

Date of Hearing: April 29, 2015

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Sebastian Ridley-Thomas, Chair

AB 834 (Salas) – As Amended March 26, 2015

SUBJECT: Political Reform Act of 1974: advertisements.

SUMMARY: Prohibits public agencies from paying for advertisements that feature candidates for office in the last 90 days before an election. Specifically, **this bill:**

- 1) Prohibits a person or entity from disseminating, broadcasting, or otherwise publishing a public advertisement featuring a candidate for elective office within 90 days before the date of the election at which the candidate will appear on the ballot.
- 2) Defines "public advertisement," for the purposes of this bill, as an advertisement, including a broadcast, billboard, or newspaper advertisement, that is paid for from the funds of a state or local public agency.
- 3) Defines "featuring a candidate," for the purposes of this bill, as containing the voice or image of, or a statement attributable to, a candidate.

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) Prohibits a public officer from expending, and prohibits a candidate from accepting, any public moneys for the purpose of seeking elective office.
- 3) Makes it unlawful for an elected state or local officer, appointee, employee, or consultant to use, or permit others to use, public resources for a campaign activity.
- 4) Provides that any officer of the state, or of any county, city, town or district of the state, and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys who uses such funds for personal use is guilty of a felony, punishable by imprisonment in the state prison for two, three, or four years, and is disqualified from holding any office in the state.
- 5) Prohibits a newsletter or other mass mailing from being sent at public expense. Defines "mass mailing," for these purposes, as over two hundred substantially similar pieces of mail, not including a form letter or other mail which is sent in response to an unsolicited request, letter or other inquiry.

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

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

In California, a government entity can pay for advertisements such as billboards, public service announcements, and commercials that feature a candidate for elective office. While this activity is not considered to be a contribution by the Fair Political Practices Commission (FPPC), the public funds that are used support candidates for public office during elections.

A central purpose of the Political Reform Act, which established the FPPC, is to provide the voters and public with meaningful disclosure of state and local campaign contributions and expenditures, state lobbying activity, and the economic interests of state and local candidates and designated public officials.

The California State Senate Rules Committee, which publishes mass mailings for all state Senators, has established a 90-day mass-mailing prohibition to those Senators whose names appear on any ballot. This policy is designed to prevent content that has the effect of enhancing the public image of Senators during an election.

At least nine states prohibit the use of public funds for public service announcements and other communications that feature candidates for public office, including elected officials running for re-election or election to a different office.

Assembly Bill 834 would establish a black out period, aligning with the California Senate mailing prohibition, which prohibits the use of advertisements that feature a candidate and is paid for by state or local entities, in the final 90 days of an election in which the candidate will appear on the ballot.

2) Existing Prohibitions Against the Use of Public Funds for Campaign Purposes: As detailed above, California law already contains a number of provisions that prohibit public funds from being used for campaign purposes. The types of payments that are prohibited by those laws vary, however, as do the standards that apply for determining whether a particular payment violates the law.

Nonetheless, these prohibitions typically apply only to payments that constitute "express advocacy" for or against a candidate or ballot measure, or that otherwise refer to an elective office or campaign or solicit contributions. In situations where public funds are used for an otherwise permissible public purpose, however, state law does not prohibit such payments simply because the payment may have the effect of benefitting a candidate for elective office. For example, a cable television program produced by a city and hosted by the mayor of that city would not necessarily violate any of the existing prohibitions against the use of public funds for campaign purposes if the program was not used to expressly advocate the election of any candidate, even though the program may benefit the mayor's reelection campaign by raising the profile of the mayor.

- 3) **San Joaquin Valley Air Pollution Control District:** As background information in support of the need for this bill, the author provided correspondence between the San Joaquin Valley Air Pollution Control District (District) and the FPPC from 2010 in which the District sought guidance on whether any provision of the PRA would limit the ability of the District to produce and conduct public education and outreach campaigns through public service announcements (PSAs) that featured members of the District's board. In its letter to the FPPC, the district indicated that some of the District's elected board members could be involved in a reelection campaign at the time the PSAs were broadcast or displayed.

