

Date of Hearing: June 29, 2016

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Shirley Weber, Chair

SB 816 (Hill) – As Amended April 26, 2016

**SENATE VOTE:** 32-3

**SUBJECT:** State Board of Equalization: members: contributions.

**SUMMARY:** Lowers the campaign contribution threshold that triggers the conflict of interest requirements for members of the Board of Equalization (BOE) under the Quentin L. Kopp Conflict of Interest Act of 1990 (Kopp Act) from \$250 to \$100.

**EXISTING LAW:**

- 1) Limits, pursuant to the Kopp Act, the ability of a member of the BOE to participate in an adjudicatory proceeding that involves a participant or party who contributed \$250 or more in the preceding 12 months to that member, as follows:
  - a) Requires a member of the BOE who knows or has reason to know that he or she received a contribution or contributions totaling \$250 or more in the last 12 months from a party, participant, or agent of a party or participant, to an adjudicatory proceeding before the BOE, to disclose the fact on the record prior to rendering a decision on the proceeding.
  - b) Requires a party or participant in an adjudicatory proceeding before the BOE to disclose on the proceeding's record any contribution or contributions of \$250 or more made in the last 12 months by that party, participant, or his or her agent to any member of the BOE. Provides that when a "close corporation" is the party or participant, disclosure only applies to the majority shareholder.
  - c) Prohibits a member of the BOE from making, participating in making, or otherwise attempting to use his or her official position to influence, a decision in an adjudicatory proceeding if the member knows or has reason to know that he or she received a contribution or contributions totaling \$250 or more in the last 12 months from a party, participant, or agent of a party or participant, and if the member knows or has reason to know that the participant has a financial interest in the decision, as specified. Permits a member to participate in a decision under the circumstances described above if the member returns the contribution within 30 days from the time that he or she knows or has reason to know about the contribution and the adjudicatory proceeding.
- 2) Provides that a knowing or willful violation of the Kopp Act is a misdemeanor. Prohibits a person convicted of a misdemeanor under the Kopp Act from being a candidate for any elective office or from acting as a lobbyist for a period of four years, as specified, unless the court determines at the time of sentencing that this provision should not be applicable. Provides that in addition to other penalties provided by law, a violation of the Kopp Act is punishable by a fine of \$10,000, or three times the amount the person failed to disclose or report properly, whichever is greater. Requires prosecution for a violation to be commenced

within four years after the date of the violation.

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

**FISCAL EFFECT:** According to the Senate Appropriations Committee, pursuant to Senate Rule 28.8, negligible state costs.

**COMMENTS:**

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

SB 816 ensures that contribution amounts above \$100 dollars to Board of Equalization members are subject to the BOE's existing disclosure and recusal rules.

As Board President Fiona Ma stated in her support letter: "these are reasonable restrictions that will strengthen public confidence that the Board decides cases based on facts and the law, independent of inappropriate influence."

And BOE Member George Runner wrote in his support letter: "SB 816 will not create a burden for Board Members since contributions are currently tracked."

The bill is supported by California Common Cause and the California Public Interest Research Group.

Ensures that [BOE] members comply with disclosure and recusal procedures for contributions received in the previous 12 months over \$100 instead of just those over \$250. Prevents BOE members from voting on cases if they've received a \$100 contribution or greater from that entity within the previous 12 months. Allows BOE members to return the contribution if they don't want to be recused from the case.

Current law contains a loophole that allows individuals with business before the BOE to contribute to BOE members at levels below \$250 without triggering disclosure and recusal rules.

As an example, a BOE member's reelection campaign committee last year received 45 contributions of \$249 each from executives, attorneys and other employees of a tax consulting firm totaling more than \$11,000.

Another BOE member received 25 contributions of \$249 each from employees of the same tax consulting firm.

California's five-member [BOE] is the only elected tax commission in the nation. It collects sales, property and use taxes, acts as the state's tax court in settling

disputes, and assesses public utility and railroad properties. Four board members are elected by districts; the state controller is the fifth member.

