

August 9, 2022

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 Maggie for NH (the “Committee”) to confirm that short code text messages containing links to “split-it” fundraising pages (which allow contributions to multiple political committees) are not subject to the joint fundraising rules under the Federal Election Campaign Act of 1971 (the “Act”) and Federal Election Commission (the “Commission”) regulations.

Please note that Senator Hassan will appear as a candidate on the 2022 New Hampshire primary ballot, which is scheduled to take place 35 days after the submission of this request. The ability of the Committee to engage in the fundraising activities contemplated in this request will directly impact the Committee’s fundraising capabilities and the scope of its campaign activities. Therefore, pursuant to 11 C.F.R. § 112.4(b), the Committee requests that the Commission consider this request on an expedited basis and issue an advisory opinion within 20 days.

I. FACTUAL BACKGROUND

The Committee is the principal campaign committee of Senator Maggie Hassan, United States Senator for New Hampshire, and candidate for re-election in 2022.

The Committee currently maintains a short-code texting program¹ through which it sends text messages to its supporters to communicate on topics of political importance and to solicit

¹ As explained in Advisory Opinion 2012-31 (AT&T), a short code is a five- or six-digit number to which wireless users can send text messages or otherwise 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

contributions (the “Short Code Program”). An individual must affirmatively opt-in to receive short-code text messages from the Short Code Program. To opt in, individuals may either text a specified keyword to the Committee’s short code number (e.g., “Text NH2022 to 12345”), or provide their cell phone number to the Committee, through a form or webpage that requests opt-ins to the Short Code Program and provides notice that the individual is consenting to receive automated text messages from the Committee (“Subscribers”). In operating the Short Code Program, the Committee only sends text messages to Subscribers who have opted into receiving messages from the Committee. The Committee pays a fee to a text messaging vendor to send each message to each Subscriber who has opted into receiving such messages.

The Committee wishes to send short code text messages to its Subscribers containing links to “split it” fundraising pages that allow contributions to multiple federal political committees.² These types of fundraising pages are an effective fundraising strategy because they exponentially increase supporter enthusiasm by simultaneously highlighting multiple candidates. These pages also allow supporters to more efficiently participate in the political process by contributing to multiple candidates simultaneously. Notably, this Commission has unanimously opined that the use of such pages is not joint fundraising.³ Since the Commission approved of these types of fundraising pages, their use has become extremely common amongst the regulated community on both sides of the aisle.⁴

II. QUESTION PRESENTED

Are short code text messages containing links to “split-it” fundraising pages, which allow contributions to multiple federal political committees, subject to the joint fundraising rules under the Act and Commission regulations?

(such as the Committee). 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).

² The Committee notes that ActBlue allows “split it” fundraising in conjunction with nonfederal candidates and other entities that raise soft money. This request, however, is limited to raising funds in conjunction with other entities that are registered with and report to the Commission. The Committee is not seeking advice from the Commission regarding the application of state law.

³ FEC Adv. Op. 2014-13 (ActBlue) at 5.

⁴ See, e.g., ActBlue, Tandem Fundraising, <https://support.actblue.com/campaigns/contribution-form-features/tandem-fundraising/>; WinRed, Creating a Team Page, <https://support.winred.com/en/articles/3730553-creating-a-team-page>; see also CFG Action, Facebook Ad, https://www.facebook.com/ads/archive/render_ad/?id=855184792124095&access_token=EAAAbSiR67EQwBAF7SjGqDpe4ZCXCDjg7waxSg6box4FKy5MyV5qTTZAO55ESknHLYfekU3ZAqMbN399JaR4HD8wluOBbdEML0Yr4CeU4mXIlh2EOIL90MirhfssgQEdWHLIPyH9ZB25UO7TzHMTJMulumbI0QBIdEYLB0EuGyAZDZD (paid advertisement from Club for Growth Action, which is not a joint fundraising committee, linking to a WinRed split it fundraising page).