In its response to the district, the FPPC concluded that since the PSAs would not contain express advocacy, would not refer to elective office, and would not solicit contributions, the payments made to create the PSAs would not be a contribution to the District's board members. Additionally, the FPPC concluded that the PSAs would not be considered "behested payments" under the PRA, and thus that those payments would not need to be reported by the board members appearing in the PSAs. The FPPC's response did not opine on whether the expenditure of public funds for the PSAs would violate any legal restriction on the use of public funds for campaign purposes that is not contained in the PRA.

- 4) **Limiting Communications Between Governmental Agencies and the Public:** Notwithstanding the author's concern that existing law may permit the payment of public funds for advertisements that can indirectly benefit public officials' campaigns, any limitation on the type or timing of communications between governmental agencies and the public has the potential to limit the ability of agencies to serve the public. For instance, many local agencies regularly produce public affairs programs that air on local cable stations to provide the public with information about the agencies' activities and services, and the policies that they are considering. If these programs are considered broadcast advertisements under the provisions of this bill, they could be restricted considerably, which could limit the public's access to information about the activities of governmental agencies.

Additionally, notwithstanding the author's concern that PSAs could be used to benefit the image of public officials who are running for reelection, it may also be the case that the involvement of public officials in PSAs can make certain messages more effective. A PSA dealing with drunk driving, for example, may be more effective if it features the county sheriff. Similarly, during a state of emergency, public officials can be effective as trusted messengers to help communicate essential information to the public.

As detailed above, state law already contains numerous protections against the use of public funds for campaign purposes. In determining whether further restrictions on the use of public funds are warranted when those funds are used for advertisements featuring public officials, the committee may wish to balance any potential for abuse against the potential that such restrictions may limit the effectiveness of governmental communications with the public.

- 5) **Technical and Logistical Issues:** As currently drafted, this bill prohibits advertisements from being distributed if those advertisements were *produced* using public funds, even if public funds are not being used to pay for the broadcast or dissemination of the advertisement.

For example, a city might choose to use public funds to produce a PSA in which the mayor of the city encourages water conservation in light of the state's ongoing drought. The city might further decide not to use public funds to broadcast that PSA, but instead to make it available to local television stations that are willing to broadcast the PSA for free. However, if a television station chose to air that PSA in the last 90 days before an election at which that mayor was appearing on the ballot as a candidate, that station would have violated the provisions of this bill.

Additionally, because the conduct prohibited by this bill is the *dissemination* of certain advertisements, and not the *use of public funds* to produce or disseminate those advertisements, individuals and entities could face liability under this bill even if they were not involved in the decision to use public funds for the advertisement. For instance, under a strict reading of this bill, a newspaper could be found to violate this bill if it ran an advertisement that was produced by a governmental entity, even where the governmental entity paid for that advertisement to appear in the newspaper.

Because the author's intent with this bill seems to be preventing governmental agencies from using public funds to promote agency officials in the days leading up to an election, it may be appropriate to amend this bill to better reflect the author's intent and to avoid the technical and logistical issues outlined above. In light of that fact, if it is the committee's desire to approve this bill, the author and the committee may wish to consider amendments that would replace the text of this bill with the following language:

SECTION 1. Section 89002 is added to the Government Code, to read:

89002. No state or local governmental agency shall make a payment or otherwise use agency resources for the purpose of publicly disseminating a communication by television, radio, billboard, or newspaper that clearly identifies a candidate for elective office within 90 days before the date of an election, or on the date of the election, at which the candidate will appear on the ballot. The commission shall promulgate regulations that permit exceptions to this prohibition when necessary to the efficient operation of the agency or responsive to an emergency or other critical issue within the agency's jurisdiction.

- 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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