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September 19, 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 the cost of sending short code text messages containing links to “split it” fundraising pages (which allow contributions to multiple political committees) would not constitute in-kind contributions, under the Federal Election Campaign Act of 1971 (the “Act”) and Federal Election Commission (the “Commission”) regulations, to the political committees listed on those fundraising pages. This question arises due to the Commission’s recent approval of a related advisory opinion request from the Committee.

Please note that Senator Hassan will appear as a candidate on the 2022 New Hampshire general election ballot, which is scheduled to take place 50 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 program<sup>1</sup> through which it sends text messages to its supporters to communicate on topics of political importance and to solicit

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<sup>1</sup> 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 to send each text message to an individual who has opted into receiving messages. There are two types of per-message fees. First, the Committee pays a “pass-through fee” for each message that it sends, which is paid to the vendor but passed along to the cellular carriers. Second, the Committee pays the vendor a per-message fee to cover the vendor’s overhead costs for transmitting the message. These per-message fees vary by service and vendor, but are generally a few cents per message. The vendor also charges a fee for access to the software that the Committee uses to draft and send messages. Finally, the Committee pays a monthly fee to lease the short code number. These fees also vary by service and vendor, but are generally up to a few hundred dollars per month. Notably, the cost of a text message would not change based on whether the message is linking to a “split it” fundraising page listing multiple political committees, as opposed to a fundraising page that only allows contributions to Maggie for NH.

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 (including the Committee itself).<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> The

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(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&T) at 2, n. 1.

<sup>2</sup> See, e.g., Maggie for NH, ActBlue fundraising page, <https://secure.actblue.com/donate/defendthesenate-hassan>. 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. The committees listed on the pages would include only federal candidate committee, political party committees, and/or political action committees that are registered with the Commission.

<sup>3</sup> FEC Adv. Op. 2014-13 (ActBlue) at 5.

<sup>4</sup> 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->

Commission has recently also confirmed that the sending of such text messages does not constitute joint fundraising, so long as the text messages and fundraising pages are created and sent without the involvement of or coordination with the other political committees listed on the fundraising pages.<sup>5</sup>

Both the “split it” fundraising pages described in this request and the short code text messages containing links to those pages would be set up and administered by the Committee without the involvement of, or coordination with, the other committees listed on the pages. The Committee would have sole control over which committees are listed on the pages. While the Committee 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 the activity proposed in this request.

The Committee would not incur any costs in connection with the creation or administration of the fundraising 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;<sup>6</sup> there are no additional costs incurred by the creation or administration of a “split it” fundraising page.

## II. QUESTION PRESENTED

Are the costs associated with the sending of such short code text messages in-kind contributions to the other federal political committees listed on the “split it” fundraising pages in question?

## III. LEGAL ANALYSIS

Short code text messages containing links to “split it” fundraising pages do not constitute “public communications” under the Act and therefore would not constitute in-kind contributions to the other committees listed on the fundraising pages.

Under Commission regulations, the costs of a communication will result in an in-kind contribution only if the communication is a “coordinated communication.”<sup>7</sup> For purposes of this request, the Committee wishes to stipulate that the payment and conduct standards for a

