



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
428 J Street • Suite 620 • Sacramento, CA 95814-2329
(916) 322-5660 • Fax (916) 322-0886

September 8, 2015

Dave Ish, CEO
Club Lemeno Text Marketing
5661 Linda Rosa Avenue
La Jolla, CA 92037

Re: Your Request for Informal Assistance
Our File No. I-15-109

Dear Mr. Ish:

This letter responds to your request for advice regarding the sender identification and advertisement disclosure provisions of the Political Reform Act (the "Act").¹ Because your inquiry is general in nature and does not involve specific governmental decisions, we are treating it as a request for informal assistance.²

QUESTION

Is the use of a text messaging service to send communications supporting or opposing a candidate or ballot measure to interested individuals prohibited by the Act?

CONCLUSION

No. 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. The Act does, however, have disclaimer requirements that apply to political communications, as discussed below.

FACTS

Club Lemeno is a California corporation founded in 2012 serving small to medium-sized business clients. The company provides a text marketing service where individuals can voluntarily agree to receive communications through text messages (SMS³ or MMS⁴) on their mobile phone.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with immunity provided by an opinion or formal written advice. (Section 84113; Regulation 18329(c)(3).)

³ SMS (short message service) is text-messaging system that allows mobile technologies to exchange short text messages of usually up to 160 characters.

The text messages can vary in size and capacity, depending on the format used. SMS is more widely used because many phones lack the capability to send and receive MMS messages, and for many smartphones, MMS messages require the use of cellular data as opposed to the traditional cellular network used for calling and sending SMS text messages. As CEO of Club Lemeno, you plan to expand your business services to include text messages from political candidates and committees. You hope to launch this service in late summer or early fall 2015.

In order to participate in this service, an individual must text a phrase to “opt-in.” The requestor will immediately receive a confirmation that may include a link to the candidate’s website or videos. The initial response will include a “text STOP to quit” instruction. This instruction can also be included in subsequent messages. The only people who will receive messages are those who opt-in by texting the phrase provided. Individuals signing up for information through other means (e.g., mailing list sign-up sheet, QR code⁵), will still need to actively consent to receive messages by texting or replying with the opt-in phrase.

Club Lemeno will not collect contributions on behalf of any candidates or ballot measures. Requests for contributions will include a link directly to the client’s website. Fees for the text messaging service will be based on usage and a general administration of the service.

During our telephone conversation on July 6, 2015, you stated that the text messages were intended to be sent in bulk. Your service can currently send about 300 texts a second using the Twilio⁶ platform. You expect the capabilities of your service to expand in the long term, allowing for larger databases and more recipients. The service can allow clients to have total control over their messages and send them out directly. Alternatively, the clients may enter into a full-service contract where Club Lemeno creates and formats the messages and advertisements for them. The service includes a URL shortener so that links can better fit within the size limits of a text message. Lastly, you are also contemplating hiring political consultants to inform employees and clients of the Act’s requirements.

ANALYSIS

Under the Act, committees must put “paid for by” disclaimers on campaign advertising, including campaign mailers, radio and television ads, telephone robocalls, and electronic media ads. A “disclaimer” is the portion of a political message that identifies the person or entity who paid for or authorized the communication. “Paid for by *committee name*” is the basic disclaimer required by the Act on most campaign communications sent by a committee. The “Political Advertising

⁴ MMS (multimedia messaging service) is a text-messaging system that allows mobile technologies to exchange messages containing multimedia content such as images, audio, or short videos, in addition to text with unlimited characters.

⁵ A QR (quick response) code is a two-dimensional barcode that can be used in advertising. The code, when scanned using a smartphone, can prepare a text message for the individual to send (e.g., the opt-in phrase to the appropriate number). It can also send the individual to a designated website, without needing to manually type the URL into a web browser.

⁶ Twilio is a cloud communications company that allows software developers to programmatically make and receive phone calls as well as send and receive text messages using their application programming interfaces.

Disclaimers” publication is available on the FPPC’s website.⁷ The disclaimers required on campaign communications differ depending on whether the communication is (1) an ad for a ballot measure, (2) an ad paid for by an independent expenditure, or (3) a communication sent by a candidate’s own campaign.

1. *Ballot Measure Advertisement*

“Advertisement” includes any general or public advertisement for the purpose of supporting or opposing a candidate for elective office or a ballot measure(s). (Section 84501.) This includes communications in the form of electronic media, such as text messages. (Regulation 18450.1(a)(2)(A).)

