

January 16, 2019

Fair Political Practices Commission  
By email to Loressa Hon, [LHon@fppc.ca.gov](mailto:LHon@fppc.ca.gov)

**Re: Appeal of Opinion Request Regarding Peer-to-Peer SMS**

Commissioners:

I write on behalf of my client, Toskr, Inc. (“Toskr”), which provides “peer-to-peer text-messaging” services to political campaigns, committees, non-profits and other entities, through a platform called “Relay.” Toskr filed an Opinion Request in September 2018, asking whether text messages sent by volunteers to voters on behalf of persons regulated by the Political Reform Act required a disclaimer under the Act. The Commission’s Executive Director declined to issue an opinion, stating in a letter dated October 11, 2018 that a disclaimer was clearly required.<sup>1</sup>

We disagree, and have appealed to the Commission. We ask the Commission to find that requiring a disclaimer on messages sent by volunteers – specifically, “Who funded this ad?” with a hyperlink to a website with the full disclaimer – would “severely interfere with the committee’s ability to convey the intended message because of the nature of the technology used to make the communication”, and clearly falls into an exemption from the disclaimer requirements.<sup>2</sup>

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<sup>1</sup> A copy of our original Opinion Request, and the Executive Director’s letter, are attached. The Executive Director’s letter stated that:

*Text messages sent by a committee for purpose of supporting or opposing a candidate or ballot measure are within the Act's definition of "advertisement." Text message advertisements are subject to the disclosure requirements for electronic media ads in Government Code section 84504.3, subdivision (a). There is nothing in existing law that would exempt text messages sent by committees from the Act's advertisement disclosure requirements.*

<sup>2</sup> See Cal. Govt. Code §§ 84501(a)(2)(E); 84504.3(b). Since the Commission’s rules after the passage of the Disclose Act included a burden of proof for a person to prove that a disclaimer on electronic media communications would be “impracticable or would severely interfere with the committee’s ability to convey the intended message”, this letter and our oral presentation at the January 17, 2019 meeting seeks to meet that burden. 2 Cal. Code of Regs. § 18450.1(a)-(b).

**1. Peer-to-peer text messaging facilitates person-to-person interactions, opposed to broadcast communications which facilitate a message from a person to *many people at once*.**

Text messaging is the most widely-used feature of a smartphone amongst people in every age-group.<sup>3</sup> Given its ubiquity, the medium has become widely used in political campaigns.<sup>4</sup> “Peer-to-peer text-messaging” is a method by which an individual – in this case a volunteer for a campaign or a committee – uses a platform (such as Toskr’s Relay) to send text messages to other individuals, with the content of the initial message pre-determined by the candidate or committee. Toskr charges a fee to its clients for use of Relay, and is one of multiple vendors that provides these services in political campaigns.

Relay allows volunteers for a candidate or a committee that they support to speak directly to a voter – *opposed to* paying for a broadcast advertisement. ***Every communication is one person to another person, and messages are sent one at a time.***<sup>5</sup> When a person sends out a text message, the recipient can write back, and a back-and-forth conversation can occur. Advertisements – on the other hand – are static and cannot facilitate any reply from the viewer or reader.

In this way, Relay is akin to a phone-bank or another person-to-person communication, which does not require a disclaimer when disseminated by volunteers.<sup>6</sup> After our Opinion Request was denied, our understanding of the state of the law is that “Who funded this ad?” is required on potentially ***each text message sent, even if sent by volunteers.***<sup>7</sup>

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<sup>3</sup> Pew Research Center, “U.S. Smartphone Use in 2015” (April 1, 2015), available at <http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/> (last accessed January 5, 2019).

<sup>4</sup> See Sacramento Bee, “Get a text ad from a candidate? Invasive, maybe, but it works, say experts.” (May 20, 2018), available at <http://www.sacbee.com/latest-news/article211475639.html> (last accessed January 5, 2019).

<sup>5</sup> ***Relay cannot text any telephone number without direct human intervention and does not allow for multiple messages to be sent automatically.*** Functionally, Relay is the same as a smartphone, where a message can be reused and sent to multiple people, one-by-one.

<sup>6</sup> See Cal. Govt. Code § 84310(a) (exempting campaign telephone calls by volunteers from the disclaimer requirement).

<sup>7</sup> As noted in our Opinion Request, it is unclear why the Commission and its staff treat text messages as electronic media advertisements in the first instance – as the Federal Communications Commission considers text messages, ***including internet-to-phone SMS***, to be telephonic communications.