- 2) **Board of Equalization Background:** Established in 1879 by a constitutional amendment, the BOE is composed of four members elected by districts and the State Controller, and was initially charged with responsibility for ensuring that county property tax assessment practices were equal and uniform throughout the state. Currently, the BOE also administers the sales and use tax, locally-imposed transactions and use taxes, several excise taxes, and more than 30 other fee programs, and considers all appeals under these laws and programs. Additionally, the BOE hears appeals from Franchise Tax Board actions. The BOE is the only elected tax board in the country.
- 3) **Kopp Act:** Under the PRA, campaign contributions generally cannot be the basis for a disqualifying conflict of interest. There is one exception—the Levine Act—which was enacted in 1982 as a response to reports that members of a state agency sought to raise money from individuals and entities that had permit requests pending before the agency.

The Levine Act is narrowly drafted to apply only to decisions made by agencies with membership that is not directly elected by voters, and only to proceedings involving licenses, permits, or other entitlements for use. Proceedings of a more general nature and with broader applicability are not covered by the Levine Act. The Levine Act expressly provides that it does not apply to the Legislature, the BOE, or constitutional officers.

In 1990, the Legislature approved and Governor Deukmejian signed SB 1738 (Roberti), Chapter 84, Statutes of 1990, a comprehensive ethics reform package that enacted new legislative conflict of interest rules, banned honoraria and limited gifts to public officials, and imposed new post-government employment restrictions on former public officials, among other provisions. One provision of SB 1738 established the Kopp Act—so named because those provisions originally were contained in legislation authored by then-Senator Quentin Kopp. The Kopp Act—which was modeled after the Levine Act—prohibits a member of the BOE from participating in an adjudicatory proceeding if the member knows or has reason to know that he or she received contributions totaling \$250 or more in the 12 months prior to the proceeding from a party, participant, or agent of a party or participant, as specified. Members are permitted to participate in the decision, however, if they return the contribution within a specified time period. When the Kopp Act was being considered, the author argued that the BOE should be subject to rules similar to those that applied to appointed boards and commissions under the Levine Act because of the BOE's quasi-judicial role as the appellate body for state tax appeals. Unlike the Levine Act, the Kopp Act is not part of the PRA, and is neither administered nor enforced by the FPPC.

- 4) **Aggregation Rules and the Kopp Act:** Pursuant to regulations adopted by the BOE to implement the Kopp Act, when an agent of a party or participant appears before the BOE, any contribution made by that agent is aggregated with any contributions made by the party or participant for the purposes of determining whether the \$250 threshold has been met. Furthermore, if the agent is an employee or a member of a law, accounting, consulting, or other firm, or a similar entity or corporation, both that employee or member *and* the entity or corporation itself are considered to be agents of the party or participant, and their

contributions are aggregated for the purposes of determining whether the \$250 threshold has been met. Contributions from individual employees of a firm, entity, or corporation are not aggregated, however, for the purpose of determining whether the \$250 threshold has been met, except where those employees appear before the BOE as an agent.

In arguing for the need for this bill, the author references two situations in which members of the BOE received multiple contributions of \$249 from employees of a tax consulting firm. Because the firm itself appears not to have made any contributions to the members of the BOE within 12 months of the time that its employees made their contributions, and because the contributions made by multiple employees of a single firm are not aggregated for the purposes of the Kopp Act, any of the employees who had made contributions could have appeared before the BOE as an agent to a party or participant without triggering the Kopp Act's recusal requirements in the subsequent 12-month period unless the party or participant that the firm was representing had made contributions to the member of the BOE.

(According to an article in the Los Angeles Times that discussed those contributions, the firm in question did *not* appear before the BOE in the year following the contributions. As a result, even if the contributions had been in amounts of \$250 or more, the disqualification rules in the Kopp Act would not have been implicated by those contributions.)