For committees supporting or opposing a ballot measure, the following requirements are applicable:

- “Paid for by” name of committee making expenditure. (Section 84504(c) and Regulation 18450.4(b)(1).) Committee must identify itself using a name or phrase that clearly identifies the economic or other special interest of its major donors of \$50,000 or more. (Section 84504(a).)
 - If major donors of \$50,000 or more share a common employer, the identity of the employer must also be disclosed in the name of the primarily formed committee. (Section 84504(c).)
 - If candidates or their controlled committees, as a group or individually, are major contributors of \$50,000 or more, the committee name identification must include the controlling candidates’ names. (Section 84504(d).)
- Name of persons from whom the committee has received its two highest cumulative contributions of \$50,000 or more.⁸ (Sections 84503 and 84506(a)(2).) Must explicitly indicate that they were major donors to the committee. (Regulation 18450.4(b)(1).)⁹

2. *Advertisement paid for by Independent Expenditure*

If an advertisement is paid for by an independent expenditure,¹⁰ the advertisement is generally required to have a disclaimer with *all* of the following:

⁷ Available at <http://www.fppc.ca.gov/charts/PoliticalAdvertisingDisclaimers.pdf>

⁸ Also does not apply to general purpose committees. (Regulation 18450.4(a).)

⁹ For example, “major funding by,” “committee contributors:” or “top contributors:” (Regulation 18450.4(b)(1).)

¹⁰ An “independent expenditure” is an expenditure made by any person in connection with a communication that expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election, but which is not made at the behest of (e.g., in cooperation or coordination with) the affected candidate or committee. (Section 82031.)

- “Paid for by” name of committee making the independent expenditure (Section 84506(a)(1) and Regulation 18450.4(b)(1).)
- Name of persons from whom the committee has received its two highest cumulative contributions of \$50,000 or more.¹¹ (Section 84506(a)(2).) Must explicitly indicate that they were major donors to the committee. (Regulation 18450.4(b)(1).)
- That it was not authorized by a candidate or committee controlled by a candidate. (Section 84506.5.)

These disclaimer requirements apply to electronic media advertisements. For most electronic media advertisements that are not limited as to text, such as MMS messages, the Act requires that the full and unabbreviated disclaimer be shown. In limited circumstances where an electronic advertisement’s size, space, or character limit constraints (i.e., SMS message) render it impracticable to include the full disclosure information specified, the candidate or committee sending the mass mailing may provide abbreviated advertisement disclosure. The abbreviated disclosure must contain at least the committee’s FPPC number and when possible, a link to the webpage on the Secretary of State’s website, displaying the committee’s campaign finance information, if applicable.” (Regulation 18450.4(b)(3)(G)(4).) The Act’s requirements are for full disclaimers on all electronic ads where possible. If abbreviated disclaimers are used a committee must be able to show why it was not possible to include the full disclaimer.

3. Communications by a Candidate’s own Campaign

Different disclaimer rules apply to campaign materials disseminated by a candidate for their own election campaign because it is generally clear to the public that the candidate is sending the communication. One rule that applies to messages sent by a candidate’s own campaign is the sender identification rule that requires “Paid for by *committee name*” and the committee address on mass mailings of over two hundred substantially similar pieces of mail sent within a calendar month. (Section 84305, 82041.5 and Regulation 18435.) The definition of mass mailing was extended to cover email, in addition to traditional mail, in Regulation 18435. But the sender identification requirement has not yet been extended to cover other electronic messages. Accordingly, the Act does not require that text message communications sent by a candidate’s own campaign have a disclaimer. However, the FPPC recommends placing “paid for by *committee name*” and the committee ID number on all public campaign materials. This practice discourages complaints from being filed with the Commission against the committee by recipients asking who sent the mailer without identification.

You stated that Club Lemeno may contract with clients to ensure the required disclosure and identification is included with the text messages. For clients who are sending the messages themselves, you stated you would inform them of the requirements. For instance, if an advertisement for a candidate is paid for by an independent expenditure, then “Paid for by *committee name*,” the two highest \$50,000+ donors, and a disclaimer stating it was not authorized

¹¹ Does not apply to general purpose committees. (Regulation 18450.4(a).) “General purpose committee” is defined as any committee formed or exists primarily to support or oppose more than one candidate or ballot measure. (Section 82027.5.)

by the candidate are all required. For ballot measures, the required disclosures are similar, with additional requirements regarding the name of the committee. For text messages paid for by a candidate's own campaign committee, "paid for by *committee name*" and the committee ID number are strongly recommended.

The text messages paid for by committees using your services need to contain the required disclaimers to be in compliance with the Act. While it is beneficial that you intend to inform your employees and clients of the Act's requirements, note that your clients as the "senders" of the communications are ultimately responsible for compliance with the Act. Your individual clients may wish to seek Commission advice if they are uncertain as to what disclaimer to include on their text messages or whether an abbreviated disclaimer is permissible.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Hyla P. Wagner
General Counsel



By: Emelyn Rodriguez
Senior Commission Counsel,
Legal Division

ER:jgl