⁷ Internet Communications, 71 Fed. Reg. 18589 (F.E.C. 2006).

required, particularly in the context of campaign messages,” citing to a series of dictionary definitions that define an “advertisement” to mean a paid announcement in mediums like television or print.⁸ Accordingly, the Commission took the position that paid internet advertisements fall within the scope of “general public political advertising” but free internet activity does not. The rationale for the distinction was that in the context of paying to place an ad on a third party site “the 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.”⁹ Further, the Commission used this same logic to reject the argument of certain commenters that content placed on websites operated by party committees constitutes “general public political advertising.” The Commission stated, “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.”¹⁰

The Texting Programs operate exactly like the kind of free internet activity the Commission held falls outside the scope of general public political advertising. In operating the Texting Programs, the Committees are using a forum that they control, their short codes, to establish their own audiences in the form of individuals that opt-in to receive the messages. Unlike in the case of paid advertising such as TV or radio ads, the Committees are not paying for access to an established audience using a forum controlled by another person. In those instances, the advertiser pays a third party to broadcast their message to the third party’s audience – the TV or radio viewers. With the Texting Programs, like in the case of a party committee website, individuals seek out the Committees’ programs and affirmatively opt-in to receive messages. Only the Committees’ established audiences – individuals that have taken the steps to opt into the programs – receive the text messages. The forum, the short code, is controlled by DSCC or DCCC. It is used exclusively by the relevant Committee to distribute content created only by the Committee. The costs associated with running the Texting Programs as set forth above are no different than the underlying costs in running a website, such as development and hosting costs. Both types of costs allow Committees to access an audience that wishes to seek out the Committees’ messages. The fees incurred by the Committees here are not fees “to place a message on a Web site controlled by another person.” The costs associated are instead to send messages directly to the individuals who opted in to receive them, rather than to a third party to distribute to the third party’s audience. In other words, the costs are not incurred to access a third party’s audience.

⁸ *Id.* at 18594.

⁹ *Id.* at 18594-95.

¹⁰ *Id.* at 18598.

Office of the General Counsel
October 1, 2021
Page 5

For those reasons, we ask the Commission to confirm that the Texting Programs operated by the Committees are not a form of “general public political advertising” and the text messages sent through the programs are not public communications for purposes of the Act.

Very truly yours,

A handwritten signature in blue ink, appearing to be 'Marc E. Elias', written over a faint horizontal line.

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

Counsel to DCCC and DSCC