

California Fair Political Practices Commission

MEMORANDUM

To: Chair Ravel, Commissioners Eskovitz, Garrett, Montgomery and Rotunda

From: Hyla P. Wagner, Senior Commission Counsel
Zackery P. Morazzini, General Counsel

Subject: Adoption of Proposed Regulation 18421.31 – Text Message Contributions

Date: September 30, 2011

I. Introduction

The Commission will consider adoption of a regulation setting forth the requirements of the Political Reform Act (the “Act”)¹ applicable to political text message contributions.

II. Background

As demonstrated by its adoption in 2010 of regulations concerning electronic advertisements and Internet campaign activity, the Commission is making a continuing effort to keep the Political Reform Act up to date with changes in technology and communications. The Commission recognizes the potential of the Internet and mobile communications to engage more people in the political process, and seeks to enact rules that will broaden participation by Californians in candidate and ballot measure elections.

Given that individuals may now make charitable donations through text messages from their mobile phones, the Commission anticipates that some political committees in California may wish to create fundraising programs permitting individuals to text small dollar amounts in political contributions.

The Commission wishes to set forth the requirements of the Political Reform Act that committees will need to meet to develop programs of text message contributions. In issuing this proposed regulation, the Commission wishes to emphasize first, that it is the political committees that have a duty to comply with the Act’s recordkeeping and reporting requirements, not the wireless carriers or vendors. Second, that this regulation is not imposing any new duties or regulatory burden on campaign committees, wireless carriers or vendors, but is merely setting forth the existing requirements of the Act that are relevant to committees if they choose to develop a text message contribution program. Third, the wireless industry association did not seek action from the Commission to permit text message contributions and is not the impetus for

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.

this regulation. Rather, Commission staff raised this issue given the widespread use of mobile communications.

Before turning to the specific provisions of the proposed regulation, we provide background concerning (1) how texting a donation works and (2) a 2010 Federal Election Commission advisory opinion on text contributions at the federal level.

Texting a donation. In the current model for nonprofit fundraising, a text donation works as follows. A wireless subscriber sends a text message pledge to make a donation. A third party vendor notifies the individual's wireless carrier to apply the pledged donation amount to the individual's next phone bill. The individual receives the wireless phone bill and in a period of two to three weeks pays the bill. Lastly, the wireless carrier pays the vendor who disperses the donations to the proper organization.

For example, to donate \$10 to UNICEF through the Mobile Giving Foundation (hmgf.org) the text messages look like this:

Subscriber: Text "FOOD" to 864233
 Reply: "To confirm your \$10 donation to UNICEF reply with the word Yes. Terms at hmgf.org/t. Reply HELP for help. Reply STOP to cancel. Msg & Data rates may apply."
 Subscriber: Text "Yes"
 Reply: "Thanks! \$10 charged to your phone bill. Txt FOOD up to three times for UNICEF donations. Info? Visit hmgf.org/t or text Help.STOP to cancel. Msg & Data rates may apply."
 Reply: "To receive alerts & other info from UNICEF please reply with MORE. You will not get other messages unless you reply. Msg & Data rates may apply."

The parties involved in a charitable text message contribution are the wireless subscriber, who is registered to a particular phone; the wireless carriers, such as Verizon, AT&T, Sprint, T-Mobile USA, TracFone Wireless, MetroPCS, and U.S. Cellular, among others; and a third party vendor that aggregates and disperses the donations, such as mobilegiving.org, mobilecommons.com, mgive.com, mobilecause.com and the mobile giving foundation (hmgf.org), among others. The third party vendor creates the infrastructure that permits charitable giving over the networks of US wireless carriers; it acts as a billing settlement and records clearinghouse between wireless carriers and participating charities and generates receipts for donors.

In the charitable contribution context, vendors typically deduct between 10 or 50 cents per \$10 donation as a charge for their services in processing the donation. Most text message donations are currently at the \$5 or \$10 level, and wireless carriers typically cap all text message donations at a maximum of \$30 per subscriber per program. The wireless carriers' industry practice has been to keep donations restricted to a maximum amount so that an individual's phone bill does not get too expensive with costs other than phone services. This reflects one current model for text message charitable contributions. However, the business models may

change rapidly in the mobile giving area, and the fees that apply to charitable contributions differ from those that apply to other transactions.

Federal Election Commission Opinion. The wireless telecommunications association, CTIA, sought approval of a plan for texting political contributions in an advisory opinion request to the Federal Election Commission. CTIA proposed a program where political contributions could be made by individuals texting five or six digit code numbers similar to the mobile giving programs for charitable donations. Under CTIA's proposal, the contribution would be made at the time the cell phone user pays their monthly bill, which includes the amount for the texted donation. A collection aggregator would collect contributions from wireless carriers over a thirty-day period and then transfer the contributions to the particular political committee. The Federal Election Commission ("FEC") denied the request in [Advisory Opinion 2010-23](#), attached. The FEC found that the proposed program would not be permissible under the Federal Election Campaign Act and FEC regulations because contributions would not be forwarded to political committees within the timeframes specifically required by the federal Act. Under FEC rules, contributions received for a political committee must be forwarded to the committee's treasurer within 30 days of receipt for contributions of \$50 or less, and within 10 days of receipt for contributions of more than \$50. The FEC also objected that the political contributions would not be held in a separate merchant account, segregated from general corporate funds of either the wireless carrier or the collection aggregators.