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[creating-a-team-page](https://www.facebook.com/ads/archive/render_ad/?id=855184792124095&access_token=EAAAbSiR67EQwBAF7SjGqDpe4ZCXCDjg7waxSg6box4FKy5MyV5qTTZA055ESknHLYfekU3ZAqMbN399JaR4HD8w1uOBbdEML0Yr4CeU4mXIIh2EOIL90MirhfssgQEdWHLIPyH9ZB25UO7TzHMTJMulumbI0QBIdEYLB0EuGyAZDZD); see also CFG Action, Facebook Ad, [https://www.facebook.com/ads/archive/render\\_ad/?id=855184792124095&access\\_token=EAAAbSiR67EQwBAF7SjGqDpe4ZCXCDjg7waxSg6box4FKy5MyV5qTTZA055ESknHLYfekU3ZAqMbN399JaR4HD8w1uOBbdEML0Yr4CeU4mXIIh2EOIL90MirhfssgQEdWHLIPyH9ZB25UO7TzHMTJMulumbI0QBIdEYLB0EuGyAZDZD](https://www.facebook.com/ads/archive/render_ad/?id=855184792124095&access_token=EAAAbSiR67EQwBAF7SjGqDpe4ZCXCDjg7waxSg6box4FKy5MyV5qTTZA055ESknHLYfekU3ZAqMbN399JaR4HD8w1uOBbdEML0Yr4CeU4mXIIh2EOIL90MirhfssgQEdWHLIPyH9ZB25UO7TzHMTJMulumbI0QBIdEYLB0EuGyAZDZD) (paid advertisement from Club for Growth Action, which is not a joint fundraising committee, linking to a WinRed split it fundraising page).

<sup>5</sup> FEC Adv. Op. 2022-19 (Maggie for NH).

<sup>6</sup> FEC Adv. Op. 2014-13 (ActBlue).

<sup>7</sup> 11 C.F.R. § 109.21(b)(1).

coordinated communication would be met. With respect to the conduct prong, both the “split it” fundraising pages and the short code text messages containing links to those pages would be set up and administered by the Committee without the involvement of, or coordination with, the other committees listed on the pages. However, the Committee will be in the possession of material, non-public information on the projects, plans, activities and/or needs of the other listed committees. Therefore, to ensure the guidance provided in this opinion is practical, the Committee would like to stipulate that the conduct prong is met.<sup>8</sup>

In order to meet the definition of a coordinated communication, a communication must be either an “electioneering communication” or a “public communication.”<sup>9</sup> “Electioneering communications” are defined to certain “broadcast, cable, or satellite communication[s].”<sup>10</sup> 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.”<sup>11</sup> 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,<sup>12</sup> or telephone bank to the general public.<sup>13</sup> 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.”<sup>14</sup> 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

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<sup>8</sup> See *id.* § 109.21(a).

<sup>9</sup> *Id.* § 109.21(c).

<sup>10</sup> *Id.* § 100.29.

<sup>11</sup> 52 U.S.C. § 30101(22); 11 C.F.R. § 100.26.

<sup>12</sup> 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.

<sup>13</sup> 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.

<sup>14</sup> FEC Adv. Op. 2011-14 (Utah Bankers Association).

11 CFR 109.21. Accordingly, the costs of these communications will not be in-kind contributions.”<sup>15</sup>

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.”<sup>16</sup>

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.”<sup>17</sup>

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.”<sup>18</sup> 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.”<sup>19</sup> 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

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<sup>15</sup> *Id.*

<sup>16</sup> MUR 6657 (Akin for Senate), First General Counsel’s Report (May 6, 2013).

<sup>17</sup> FEC Adv. Op. 2021-11 (DSCC & DCCC), Draft B at 5; *see also* FEC Adv. Op. 2021-11, Certification of Vote.

<sup>18</sup> FEC, Internet Communications, 71 Fed. Reg. 18589 (Apr. 12, 2006).

<sup>19</sup> *Id.* at 18594-95.

person.”<sup>20</sup>

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.”<sup>21</sup> In addition, that intermediary must be “*owned or controlled by another person.*”<sup>22</sup> 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.<sup>23</sup> 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.

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<sup>20</sup> *Id.* at 18598.

<sup>21</sup> *Id.* at 18594 (Apr. 12, 2006).

<sup>22</sup> *Id.*

<sup>23</sup> *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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For these reasons, we ask the Commission to confirm that short code text messages are not public communications, and that the cost of sending short code text messages containing links to “split it” fundraising pages, which allow contributions to multiple political committees therefore do not constitute in-kind contributions to those committees under the Act and Commission regulations.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jacquelyn Lopez". The signature is written in a cursive style with a large initial 'J' and a long, sweeping underline.

Jacquelyn Lopez  
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*Counsel to Maggie for NH*