III. LEGAL ANALYSIS

Short code text messages containing links to “split it” fundraising pages would not be subject to the joint fundraising rules because the use of such messages does not constitute an agreement on the part of the committees to fundraise jointly, and because short codes text messages do not involve allocable costs that would trigger the joint fundraising rules.

A. Solicitations disseminated by one committee do not constitute an agreement on the part of the committees to fundraise jointly.

In its 2014 advisory opinion regarding “split-it” fundraising pages, the Commission noted that the use of such pages did not constitute joint fundraising because the use of such pages “does not indicate that the recipient political committees have agreed to fundraise jointly or have collectively arranged for the disposition of any contributions raised,” and that apart from the committee making the solicitation, the other committees in question “have no involvement in the creation, modification, or administration of the contribution form.”⁵

The same principle is true here, where a campaign is merely texting a split-it page to its Subscribers. Notably, the use of a “split it” fundraising page does not entail the creation, modification, or administration of a new fundraising account, entity, or even contribution form; rather, it merely involves embedding an *existing* contribution form for another committee on a fundraising page.⁶ Nor does the creation of a “split it” page entail any costs. Functionally, this is almost identical to an email or webpage containing links to the donate pages of multiple different candidates – a practice that the Commission has never treated as joint fundraising.⁷

Notably, the Commission has itself advised that fundraising on behalf of more than one committee does not necessarily constitute joint fundraising. In a 1990 rulemaking amending the language of 11 C.F.R. § 106.1, the Commission explained that “[t]he second example stated in the rules covers the costs of fundraising events where funds are collected by one committee for more than one clearly identified candidate. Such costs are to be allocated according [sic] the amount of funds received on behalf of each candidate as compared to the total receipts by all candidates. *This situation should not be confused with that described in 11 CFR § 102.17, which concerns joint fundraising activities conducted by more than one committee.*”⁸

⁵ FEC Adv. Op. 2014-13 (ActBlue) at 5.

⁶ See, e.g., ActBlue, Tandem Fundraising, <https://support.actblue.com/campaigns/contribution-form-features/tandem-fundraising/> (“You can create a form for your own campaign or organization and add others who are working alongside you in your issue area, or you can create a form that lists groups you’d like to help support”).

⁷ See, e.g., FEC Adv. Op. 2011-14 (Utah Bankers Association) at 2.

⁸ FEC, Methods of Allocation Between Federal and Non-Federal Accounts; Payments; Reporting, 55 Fed. Reg. 26058 (June 26, 1990).

This explanation makes clear that collecting funds on behalf of multiple candidates is not *per se* joint fundraising – and under the scenario described in this request, the Committee would not even be collecting funds; rather, it would merely be directing donors to the fundraising forms of other committees.

Furthermore, “split-it” fundraising pages are fundamentally inconsistent with the joint fundraising activities contemplated by the Act and Commission regulations. For example, the joint fundraising regulation requires the participants to enter into a written agreement “identify[ing] the fundraising representative and [stating] a formula for the allocation of fundraising proceeds.”⁹ But in the case of “split-it” fundraising pages, there is no fundraising representative, and there is no allocation formula; funds are transmitted directly from the donor to each committee listed on the page through a payment processor like ActBlue. The donor can choose not only the amount to allocate to each committee, but also to not donate to one or more committees at all.

Similarly, the regulation refers to “commercial fundraising firm[s],” “[f]unds advanced for fundraising costs,” and “fundraising events,” but none of these are relevant to the practice of sending a text message to a supporter which allows the supporter to go to a webpage and make a contribution. Rather than two campaigns coming together with the mutual intent of holding joint events to raise funds, the activity contemplated in this request merely entails one campaign embedding on its fundraising page another campaign’s contribution form. In short, the language and requirements of the joint fundraising regulation, while relevant to traditional in-person fundraisers, are fundamentally inapplicable to this type of online fundraising (of course, the same may not be true of other types of online fundraising which *do* involve two campaigns coming together and making joint expenditures for the purpose of fundraising).