The Political Reform Act does not present the same roadblocks to a text message donation program that the FEC found in federal law. Unlike the federal system, the Act does not have a precise 30-day requirement for forwarding contributions to a committee's treasurer. The Act requires that contributions collected by another on behalf of a candidate or committee be forwarded "promptly" to the committee's treasurer, with "promptly" being defined as before the next campaign statement is due. (Section 84306 and Regulation 18421.3.) Further, the Act does not necessarily require that contributions destined for a political committee never be commingled with general corporate funds of the wireless carrier or collection aggregator, as the federal rules do. (Regulation 18421.3.)

As noted above, in this case neither the wireless industry association nor any other specific party is seeking action by the Commission to permit text message contributions. The Commission itself is attempting to keep the Act current with the mobile communications technology used daily by most Californians.

III. Proposed Regulation and Current Law

Proposed regulation 18421.31 states that a committee may raise funds through text message contributions under the Act. The regulation applies to a committee fundraising through low-dollar text message contributions.

Contributions received. Regulation 18421.1(c) of the Act defines when contributions are "received." The proposed regulation states that text message contributions are received for purposes of the Act, on the date that a mobile fundraising vendor, acting as agent of a candidate or committee, obtains possession and control of the contributions.

Transferring contributions to a committee promptly. In addition, Section 84306 of the Act requires that all contributions received by a person acting as an agent of a candidate or committee shall be reported promptly to the candidate or committee's treasurer or any of his or her designated agents. "Promptly" is defined to mean not later than the closing date of any campaign statement the committee or candidate for whom the contribution is intended is required to file. The proposed regulation provides that contributions made by text message shall be considered to be transferred promptly to a committee's bank account if they are collected by the wireless carrier and forwarded by the mobile fundraising vendor to the committee following standard business practices for those transactions or within a specified time period.

Contributor information. The regulation states that a committee raising funds by text message contributions shall maintain the contribution information as required by Regulation 18401(a)(1)-(3). The most salient requirement of the Act affecting text message donations is that full contributor information must be reported for any donor who gives \$100 or more. (Section 84211(f).) Further, the Act prohibits any person from making an anonymous contribution or contributions to a candidate or committee totaling \$100 or more in a calendar year. (Section 84304.)

The Act's recordkeeping rules apply with increasing exactitude from small contributions to larger contributions. The current rules provide that for contributions of *less than \$25*, a committee only needs to keep the dates and daily totals of the contributions, but does not need to obtain or keep detailed information on the contributors (contributor name and address). (Regulation 18401(a)(1).) The recordkeeping rules for contributions less than \$25 permit small dollar fundraising, such as pass-the-hat fundraisers at campaign appearances at churches or other community events, and permit supporters to make small donations at campaign headquarters for bumper stickers, t-shirts, or food.

For contributions of *\$25 or more but less than \$100*, the committee records must include the full name and street address of the contributor, the cumulative amount received from the contributor, and intermediary information (the full name, street address, occupation and employer of the intermediary or agent and of the true source of the contribution), if the contribution is received through an intermediary or agent, as defined in Regulation 18432.5. (Regulation 18401(a)(2).)

For contributions of *\$100 or more*, the committee must keep the contributor's name and address, occupation and employer information, the cumulative amount received from the contributor, and intermediary information. (Regulation 18401(a)(3).) Many text message donation programs appear to be currently capped at three donations of \$10, for a total of \$30 per subscriber per program. However, if it is ever possible for a single donor to text cumulative contributions of \$100 or more in a calendar year to a candidate or committee, the committee must ensure that it obtains the contributor's name, address, occupation and employer information. While there is no specific requirement on how the contributor information is provided to a committee, campaign committees must obtain contributor information as specified by the recordkeeping rules of Regulation 18401.

Contributor and amount of contribution. The regulation also provides that a contribution made by text message will be attributed to the person who is subscribed to the cell phone number that texted in the contribution. Further, it states that the entire amount authorized by the contributor is counted as the amount of the contribution, and that any fees deducted by the wireless carrier or mobile fundraising vendor for processing the contributions shall be reported by the committee as an expenditure, consistent with Regulation 18421.3(a).

IV. Conclusion and Staff Recommendation

Enacting this regulation will inform political committees, wireless carriers, mobile marketing companies and fundraising firms that the Act is not a barrier to the creation of political text message contribution programs in California. It will give the green light for political committees and these private entities to develop text message contribution programs if they choose to.

Staff held interested persons meetings on July 14, 2011 and on September 13, 2011, to hear public input the proposed regulation. Several wireless carriers, a mobile marketing business, public interest groups, and political attorneys participated. A number of issues were raised. First, the wireless carriers wanted to confirm that if this regulation is passed, it does not obligate them to participate in a political text message contribution program. We confirmed that participating in such a program would be purely at their discretion. A question was raised about whether there was any audit trail for a contribution made by text. A Mobile Commons representative commented that there is a fairly complete audit trail for texted contributions ending with the subscriber's paid phone bill. A question was raised about whether multiple contributions texted from corporate owned phones would create a problem. Here, the Act does not prohibit corporate contributions, so it would not give rise to a special problem. In addition, most corporations have policies discouraging personal use of company resources, so this would likely police itself. Another question asked what documents could third party vendors use to verify the authenticity of a candidate, that a candidate is not a fraud? In the charitable contribution context, third party vendors require that charities meet five criteria before they are eligible to participate in the text contributions program. There are criteria that vendors could use here such as the candidate's filing a Form 501, a committee filing a Form 410 statement of organization, creating a campaign bank account, and obtaining an FPPC ID number, or a candidate or measure's qualification for the ballot. Another comment specified that we should state that text message means messages sent over the short message system (SMS), and we have added this language to the regulation.

It is not anticipated that adoption of this regulation will increase costs of compliance with the Act.

Staff recommends adopting Regulation 18421.31.

Attachments - Regulation 18421.31

- Federal Election Commission Advisory Opinion 2010-23