**2. Inclusion of a disclaimer on grassroots, volunteer-to-voter text messages defeats the purpose of sending those messages – since “branding” these messages turns them into advertisements.**

The Political Reform Act has long stated, and the Commission has long advised, that activities of volunteers do not require political identification statements.<sup>8</sup> This person-to-person, volunteer-to-voter activity is crucial to the democratic process, and the Commission has consistently recognized that the activity should be encouraged.<sup>9</sup>

Additionally, the addition of a disclaimer on these types of messages significantly reduces response rates – since it fundamentally changes the interaction from a conversation, to an advertisement.

Toskr analyzed data from one of its clients, Color of Change PAC, which sent text messages in a wide array of elections during 2018 both inside and outside of California. For the text messages sent in California elections, Color of Change PAC included the following disclaimer: [who funded this ad? <http://rvdr.me/Ad>]. *Text messages sent with the disclaimer were 40% less likely to receive a response.*

Relay is no different than other platforms used to facilitate volunteer communications, and the above data clearly shows the burdens of requiring a disclaimer on these messages.<sup>10</sup> The volunteer-to-voter interactions through Relay are *in direct contrast to* broadcast communications, sent from one person to many at once, which clearly raise issues of “dark money” and anonymous spending that the Disclose Act was designed to address.

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<sup>8</sup> Cal. Govt. Code § 84310(a); California Fair Political Practices Commission, “General Purpose Committees Campaign Disclosure Manual 4” at 9. 8 (November 2017, based on a previous version of the Political Reform Act) (“No ID required on telephone calls personally dialed by candidate, campaign manager or volunteers”), available at [http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Campaign%20Manuals/Manual\\_4/Final\\_Manual\\_4.pdf](http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Campaign%20Manuals/Manual_4/Final_Manual_4.pdf) (last accessed January 5, 2019).

<sup>9</sup> See California Fair Political Practices Commission, I-15-109 (September 8, 2015) (“Political speech is highly protected and the Act does not prohibit a candidate or ballot measure from communicating their message in any form, including text messaging”); see also *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995)

<sup>10</sup> As noted in our Opinion Request, “There is no truly zero-cost activity in political advocacy – volunteer phone banks require that a committee pay for phones for its offices to facilitate one-on-one calls to voters, canvassing requires an office or a staging area (not to mention gas for volunteers to drive to the campaign office – which are exempted from the definition of “contribution”), and even volunteers printing flyers from the internet incurs a small, but non-zero cost.”

**3. The Commission should find that peer-to-peer text messages sent by volunteers are exempted from the disclaimer requirements.**

As of now, the risk of running afoul of the Disclose Act's hefty penalties severely interferes with a committee's ability to convey their intended message – by essentially requiring that all person-to-person messages become branded broadcast advertisements.<sup>11</sup> The recently passed AB 2188 unfortunately does not clearly address these issues, although can be interpreted to not require disclaimers on text messages.<sup>12</sup>

It is our view – which is more than supported by Commission precedent – that disclaimers should be focused on regulating *broadcast* speech, going from one source to many persons at once (television, radio, direct mail, online advertising, and the like), opposed to speech that is from one person to another.

Relay allows for a true back-and-forth between two people about a candidate or issue of importance in their community. A disclaimer on these person-to-person text messages would defeat the purpose of conveying a person-to-person message at all, turning these conversations into what are ultimately generic campaign advertisements.

For these reasons, we ask that the Commission find that messages sent through Relay by volunteers *do not* require a disclaimer, as requiring a disclaimer would “severely interfere with the committee’s ability to convey the intended message because of the nature of the technology used to make the communication.” This conclusion is more than justifiable under exemptions from “advertisement” in the Political Reform Act (as amended by the Disclose Act), as well as under previous Commission opinions and guidance.

If you have any questions, please do not hesitate to contact me at 202-479-1111, or at [mitrani@sandlerreiff.com](mailto:mitrani@sandlerreiff.com).

Sincerely,



David Mitrani  
Counsel  
Toskr, Inc.

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<sup>11</sup> See Cal. Govt. Code § 84510(a).

<sup>12</sup> While tying the disclaimer requirement for an “electronic media advertisement” to an “online platform” makes it *less likely* that a disclaimer is required on text messages sent through Relay, we would implore the Commission to address this issue in more specificity through a rulemaking.