Date of Hearing: June 29, 2022

ASSEMBLY COMMITTEE ON ELECTIONS
Isaac G. Bryan, Chair
SB 746 (Skinner) – As Amended May 10, 2022

SENATE VOTE: (vote not relevant)

SUBJECT: Political Reform Act of 1974: business entities: political purposes.

SUMMARY: Requires a business entity to disclose any campaign contributions or expenditures that result when the entity intentionally utilizes its products or services to disseminate communications made for political purposes, as specified. Partially overrides a regulation that allows employees to spend a small portion of their compensated time on political activities without triggering campaign disclosure reporting for the employer. Specifically, **this bill**:

1) Provides that a business entity that intentionally utilizes its products or services to disseminate communications made for political purposes, and that takes that action at the direction of one or more of the officers of the business entity, is subject to the limits, prohibitions, and reporting requirements set forth in the Political Reform Act (PRA) for any resulting contribution or expenditure, as specified. Defines "political purposes," for the purpose of this provision, as influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate or candidates, or the qualification or passage of any measure.

2) Specifies that if the product or service used by a business entity to disseminate a political communication, as described above, is an online service operated by the business entity, any payment of salary, reimbursement for personal expense, or other compensation paid or incurred by the business entity for the specific purpose of disseminating the communication is a contribution or expenditure for purposes of the PRA, notwithstanding an existing regulation that specifies that the payment of salary or other compensation by an employer to an employee is a contribution or expenditure under the PRA if the employee spends more than 10% of compensated time in any month rendering services for political purposes.

3) Provides that the provisions of this bill do not apply to either of the following:

    a) A business entity's use of its products or services exclusively to carry out its commercial activities, including, but not limited to, delivering user-generated content or an advertisement on behalf of another person.

    b) Communications that are internal to a business entity or entities.

4) Defines "officer," for the purposes of this bill, as a natural person elected or appointed by the board of directors to manage the daily operations of a business entity, such as a chief executive officer, president, secretary, or treasurer.

EXISTING LAW:

1) Creates the Fair Political Practices Commission (FPPC), and makes it responsible for the impartial, effective administration and implementation of the PRA.

2) Defines "contribution," for the purpose of the PRA, as a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment, except to the extent that full and adequate consideration is received or if it is clear from the surrounding circumstances that the payment is not made for political purposes.

3) Defines "expenditure," for the purpose of the PRA, as a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment, unless it is clear from the surrounding circumstances that it is not made for political purposes. Specifies that a payment is made for political purposes if it is for purposes of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate or candidates, or the qualification or passage of any measure, among other provisions.

4) Requires political committees to file periodic campaign reports that disclose campaign contributions and expenditures, as specified.

5) Provides, pursuant to a regulation adopted by the FPPC, that the payment of salary, reimbursement for personal expenses, or other compensation by an employer to an employee who spends more than 10% of compensated time in any one month rendering services for political purposes is a contribution or an expenditure by the employer if either of the following conditions are met:

   a) The employee renders services at the request or direction of the employer.

   b) The employee, with consent of the employer, is relieved of any normal working responsibilities related to the employee's employment in order to render the personal services, unless the employee engages in political activity on bona fide, although compensable, vacation time or pursuant to a uniform policy allowing employees to engage in political activity.

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

COMMENTS:

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

> Under current law, the only way a business can legally influence an election is by making a cash or in-kind campaign contribution to a candidate or political committee, or by making independent expenditures, and both actions must be disclosed to the public. Although the Constitution guarantees a business the right to influence an election, the Supreme Court has also held that there is ample reason to require public disclosure of such influence. Accordingly, California has extensive reporting requirements for both monetary and nonmonetary contributions to political campaigns. However, recent technological advancements have made it possible for digital companies to individually influence voter behavior in ways that do not have to be publicly disclosed.
>
> Just like with other types of media, voters should have the right to know if they're being purposely presented with information designed to influence how they vote.

> SB 746 addresses this gap in political reporting requirements and restores public trust in online content by allowing voters to know if they are being manipulated in partisan ways. Specifically, SB 746 promotes Internet transparency by requiring online platforms that use personal information to directly target voters on behalf of a candidate or ballot measure to disclose that activity to the Fair Political Practices Commission. Users can then see from this annual, public report which online businesses have politically targeted consumers – potentially influencing the way consumers have voted. Taking this step is critical to ensuring that evolving technological capabilities do not interfere with our Constitutional right to free and fair elections.

