

September 27, 2018

Fair Political Practices Commission
Attn: Executive Director
1102 Q Street, Suite 3000
Sacramento, CA 95811
By email to ExecutiveDirector@fppc.ca.gov

Re: Opinion Request Regarding Peer-to-Peer SMS

Commissioners:

Pursuant to 2 Cal. Code of Regs. § 18320, I submit this written request for the Fair Political Practices Commission’s (the “Commission”) opinion on behalf of my client, Toskr, Inc. (“Toskr”).

Toskr is a Delaware corporation, whose principal place of business is in Oakland, California. Toskr provides peer-to-peer text-messaging services to political campaigns, committees, non-profits and other entities, through a platform called “Relay.” Toskr does not provide broadcast text-messaging services (where more than one message is disseminated at once).

Text messaging is the most widely-used feature of a smartphone amongst people in every age-group.¹ With respect to political campaigns, “Peer-to-peer text-messaging” is a method by which an individual – generally a volunteer for a campaign or a committee – uses a platform (such as Toskr’s Relay) to send text messages to individuals, with the content of the initial message pre-determined by the candidate or committee (collectively referred to as “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.²

Toskr submits this request for an opinion as to whether clients that use its Relay platform must include a disclaimer on each text message sent, and whether the identity of the sender

¹ 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/](http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/) (last accessed September 27, 2018).

² 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](http://www.sacbee.com/latest-news/article211475639.html) (last accessed September 27, 2018).

(either a volunteer or a person paid by the committee) is material to the analysis. The Commission's response to this question could greatly affect Toskr's bottom-line, and how it services clients operating in California state and local elections.

If messages sent on Relay – whether from volunteers, paid staff, or other paid persons – require a disclaimer, *the platform's effectiveness would be severely reduced in California state or local elections*, which would potentially damage Toskr's business.³ Having grown out of a national Democratic political campaign, Toskr is naturally used by progressive candidates, committees, and organizations throughout California, making up a major portion of its business. Those candidates, committees, and organizations could cease to use the platform should it become too burdensome to use in connection with California elections.

Toskr is aware of at least one client that included the disclaimers for electronic media advertisements on each-and-every California state or local text-message sent through Relay, *including by volunteers*. This client noted to Toskr how cumbersome and burdensome these disclaimer requirements are, and how they have affected their impact. Given the ambiguity in the law, Toskr shares these concerns.

Relay allows volunteers for a candidate or a committee that they support to speak directly to voters – *opposed to* a candidate or committee paying for a broadcast advertisement. Every communication is one-on-one, and the vast majority are volunteer-to-voter. When a person sends out a text message, the recipient can write back, and often a lengthy back and forth conversation occurs (such as “what is a candidate's position on criminal justice reform”, “why is your committee supporting them” and the like).

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. Additionally, the nature of peer-to-peer text messaging – one person having a conversation with another – means that including a disclaimer would severely interfere with the committee's ability to convey the intended message, meeting an exemption from the Political Reform Act's definition of “Advertisement.” The inclusion of a disclaimer creates the impression of a broadcast message, when it is in fact sent from one person to one person.

It is for these reasons that we request that the Commission advise that peer-to-peer text-messaging, such as through Toskr's Relay platform, *does not require a disclaimer* under the Political Reform Act.

³ Of note, this would not be the first time that a vendor asked for Commission's advice on whether text messages require a disclaimer. See California Fair Political Practices Commission, I-15-109 (September 8, 2015).

1. Questions for the Commission to Consider

Toskr requests advice on the following questions:

Question 1: Must a committee using Toskr’s Relay platform include a disclaimer on its text messages, if those messages are disseminated by volunteers?

Question 2: Must a committee using Toskr’s Relay platform include a disclaimer on its text messages, if those messages are disseminated by persons paid for that service?

We request that the Commission answer both questions in the negative. Toskr facilitates person-to-person conversations, ***not*** advertisements.

Recent legislative changes – and the Commission’s regulatory responses – have “muddied the waters” as to whether disclaimers are required on text messages, including those disseminated by volunteers. While the content of the communications is determined by Toskr’s clients (the candidates or committees) and are disseminated for a fee, the person sending the message has latitude to answer back based on their own experiences and beliefs about the candidate they advocating for or against.