Using split-it pages is ubiquitous for modern campaigns. In 2021, the two major political contribution processing platforms (ActBlue and WinRed) processed almost \$1.9 billion in contributions, from millions of donors, for more than 20,000 campaigns and organizations.¹⁰ Treating text messages that promote split-it pages as joint fundraising would subject many of these campaigns and organizations – and their millions of supporters – to the expensive and onerous process of establishing a new joint fundraising committee, executing a new joint fundraising agreement, establishing a new depository, and so forth, merely on the basis of embedding an existing form for another campaign on an existing fundraising page. This would create an unnecessary barrier to participation in the political process for millions of donors, and,

⁹ 11 C.F.R. § 102.17(c)(1).

¹⁰ See ActBlue, *2021 Numbers Recap: Donors stay dedicated to fueling change* (Jan. 27, 2022), <https://blog.actblue.com/2022/01/27/2021-numbers-recap-donors-stay-dedicated-to-fueling-change/>; WinRed, *WinRed raises \$559 million in 2021, over 3,200 campaigns and organizations use the platform today* (Jan. 18, 2022), <https://winred.com/blog/2021-fundraising/>.

as described above, is fundamentally inconsistent with the purpose of the joint fundraising regulations.

- B. Even if the use of a “split-it” fundraising page were to constitute an “agreement to fundraise jointly,” short code text messages are not public communications, and there would therefore be no allocable costs to trigger the joint fundraising rules.

Under Commission regulations, the costs of a communication will result in an in-kind contribution only if the communication is a “coordinated communication.”¹¹ In order to meet the definition of a coordinated communication, a communication must be either an “electioneering communication” or a “public communication.”¹² “Electioneering communications” are defined to certain “broadcast, cable, or satellite communication[s].”¹³ A “public communication” is defined 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.”¹⁴ A communication that does not fit within one of those enumerated categories is not a public communication. Text messages sent through the Short Code Program are not sent by means of a broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing,¹⁵ or telephone bank to the general public.¹⁶ Therefore, text messages can only be a public communication if they fall within the scope of “general public political advertising.”

In a 2011 advisory opinion, the Commission was asked whether an organization could “solicit individuals in the general public via email and the [organization’s] website to make contributions directly to certain recommended Federal Candidates.”¹⁷ The Commission opined that the “costs of the [organization’s] solicitations via email and website will not be in-kind contributions to the recommended candidates because the solicitations will not be ‘coordinated communications,’” stating that “[b]ecause the Project’s communications will appear only on the Project’s own website and by email, the communications will not be either public communications or electioneering communications...[b]ecause the content prong is not satisfied, the Project’s communications via email and on its own website will not be coordinated communications under

¹¹ 11 C.F.R. § 109.21(b)(1).

¹² *Id.* § 109.21(c).

¹³ *Id.* § 100.29.

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

¹⁵ A “mass mailing” is defined 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.” 52 U.S.C. § 30101(23); 11 C.F.R. § 100.27.

¹⁶ A “telephone bank” is defined as “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 plain language of this definition would not encompass text messages, and the FEC has never interpreted the scope of a “telephone bank” to include text messages.

¹⁷ FEC Adv. Op. 2011-14.

11 CFR 109.21. Accordingly, the costs of these communications will not be in-kind contributions.”¹⁸

In a 2013 enforcement action, the Commission similarly determined that email solicitations sent in coordination with a candidate did not constitute in-kind contributions to that candidate, noting that email solicitations “do not satisfy the content requirement because they are neither electioneering communications nor public communications... communications over the Internet are specifically exempt from the definition of ‘public communication’ unless placed for a fee on a third party website,” and concluding that therefore, “there was no coordinated communication under 11 C.F.R. § 109.21 and thus no contribution.”¹⁹

The same is true here. Text messages are by their nature communications, and therefore subject to the provisions of 11 C.F.R. § 109.21. However, short code text messages are not *public* communications, as defined by Commission regulations. As a plurality of the Commission has acknowledged, short code text messages “are similar to speech disseminated through a political...committee’s own website, which requires viewers to affirmatively access the communications and which the Commission previously concluded is not a public communication. For these reasons, [short code] text messages...do not constitute a form of general public political advertising and, therefore, are not public communications.”²⁰