2) **What is the Problem?** In describing the primary problem that this bill seeks to address, the author contends that existing law would allow a large online platform to manipulate the algorithm that determines the content that its users see in a manner that is designed to influence the outcome of an election, and that the company would not be required to disclose those activities under existing law. The author provided two examples where actions taken by large technology companies had the potential to influence elections without regulatory oversight or public disclosure.

   First, the author points to reports that Google was providing skewed search results in connection with a proposition that it did not support. As *Politico* reported in October 2020:

   > Google searches for seven of the state's 12 ballot proposals have surfaced campaign arguments from the state voter guide instead of neutral "snippets," said former cybersecurity executive Tom Kemp. He said those search results could sway voters who rely on those first impressions to understand what the measures do, on subjects ranging from stem cell research to commercial property taxes.
   >
   > His findings about Google — a de-facto roadmap for voters making their way through lengthy ballots — suggest that algorithms can turn even neutral sources into biased ones, a problem that could extend well beyond the nation's tech capital…
   >
   > In one California example, a Google search of "Prop 24" on Thursday turned up this description of a November data privacy initiative from the state's voter guide: "CON Proposition 24 reduces your privacy rights in California. Proposition 24 allows 'pay for privacy' schemes, makes workers wait years to learn what confidential …"

   In addition, the author points to a 2014 report by *Mother Jones* magazine that Facebook was "quietly conducting experiments on how the company's actions can affect the voting behavior of its users." *Mother Jones* further reported that "the process by which Facebook has developed this tool—what the firm calls the 'voter megaphone'—has not been very transparent, raising questions about its use and Facebook's ability to influence elections." The tool described in the article is one that Facebook says is designed to encourage its users to vote. In response to questions from the *Mother Jones* reporter, Facebook claimed that the distribution of the tool was random (that is, Facebook did not push the tool to certain types of users).

3) **Does This Bill Accomplish the Author's Goals?** Notwithstanding the author's concern about the power that large online services may have to influence voter behavior by affecting the information that their users see, it is not clear that the language of this bill would provide any additional meaningful disclosure about whether and how online services seek to influence, for political purposes, the information that its users see.

   The two examples discussed above may demonstrate that large online platforms have the potential to exert considerable influence over the voting behavior of their users with little or no public disclosure. It is not clear, however, that this bill would have required disclosure in either of those cases. The same former cybersecurity executive who called attention to Google's search results (Tom Kemp) was quoted in the *Politico* article as saying that he believes the bias in Google's search results was inadvertent. In the case of Facebook's voter megaphone, nothing in the article indicates that Facebook's activities were for "political purposes" as that term is defined in this bill.

   Additionally, committee staff is unaware of any evidence of an online platform intentionally modifying the algorithm that determines the content that its users see in an effort to support or oppose specific candidates or ballot measures. If an online platform *did* intentionally modify its algorithm in such a manner, those actions may or may not already be subject to reporting under the PRA under existing law, depending on the exact nature of the platform's actions.

   This bill contains two primary provisions. The first, found in subdivision (a) of the proposed Section 86000 of the Government Code, specifies that a business entity "shall be subject to the limits, prohibitions, and reporting requirements" of the PRA for any contribution or expenditure that results when the business entity "intentionally utilizes its products or services to disseminate communications made for political purposes" as specified and if certain conditions are met. This bill does *not*, however, change the definition of the terms "contribution" or "expenditure" as those terms are used in the PRA, nor does it appear to make any change to the type of conduct that results in a payment being classified as a contribution or expenditure. As a result, although it is somewhat unclear, the language in subdivision (a) of proposed Section 86000 appears simply to state that if a business entity makes a payment that is a contribution or expenditure under the PRA, that contribution or expenditure is subject to the limits, prohibitions, and reporting requirements of the PRA. Since contributions and expenditures *already* are subject to the limits, prohibitions, and reporting requirements of the PRA, it is unclear whether subdivision (a) makes any change to current law at all, or whether it simply is declaratory of existing law.

   The second primary provision of this bill is found in subdivision (b) of the proposed Section 86000 of the Government Code. That provision seeks to override an existing FPPC regulation as it relates to an employer's payment of an employee's salary or other compensation, and where a portion of that employee's compensated time is spent rendering services for political purposes. Specifically, as a general rule, when an employer pays a salary or other compensation to its employees who are engaged in rendering services for political purposes, that payment normally is considered a campaign contribution or expenditure. However, 2 Cal. Code Regs. §18423 provides a limited exception to this general rule, allowing payment of salary or other compensation by an employer to an employee to go unreported as a contribution or expenditure if 10% or less of the employee's compensated time in a month is spent rendering services for political purposes. This limited exception

(hereinafter referred to as the "10% exception") applies to all employers; it is not something that is unique to for-profit businesses or to large online services.