Messages sent through Relay by volunteers are in-line with Commission precedent that a disclaimer is not required. Messages sent by paid persons should also fall under the exemption from “Advertisement” for impracticability, as requiring a disclaimer would severely interfere with Toskr’s clients’s ability to convey their message to voters.

2. Factual Background

Toskr’s Relay platform (and other peer-to-peer text-messaging services) operates as software application, as follows:

- I. A candidate or committee creates a campaign in Relay, defines an initial message as well as suggested replies, and uploads a list of phone numbers to text. Messages can range from “vote on June 5th” to “do you support John Smith for State Senate”, and the like.
- II. Volunteers for the campaign or committee – or paid staff or paid texters – log into the Relay app through their computer, tablet, or smartphone from a link provided by the candidate or committee directly to that texting campaign.

- III. Senders disseminate one text message at a time to recipients pre-determined by the candidate or committee.
- IV. If recipients respond to the initial message, senders have the ability to write back or to send pre-determined responses and can engage in a substantive conversation through the platform.

Relay cannot text any telephone number without direct human intervention, does not allow for multiple messages to be sent automatically, and does not have the capability to do so. Functionally, Relay is the same as a smartphone that stores numbers that can be called or texted by touching the number in the phone’s contact list, and a message can be reused and sent to multiple people, one-by-one.

3. Legal Background

In October of 2017, the California legislature passed AB 249 – known as the “Disclose Act” (the “Act”). The Act was intended to meet the following two goals:

“(a) For voters to make an informed choice in the political marketplace, political advertisements should not intentionally deceive voters about the identity of who or what interest is trying to persuade them how to vote.

(b) Disclosing who or what interest paid for a political advertisement will help voters be able to better evaluate the arguments to which they are being subjected during political campaigns and therefore make more informed voting decisions.”⁴

To effectuate these goals, the Act changed how disclaimers were required on campaign materials in California, defining “advertisements” subject to the requirements. The Act requires disclaimers on “Advertisements” generally – “any general or public communication that is authorized and paid for by a committee for the purpose of supporting or opposing a candidate or candidates for elective office or a ballot measure or ballot measures.”⁵ Violations of the Act can carry a penalty of up to three times the amount of the spending.⁶

⁴ AB 249 § 2 (2017), [available at https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB249](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB249) (last accessed September 27, 2018).

⁵ Cal. Govt. Code § 84501(a)(1).

⁶ Cal. Govt. Code § 84510(a).

Three major types of disclosures are called for – a “Paid for by” line identifying the spender, a “not authorized” line for independent expenditures, and major funding disclosures for contributors of \$50,000 or more.⁷ “Advertisements” by “radio or telephonic means”, or by “video”, “print”, electronic media” and “radio or television” specifically require a disclaimer.⁸

Notably, the Act exempts certain items that meet the definition of “Advertisement”: small materials such as “A campaign button smaller than 10 inches in diameter; a bumper sticker smaller than 60 square inches; or a small tangible promotional item. . . upon which the disclosure required cannot be conveniently printed or displayed”, and electronic media communications “for which inclusion of the [disclaimers] is impracticable or 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.”⁹

While the Commission was given the statutory authority to exempt additional materials from the definition of “advertisement”, it did not do so.¹⁰ Instead, the Commission amended 2 Cal. Code of Regs. § 18450.1 – regarding disclaimers on advertisements – to remove a long-standing 200-message threshold before a disclaimer was required, and added a burden of proof for a committee 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. . .”¹¹

From this, it is unclear whether the Political Reform Act would consider a text message a telephonic or an electronic media advertisement. While the arguments below do not turn on this distinction between telephonic or electronic, the ambiguity is worth noting, as it provides crucial context as to why guidance from the Commission is imperative on these issues.¹²

⁷ Cal. Govt. Code §§ 84501(c) (“top contributors”); 84502(a)(1) (“paid for by”); 84506.5 (“not authorized by”); 84503 (“committee major funding from”).