- 5) **Strategic Disqualification Under the Kopp Act:** Under the BOE's Regulation 5550, any three members of the BOE constitute a quorum, except in specified circumstances, and a majority of the quorum is required to approve or disapprove taxpayer appeals and other matters. As a result, if two members of the BOE are disqualified under the Kopp Act from participating in a proceeding, it would take only two of the remaining three members to reach a decision in the proceeding. The fact that disqualifications due to the Kopp Act can reduce the number of votes necessary for the BOE to reach a decision has led to concern that parties and participants can strategically disqualify members of the BOE from certain proceedings by making campaign contributions of \$250 or more to those members. To the extent that the Kopp Act is actually being used to strategically disqualify members in proceedings, this bill could exacerbate that problem.
- 6) **Arguments in Support:** In support of the previous version of this bill, which would have eliminated the \$250 threshold that triggered the Kopp Act's conflict of interest requirements, thereby making the Kopp Act applicable to adjudicatory proceedings that involves a party, participant, or agent who contributed *any* amount to a member of the BOE in the preceding 12 months, California Common Cause wrote:

The [BOE] is the only elected tax commission in the nation; it is also unique in that it not only administers tax programs, but also adjudicates individual tax disputes as an appellate body. To ensure commissioner impartiality in tax disputes, state law requires a member of the [BOE] to recuse himself or herself from hearing the appeal of any party who has contributed \$250 or more to [a] member's campaign in the prior twelve months. This recusal limit, which is lower than the campaign contribution limits to a member of the [BOE], helps to ensure that members do not have a conflict of interest or the appearance of a conflict of interest as they adjudicate tax claims.

However, recent news reports have called into question the effectiveness of the current recusal rules. Tax firms have avoided the recusal limits by having multiple employees give just under the limit; individually, no one has triggered the recusal rule, but in the aggregate their contributions far exceed it. According to a 2015 *Los Angeles Times* report, dozens of employees of Ryan LLC, a tax preparation firm whose clients often have business before the board, have given just under the recusal limit to two board members. For example, 45 employees each gave \$249 to one member, causing the total contribution from Ryan employees to exceed \$11,000. This tactic of coordinated firm giving circumvents the recusal limits and undermines the clear spirit of the law.

7) **Arguments in Opposition:** In opposition to this bill, BOE Member Jerome Horton writes:

SB 816 sets the following poor public policy precedents:

It lowers the \$249 contribution limits in the 1991 Kopp Act to \$100, disregarding constitutional requirements for an inflation adjustment and violates the Equal Protection Clause of the Fourteenth Amendment, as clarified by the Supreme Court in *Davis v. Federal Election Commission*, 554 U.S. 724 (2008).

It subjects a subset of small businesses, who previously participated in the political process, to civil and criminal penalties in Government Code section 15626(i) and violates their due process if they fail to report even minimal amounts (or in-kind donations) aggregating to \$100 within 30 days of making the contribution.

It increases the potential for tax cheats to “game the system” and Members to avoid voting based on nominal contributions – practices that have occurred under the current contribution limits: e.g., BOE voting records show the state lost \$33 million on 2-1 votes in two cases due to disqualification of two Members in 2005.

It does not apply to judges whose contribution limits are \$1,500, despite the fact that their decisions have finality and a precedential impact on the same set of citizens, while BOE Members, by law, do not.

It violates U.S. Supreme Court decisions issued in the past 25 years, which determined that reducing contributions limits to extremely low levels, based on mere perception, without evidence of any quid pro quo conflicts, violates the free speech, equal protection, and due process rights of citizens who wish to participate in the election process.

8) **Related Legislation:** AB 1828 (Dodd), eliminates the current \$250 campaign contribution threshold that triggers the conflict of interest requirements under the Kopp Act, and expands the Kopp Act to apply to campaign contributions made after a proceeding, and to behested payments, as specified. AB 1828 was approved by this committee on a 4-3 vote, but subsequently was held on the Assembly Appropriations Committee's suspense file.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

Board of Equalization Member Fiona Ma (prior version)  
Board of Equalization Member George Runner (prior version)  
CALPIRG (prior version)  
California Common Cause (prior version)

**Opposition**

Alhambra Chamber of Commerce  
Board of Equalization Member Jerome Horton  
California Small Business Association  
Cerritos Regional Chamber of Commerce  
Gardena Chamber of Commerce  
Glendora Chamber of Commerce  
Greater Los Angeles African American Chamber of Commerce  
Inglewood Airport Area Chamber of Commerce  
Los Angeles County Business Federation  
National Association for Equal Justice in America (prior version)  
Norwalk Chamber of Commerce  
Valley Industry and Commerce Association  
West Hollywood Chamber of Commerce

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