This bill seeks to eliminate the 10% exception as it relates to a business entity if the salary or other compensation paid by the business entity to its employees is for services related to the specific purpose of disseminating a political communication through an online service operated by the business entity. For example, if 5% of an employee's compensated time is spent rendering services for the specific purpose of disseminating a political communication through the employer's online service, the value of that 5% of the employee's compensated time would be considered a contribution or expenditure by the employer. Eliminating the 10% exception in these circumstances would require some business entities that operate online services to report a larger number of payments as contributions or expenditures. For example, an online service provider might be required to report that $1,000 worth of one of its employee's compensated time was spent rendering services that supported or opposed a specified candidate or ballot measure.

Eliminating the 10% exception would not, however, require the provider to publicly disclose that it made changes to how information was provided to its users in an effort to influence elections, nor would it require any disclosure about more subtle ways that a service may seek to influence the political decisions of its users (for instance, by targeting its users with politically-charged content that does not expressly advocate for or against a candidate or ballot measure).

Finally, unlike prior versions of this bill, nothing in the language of this bill gives an *individual consumer* the right or ability to determine how a business used that consumer's personal information for a political purpose. In fact, nothing in this bill gives an individual the right or ability to know whether the business targeted that individual with political communications or, if the individual *was* targeted, what those communications were and which candidate or ballot measure they were intended to support or oppose.

4) **10% Exception**: Although the author's staff has described the 10% exception as it relates to online services as a "loophole," committee staff is not aware of any evidence that the existing 10% exception is being abused. On the other hand, eliminating the exception, even if only for certain political communications that are disseminated using online services, could have unintended consequences and add considerable complexity for campaign reporting.

One effect of the 10% exception is that it eliminates the need for an employer that engages in very little political activity to maintain detailed records if *any* of its employees spend *any* of their compensated time rendering services for political purposes. Without the 10% exception, even minimal amounts of political activity by an employer could trigger campaign reporting obligations under the PRA. For example, if an employee at a small business spent a small portion of their compensated time writing social media posts that urge their customers to vote against a local ballot measure because it would have negative effects on the business, the business could be required to document that employee's time for campaign reporting purposes. Such posts may or may not trigger reporting under the PRA, but the business nonetheless may need to track the amount of time the employee spent writing those social media posts to determine whether relevant disclosure thresholds were met. In that way, the 10% exception serves as a safe harbor, allowing employers that otherwise do not engage in political activities to have one or more employees spend a small amount of compensated time

on political activities without triggering campaign reporting obligations.

For employers who engage in much higher levels of political activity, the 10% exception can help ensure that compliance with campaign disclosure rules is not overly burdensome. For example, in 2021, Google was classified as a political committee under California law (specifically, a "major donor committee") because it made contributions totaling $10,000 or more in a calendar year to or at the behest of candidates or committees. As a result, Google was required to file campaign disclosure reports disclosing the contributions and expenditures it made. In the absence of the 10% exception, if even *one* of Google's employees spent *any* of their compensated time rendering services for political purposes at Google's request or direction, the value of that employee's time would be a reportable contribution or expenditure that would have to be disclosed on Google's campaign disclosure reports. Given that Google has more than 100,000 employees, requiring documentation and reporting of di minimis amounts of employee time that is spent rendering services for political purposes could be impracticable, and likely would provide very little meaningful information to the public.

In the absence of any evidence that the 10% exception is being abused to avoid disclosure of meaningful levels of campaign activity, the committee should consider whether the elimination of that exception is prudent.

5) **Prior Version of this Bill**: As approved by the Senate, this bill would have required businesses to disclose whether they use the personal information of consumers for political purposes, as defined, to consumers, upon request, and annually to the Attorney General or the California Privacy Protection Agency. Last month, this bill was gutted-and-amended to delete those provisions of the bill and to add the current contents. Although the author is seeking to address a similar issue with the current contents of this bill as the prior version sought to address, the current version of this bill takes a substantially different policy approach. Accordingly, prior votes on this bill are not relevant to the current version, and in accordance with the committee's longstanding policy, letters of support or opposition that were submitted to prior versions of this bill are not reflected in this analysis.

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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