

Date of Hearing: April 10, 2019

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Marc Berman, Chair

AB 201 (Cervantes) – As Amended March 14, 2019

SUBJECT: Political Reform Act of 1974: campaign disclosure: text messages

SUMMARY: Requires a text message that supports or opposes a candidate or ballot measure to disclose the name of the candidate or committee that paid for the text message, as specified.

Specifically, **this bill:**

- 1) Prohibits a candidate or committee from authorizing or paying for an advertisement that is a text message that supports or opposes a candidate or ballot measure unless the text message discloses the name of the candidate or committee that authorizes or pays for the text message, and provides a hyperlink in the text message to an internet website containing more information about the candidate or committee. Requires this disclosure to be in the same font size as a majority of the text in the text message. Prohibits a candidate or committee from contracting with a vendor that does not comply with this disclosure requirement.
- 2) Provides that this bill does not apply to a text message that is individually sent without the assistance of mass distribution technology if either of the following conditions is met:
 - a) The text message is sent by the candidate, the campaign manager, or individuals who are volunteers; or,
 - b) The text message is sent in response to a voter who replies to a text message from a candidate or committee.
- 3) Requires an internet website that is hyperlinked as provided for in this bill to remain online and available to the public until 30 days after the date of the election in which the candidate or ballot measure supported or opposed by the advertisement was voted on.

EXISTING LAW:

- 1) Creates the Fair Political Practices Commission (FPPC), and makes it responsible for the impartial, effective administration and implementation of the Political Reform Act (PRA).
- 2) Defines the term “advertisement,” for the purposes of specified provisions of the PRA, as 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.
- 3) Requires, until January 1, 2020, an electronic media advertisement that supports or opposes a candidate or ballot measure to include a disclosure identifying the name of the committee that paid for the advertisement and the top contributors to that committee, as specified, unless the advertisement is paid for by either of the following:
 - a) A political party committee; or,

- b) A candidate-controlled committee established for an elective office of the controlling candidate.
- 4) Requires, beginning January 1, 2020, an electronic media advertisement that is a graphic, image, animated graphic, animated image, email message, internet website, or made via a form of social media to include a disclosure or a link to a disclosure identifying the name of the committee that paid for the advertisement and the top contributors to that committee, as specified, unless the advertisement is paid for by either of the following:
- a) A political party committee; or,
 - b) A candidate-controlled committee established for an elective office of the controlling candidate.

FISCAL EFFECT: Unknown. State-mandated local program; contains a crimes and infractions disclaimer.

COMMENTS:

- 1) **Purpose of the Bill:** According to the author:

One of the fundamental tenets of our state’s election laws is that, in the realm of campaign communications, there is a preference for more disclosure rather than less. With read rates upwards of 98 percent, mass text messages represent the new frontier of modern campaigns. Under existing law, there are limited regulations of mass campaign text messages, including requirements for disclosing which entity paid for them. Due to a quirk in recent elections laws passed by the Legislature, even those limited regulations are set to expire in January 2020. Without further legislation, unregulated mass text messages will be the norm, not the exception.

Assembly Bill 201 will bring needed regulation to this burgeoning front of modern campaigns. It will require mass campaign text messages that support or oppose a candidate or ballot measure—whether sent by a candidate, political party, or independent expenditure campaign—to include disclosures about which entity paid for the mass text messages. This disclosure must also include a [link] to the entity’s website. AB 201 will help provide California voters with more complete information about who is paying for and sending them mass text messages.

- 2) **Existing Disclosure Requirements for Text Messages and Previous Legislation:** As detailed above, existing law generally requires electronic media advertisements to include a disclosure identifying the name of the committee that paid for the advertisement and the top contributors to that committee, as specified, except in situations where the advertisement is paid for by a candidate’s own controlled committee or a political party committee. The FPPC has interpreted the term “electronic media advertisement” to include text messages. Accordingly, many campaign text messages that are sent in California already are required to include a disclosure of the entity that is paying for the text message to be sent. Typically, this disclosure is accomplished through including the text “Who funded this ad?” as a hyperlink in the text message that links to an internet website with more details about the committee

that paid for the advertisement.

As noted above, however, electronic media advertisements that are paid for by a candidate's own controlled committee or a political party committee generally are not required to include disclosures. Communications by candidates' own campaigns and political parties traditionally have been subject to different disclosure requirements because the identity of the entity sending the communication generally is clear to the public.

In the absence of further changes to state law, however, campaign text messages will no longer be required to include disclosures starting next year as a result of the passage of AB 2188 (Mullin), Chapter 754, Statutes of 2018. While AB 2188 was approved by the Legislature and signed into law last year, it contained a delayed operative date, and will not take effect until January 1, 2020.