⁸ Cal. Govt. Code §§ 84504 (“radio or telephonic means”); 84504.1 (“video”); 84504.2 (“print”); 84504.3 (“electronic media”); 84504.4 (“radio or television”).

⁹ Cal. Govt. Code §§ 84501(a)(2)(A), (E); 84504.3(b).

¹⁰ See Cal. Govt. Code § 84501(a)(2)(F).

¹¹ 2 Cal. Code of Regs. § 18450.1(a)-(b).

¹² The Federal Communications Commission (“FCC”) considers text messages, *including internet-to-phone SMS*, to be telephonic communications. See FCC Declaratory Ruling and Order 15-72, 30 FCC Rcd. 7971 at 7978-7979 ¶ 27, 8017-8020 ¶ 110-115 (July 10, 2015) (“The TCPA’s consent requirement applies to short message service text messages (“SMS” or “text message”) in addition to voice calls”), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-72A1_Rcd.pdf (last accessed September 27, 2018). Cal. Govt. Code § 84310(a) – which is only applicable to controlled committees – mirrors this, referring to calls “made by an individual, or individuals, or by electronic means.”

Despite this, Cal. Govt. Code § 84504’s requirement that the disclaimer be “read in a clearly spoken manner and in a pitch and tone substantially similar to the rest of the advertisement, and shall last no less

4. The Commission should find that a committee’s use of Toskr’s Relay platform by volunteers does not require a disclaimer under the Political Reform Act, since Commission precedent states that messages disseminated by volunteers do not require a disclaimer.

Volunteer-driven text messages through Relay should be exempted from the Act’s disclaimer requirements in general. The Political Reform Act has long stated, and the Commission has long advised, that activities of volunteers do not require political identification statements.¹³

Relay runs directly parallel to mediums that the Commission has previously considered, including volunteer phone banks. 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. Similarly, Relay’s clients pay it a small fee to facilitate this person-to-person communication.

This grassroots, volunteer activity is crucial to the democratic process, and the Commission has consistently recognized that the activity should, as a regulatory matter, be encouraged.¹⁴ The Commission made this precise argument in I-15-109, stating that “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.”¹⁵ Requiring a disclaimer on peer-to-peer text messages – especially those sent by volunteers – would severely restrict the medium from being used, as it would turn every message into a branded advertisement.

than three seconds” is clearly inapplicable to text messages. California Fair Political Practices Commission I-15-109 (under a previous version of the Political Reform Act) treats SMS as electronic media advertisements.

For the purposes of this request, the analysis below will assume that person-to-person text messages sent through Relay are an electronic media communication.

¹³ See, e.g. Cal. Govt. Code § 84310(a) (exempting campaign telephone calls by volunteers from the disclaimer requirement); California Fair Political Practices Commission, “General Purpose Committees Campaign Disclosure Manual 4” at 9. 8 (November 2017, based on outdated 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 (last accessed September 27, 2018).

¹⁴ See *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).

¹⁵ California Fair Political Practices Commission, I-15-109 (September 8, 2015) (in reference to a mass-SMS service).

This highly-protected political speech is precisely what Relay fosters – it connects a person who knows about a candidate or a cause to a person that does not, and gives them an open platform to communicate their views and to engage in political discourse. Accordingly, the Commission should find that messages sent by volunteers through Relay do not require a disclaimer under the Political Reform Act.

5. The Commission should find that a committee’s use of Toskr’s Relay platform by persons paid for that service does not require a disclaimer under the Political Reform Act, as a disclaimer would severely interfere with the committee’s ability to convey the intended message.

Messages sent on Toskr’s Relay platform – even by paid persons such as campaign or committee staff, or paid texters – should be exempt from the Political Reform Act’s disclaimer requirements as an “electronic media communication. . .for which inclusion of the [disclaimers] is impracticable or 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.”¹⁶

Person-to-person text messaging, including platforms such as Relay, are a fairly new technological phenomenon in politics. The ability for individuals to converse with others in a structured way has allowed committees to effectively convey their political advocacy messages to the general public.