In its 2006 rulemaking regarding internet communications, the Commission 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.”²¹ In the accompanying Explanation and Justification, the Commission indicated that paid internet advertising falls within the scope of “general public political advertising,” but free internet activity does not, because in the former scenario “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.”²² For the same reason, the Commission rejected the proposition that content by a political committee on its own website constitutes “general public political advertising.” Rather, the Commission determined that that “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.”²³

¹⁸ *Id.*

¹⁹ MUR 6657, First General Counsel’s Report (May 6, 2013).

²⁰ FEC Adv. Op. 2021-11 (DSCC & DCCC), Draft B at 5; *see also* FEC Adv. Op. 2021-11, Certification of Vote.

²¹ FEC, Internet Communications, 71 Fed. Reg. 18589 (Apr. 12, 2006).

²² *Id.* at 18594-95.

²³ *Id.* at 18598.

This rationale is equally applicable to the Short Code Program. In operating the Short Code Program, the Committee uses its own text messages over its own short code to communicate with an audience that has sought it out. All recipients of text messages through the Short Code Program have affirmatively opted into receiving such messages. In addition, the Committee is not paying a fee to place its message on a forum controlled by a third party; rather, it is transmitting its messages directly to its own audience, the individual Subscribers. As such, the short code text messages described in this request are analogous to this type of free internet activity that the Commission has held falls outside the scope of general public political advertising. By sending these text messages, the Committee is communicating on an individual basis with an audience that has sought it out. In its 2006 Rulemaking, the Commission specified that for a communication to meet the definition of a public communication, the payor must pay the third-party intermediary “*for access to the public through that form of media.*”²⁴ In addition, that intermediary must be “*owned or controlled by another person.*”²⁵ Neither factor is true as applied to the Short Code Program. Unlike a television station or publication, text messaging vendors are not selling the Committee access to the vendors’ audiences or to the general public; rather, the Committee has obtained its own audience in the form of individual opted-in Subscribers, and the vendors are only providing the technology used by the Committee to communicate with its own audience.

Furthermore, the costs associated with these text messages are functionally equivalent to the costs of operating an email program. Both types of costs allow the Committee to communicate directly with an audience that has affirmatively sought to receive communications from the Committee, rather than to pay a third party to distribute communications to its own audience as part of a forum that the third party controls. For all of these reasons, these communications are not aimed at the general public, nor are they for the purpose of “*plac[ing] a message on a Web site controlled by another person.*”

The Commission has also consistently found that the cost of communications are not in-kind contributions unless they meet the definition of a coordinated communication under Commission regulations.²⁶ Therefore, because short code messages are not public communications, and not coordinated communications, they also cannot be in-kind contributions (or expenditures) under § 109.21, and thus do not represent the type of allocable cost that would trigger the joint fundraising rules. Simultaneously treating the same communications as expenditures for purposes of the joint fundraising rules, and *not* as expenditures for purposes of the coordinated communications rules, would produce a paradoxical result.

²⁴ *Id.* at 18594 (Apr. 12, 2006).

²⁵ *Id.*

²⁶ *See, e.g.*, Adv. Op. 2011-14 (Utah Bankers Association); MUR 6477 (Turn Right USA), First General Counsel's Report at 8 (Dec. 27, 2011); MUR 6502 (Nebraska Democratic Party), First General Counsel's Report at 13 (May 17, 2012); MUR 6522 (Lisa Wilson-Foley for Congress), First General Counsel's Report at 7 (Feb. 5, 2013); MUR 6657 (Akin for Senate), First General Counsel's Report at 6-7 (May. 16, 2013); MUR 6722 (House Majority PAC), First General Counsel's Report at 4-5 (Aug. 6, 2013).