AB 2188 made various changes to the required format for disclosures on political advertisements that are electronic media ads. These disclosure requirements will replace the existing disclosure requirements when AB 2188 takes effect next year. AB 2188 specified different formatting requirements depending on the medium through which and manner in which an advertisement was disseminated. For instance, the disclosure requirements in AB 2188 were different for graphic electronic media advertisements than for email messages, which in turn had different disclosure requirements than video electronic media advertisements. None of the disclosure requirements in AB 2188, however, cover text messages that are political advertisements. As a result, when AB 2188 takes effect and its provisions replace the current rules that apply to electronic media advertisements, political text messages will no longer be required to include disclosures under state law.

This bill not only would ensure that specified political text messages remain subject to a requirement that those text messages include a disclosure about the entity paying for the text message, but also would expand the text message disclosure rules to require disclosures to appear on most text messages sent by candidates and political parties.

- 3) **Mass Distribution Technology:** As detailed above, the text message disclosure requirements found in this bill do not apply to a text message that is individually sent without the assistance of mass distribution technology. The term "mass distribution technology," however, is not defined in this bill or in the PRA generally. In the absence of such a definition, it is unclear whether this bill is intended to apply to certain types of text messaging services and platforms that increasingly are used by political campaigns.

For example, peer-to-peer (P2P) text messaging has become an increasingly common tool used by political campaigns. With P2P text messaging, each text message is sent by one individual to another individual. In contrast to P2P text messaging, broadcast messaging permits a single text message to be sent to multiple recipients at once. Unlike P2P text messaging, broadcast messaging can allow text messages to be sent to multiple recipients automatically and without human intervention.

Several messaging services and platforms have been developed to help facilitate P2P texting by political campaigns. In a letter that it sent to the FPCC last fall, Toskr—a company that provides P2P messaging services to political campaigns through its "Relay" platform—described the messaging services that it provides in the following way:

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.

Because P2P text messaging services require human intervention to send each individual text message, a plain-language definition of the term "mass distribution technology" would seem to exclude P2P messaging services. On the other hand, it could be argued that P2P services like Toskr's "Relay" platform help facilitate the widespread distribution of text messages, and therefore constitute a "mass distribution technology."

According to the author's staff, it is *not* the author's intent for the term "mass distribution technology" to include P2P text messaging services like those described above. In light of that fact, and to ensure that this bill is implemented in a manner that is consistent with the author's intent, it may be appropriate to define the term "mass distribution technology."

- 4) **Hyperlink to More Information and Suggested Amendments:** As detailed above, this bill requires specified political text messages to include the name of the candidate or committee that authorizes or pays for the text message, and a hyperlink in the text message that links to an internet website containing more information about the candidate or committee. The bill does not specify, however, what additional information would need to be disclosed on the internet website that a person reaches if they follow the hyperlink in the text message, nor does it provide details about *how* a candidate's or committee's identity should be disclosed in a text message.

To provide clarity to the entities that will be required to maintain an internet website pursuant to this bill, and to ensure that this bill is implemented in a manner that is consistent with the author's intent, committee staff recommends that this bill be amended to specify the information that must be included on the internet website. If it is the author's desire to

maintain disclosure requirements similar to those that are in effect under existing law (and that will become inoperative next year in the absence of further legislation), the bill should be amended to require that the website include the name of the committee that paid for the advertisement; the top contributors to the committee paying for the advertisement if applicable; and if the advertisement is an independent expenditure (IE), a specified disclosure that is required to be included on IEs under existing law.

Additionally, in light of the fact that this bill will require text messages to include a hyperlink to an internet website that contains details about candidate or committee that pays for the text message, the author and the committee may wish to consider amendments to this bill that provide for a shorter disclosure in the text message itself, in recognition of the character limitations of text messages. SMS (short message service) text messaging, which is the most widely available form of text messaging, is limited to 160 characters in each single SMS message. If a candidate or committee was required to disclose the full committee name in a text message, that disclosure could take up a significant portion of the 160 character limit. In recognition of these limitations, existing state law simply requires text messages to include the text “Who funded this ad?,” with a hyperlink to an internet website that includes more information about the identity of the committee that paid for the text message. The author and the committee may wish to amend this bill to require text messages to include the text “Who funded this ad?,” with that text being a hyperlink to the internet website with additional information.

- 5) **Related Legislation:** AB 864 (Mullin), which is also being heard in this committee today, requires a text message that supports or opposes a candidate or ballot measure to include a disclosure of the candidate or committee that paid for the text message, among other provisions.
- 6) **Political Reform Act of 1974:** California voters passed an initiative, Proposition 9, in 1974 that created the FPPC and codified significant restrictions and prohibitions on candidates, officeholders and lobbyists. That initiative is commonly known as the PRA. Amendments to the PRA that are not submitted to the voters, such as those contained in this bill, must further the purposes of the initiative and require a two-thirds vote of both houses of the Legislature.

REGISTERED SUPPORT / OPPOSITION:

Support

None on file.

Opposition

None on file.

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