The addition of a disclaimer would fundamentally change the nature of the interaction between message sender and recipient. Reframing a person-to-person communication as an “ad” will make recipients significantly less responsive. This concern was borne out during the June 5th California primary, when at least one Toskr client added disclaimers to their messages – that client saw an approximately 50% reduction in responses to their California messages as compared with identical messages sent in other jurisdictions where they did not add a disclaimer.

Further to this point, the Commission’s removal of the 200-message threshold before a disclaimer was required, creates a situation where it is theoretically possible for *every single text message on Relay to require a “Who funded this ad” disclaimer, including all replies*. While Toskr is committed to compliance, this would simply lead to absurd results, where volunteers (or even paid staff) are attempting to have conversations with “who funded this ad”, with a link to the committee’s website on each message, such as:

Committee Volunteer: Hello, it’s John Smith from VotePAC, will you pledge to vote on Tuesday? [who funded this ad? votepac.com].

Voter: Yes, I’ll definitely vote.

¹⁶ Cal. Govt. Code § 84501(a)(2)(E).

Volunteer: Excellent, do you know where your polling place is? You should vote for Jane Doe for Mayor, she will help fix our roads. [who funded this ad? votepac.com].

Voter: Thanks, I'll keep that in mind.

Volunteer: If you need any additional information, please visit votepac.com. [who funded this ad? votepac.com].

Finally, the Disclose Act singles out two types of communications that do not require a disclaimer on each message: “advertisement[s] made via a form of electronic media that allows users to engage in discourse and post content [do not require a disclaimer ‘on each individual post, comment, or other similar communication’]” and “advertisements made via social media for which the only expense or cost of the communication is compensated staff time” (with exceptions).¹⁷

Person-to-person text messages sent through Relay are analogous to these mediums exempted from the disclaimer requirements altogether. Relay’s purpose is to facilitate person-to-person communications, opposed to broadcast advertisements designed to reach many people at once. It is a medium for people to “engage in discourse” with others regarding candidates and causes that they support. To the extent that a committee’s staff are using Relay – their staff time should not affect this analysis – as it is actually *more* of a grassroots communication than social media.

These two exemptions show a clear intent for the Disclose Act to *not* require a disclaimer in character-limited mediums, such as social media (and, as described above – peer-to-peer text messages) – where millions of people can be reached at once. With Relay, one person communicates directly with one person, *in direct contrast to* broadcast text-messages (sent from one person to many at once), which raise issues such as “dark money” and anonymous-spending that the Disclose Act was designed to prevent.

These practical limitations severely interfere with a committee’s ability to convey their intended message – by essentially requiring that all person-to-person messages become branded broadcast advertisements. Accordingly, the Commission should find that person-to-person text messages sent through Relay meets the exemption from “Advertisement” for when including the disclaimer “is impracticable or 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.”

6. Conclusion

The Disclose Act’s goal of educating voters as to who is paying for political advertisements is certainly a laudable one. Voters should be able to “make an informed choice in the political marketplace.” However, required disclaimers should be focused on regulating broadcast speech – speech going from one source to many persons at once (television, radio,

¹⁷ Cal. Govt. Code § 84504.3(f)-(g).

direct mail, online advertising, and the like) – opposed to speech that is from one person to another.

If the Commission were to answer the questions presented in this request in the negative, volunteers and committees would essentially be required to “brand” unique and genuine conversations as advertisements. While the committee using Relay has latitude to suggest and define messages and responses, they are very much conversations between volunteers (or paid staff or paid texters) and the voters.

Relay lets committees – in most cases through their volunteers – speak to the general public at scale, without having to resort to broadcast messaging, which is often impersonal. The platform 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. A disclaimer (especially “who funded this ad”) turns these person-to-person conversations into what is ultimately a generic campaign advertisement.

Accordingly, we ask that the Commission find that messages sent through Relay – whether disseminated by volunteers, paid staff, or paid texters – do not require a disclaimer. 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 regarding this request, please do not hesitate to contact me at 202-479-1111, or at mitrani@sandlerreiff.com.

Sincerely,



David Mitrani
Counsel
Toskr, Inc.