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In other words, even if the Commission were to determine that merely sending a text message with a link to a “split-it” fundraising page *could* constitute joint fundraising, as a factual matter there still would be no costs to allocate in this scenario, and the joint fundraising rules would therefore not be triggered. Ultimately, the purpose of the joint fundraising rules is to ensure the appropriate allocation of expenses when the expenses in question would otherwise result in an in-kind contribution, to avoid one committee paying for the fundraising costs of another.²⁷ That purpose is inapplicable here because the communications in question would not constitute in-kind contributions regardless.

For these reasons, we ask the Commission to confirm that short code text messages containing links to “split-it” fundraising pages, which allow contributions to multiple political committees, are not subject to the joint fundraising rules under the Act and Commission regulations.

Very truly yours,



Jacquelyn Lopez
Varoon Modak

Counsel to Maggie for NH

²⁷ See FEC, Public Financing of Presidential Primary and General Election Candidates, 56 Fed. Reg. 35898 (July 29, 1991) (explaining that the “two problems” to be addressed by 11 C.F.R. § 102.17 are the lack of an “explicit allocation formula for determining the amounts to be distributed to each of the participating original committees,” and for how “the expenses for a series of fundraising events or activities must be allocated”). Neither of those problems exists here, because contributions are transmitted directly from donors to the recipient committees, and there are no allocable costs for fundraising events or activities.

Joanna Waldstreicher

From: Varoon Modak <vmodak@elias.law>
Sent: Monday, August 22, 2022 11:03 PM
To: Amy Rothstein
Cc: Joanna Waldstreicher; Jacquelyn Lopez
Subject: Maggie for NH - Advisory Opinion Request - Supplemental Information

Amy, thanks again for taking the time to speak with us. Our answers to the follow-up questions that we discussed are below. Please let us know if we can provide any additional information in connection with this request.

1. Would Maggie for NH be coordinating with the other committees listed on the split-it pages?

No. The split-it pages at question in this request would be set up and administered by Maggie for NH without the involvement of, or coordination with, the other committees listed on the pages.

2. Is the use of split-it pages part of a larger effort by the committees listed on the split-it pages to engage in fundraising?

No. While Maggie for NH may choose to separately engage in joint fundraising activities with other committees as part of its overall fundraising activities, those activities would be separate from activity proposed in the request.

3. Who would decide which committees are listed on the split-it pages?

Maggie for NH only.

4. Who would create and administer the ActBlue pages?

Maggie for NH only.

5. Would Maggie for NH itself be listed on the split-it pages?

Yes.

6. Which other committees or entities would be listed on the split-it pages?

The split-it pages could include federal candidates, party committees, or political action committees that are registered with the Commission. No SSFs would be included. All solicitations would be for federally permissible funds and would comply with all relevant requirements of the Act.

7. Are there any costs associated with the use of ActBlue and/or an ActBlue split-it pages?

Maggie for NH would not incur any costs for creation or administration of the ActBlue split-it pages. The costs associated with ActBlue processing contributions to each committee are already borne by those committees pursuant to their existing contractual relationship with ActBlue, as approved by the Commission in Advisory Opinion 2014-13; there are no additional costs incurred by creation of a split-it page.

8. How is a split-it page created on ActBlue?

Any committee can create a split-it page that allows for simultaneous contributions to multiple committees, if the committee has an existing ActBlue account. Such pages can be created without the knowledge or consent of the other committees listed on the pages. Additional information regarding split-it pages is available at: <https://support.actblue.com/campaigns/contribution-form-features/tandem-fundraising/>. Other political contribution processing services such as WinRed also provide a similar feature: <https://support.winred.com/en/articles/3730553-creating-a-team-page>.

9. What does an ActBlue split-it page look like?

An example can be found here: <https://secure.actblue.com/donate/defendthesenate-hassan>

10. How much would each text message cost to send?

The cost of sending a text message varies by service/vendor, but is generally a few cents per text. The cost of a text message would not change based on whether the message is linking to a split-it page as opposed to a page that only allows contributions to Maggie for NH.

Varoon Modak

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