

Date of Hearing: April 11, 2018

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Marc Berman, Chair

AB 2689 (Gray) – As Amended March 14, 2018

SUBJECT: Contribution and gift ban: Senate confirmation.

SUMMARY: Prohibits a Governor's appointee who is subject to Senate confirmation from making contributions or gifts to Senators or Senate candidates while the appointee's confirmation is pending, and prohibits Senators and Senate candidates from receiving such contributions or gifts. Specifically, **this bill**:

- 1) Prohibits a person appointed or reappointed by the Governor to an office subject to Senate confirmation from making to any Senator or controlled committee of a Senator, and prohibits a Senator or controlled committee of a Senator from accepting, a contribution or a gift during the period between the appointment or reappointment by the Governor and confirmation by the Senate.
- 2) Provides that the prohibitions detailed above also apply to a contribution or gift to a *candidate* for the Senate or a controlled committee of the candidate if the candidate's term of office would begin within 365 days of the appointment or reappointment.
- 3) Provides that the prohibitions detailed above additionally apply to costs related to a fundraising event held at the home of the person who was appointed or reappointed, even in situations where those costs would not otherwise be considered a contribution.

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 person, other than a small contributor committee or political party committee, from making a contribution to a candidate for elective state office, and prohibits a candidate from accepting a contribution from such a person, that exceeds the following amounts:
 - a) For candidates for Governor, \$29,200 per election;
 - b) For candidates for Attorney General (AG), Insurance Commissioner, Controller, Secretary of State (SOS), Treasurer, Superintendent of Public Instruction (SPI), or member of the Board of Equalization (BOE), \$7,300 per election; and,
 - c) For candidates for state Senate or Assembly, for member elected to the Board of Administration of the Public Employees Retirement System, or for member elected to the Teachers' Retirement Board of the State Teachers' Retirement System, \$4,400 per election.
- 3) Provides that a “contribution,” for the purposes of the PRA, does not include payments made by an occupant of a home or office for costs related to any meeting or fundraising event in

the occupant's home or office if the costs for the meeting or fundraising event are \$500 or less, except as follows:

- a) Provides that a payment made by a lobbyist or a cohabitant of a lobbyist for costs related to a fundraising event held at the home of the lobbyist, including the value of the use of the home as a fundraising event venue, is a contribution, regardless of the cost of the event.
- b) Provides that a payment made by a lobbying firm for costs related to a fundraising event held at the office of the lobbying firm, including the value of the use of the office as a fundraising event venue, is a contribution, regardless of the cost of the event.
- 4) Prohibits a lobbyist or lobbying firm from making gifts aggregating more than \$10 in a calendar month to a candidate for elective state office, an elected state officer, or a legislative official, as defined, or to an agency official, as defined, of any agency required to be listed on the registration statement of the lobbying firm or the lobbyist employer of the lobbyist. Prohibits an official from knowingly receiving a gift that is unlawful under this provision.
- 5) Prohibits elected state and local officers, candidates for elective state or local office, members of state boards and commissions, and designated employees of state or local government agencies from accepting gifts from a single source in a calendar year with a total value of more than \$470, with certain limited exceptions.
- 6) Requires the FPPC to adjust the contribution and gift limits outlined above on January 1 of each odd-numbered year to reflect changes in the consumer price index. Requires the adjusted gift limit to be rounded to the nearest \$10, and requires the adjusted contribution limit to be rounded to the nearest \$100.
- 7) Permits the Governor to appoint a person to serve in various offices, subject to confirmation by the Senate. Provides that until the appointee has been confirmed by the Senate, the person serves at the pleasure of the Governor. Provides that if the term of office of an incumbent whose position is subject to Senate confirmation expires, the Governor has up to 60 days to reappoint the incumbent.
- 8) Requires the Governor, when appointing a person to a position that is subject to confirmation by the Senate, to submit the name of the appointee to the Senate within 60 days after the person first began performing the duties of the office. Requires, in the case of the reappointment of an incumbent to a Senate-confirmable position, that the Governor submit the name of the person to the Senate within 90 days after the expiration of the term.
- 9) Provides that the Senate has 365 days to either confirm or refuse to confirm a Governor's appointee who is subject to Senate confirmation, except as specified. Provides that if the Senate refuses to confirm or otherwise fails to confirm a Governor's appointee to a position that is subject to Senate confirmation, the office shall be deemed vacant, as specified.
- 10) Requires the Governor to nominate a person to fill any vacancy in the office of the SPI, Lieutenant Governor, SOS, Controller, Treasurer, AG, or Insurance Commissioner, or on the BOE.

- a) Provides that such a nominee shall take office upon confirmation by a majority of the membership of the Senate and a majority of the membership of the Assembly, and shall hold office for the remainder of the unexpired term.
- b) Provides that if the nominee is neither confirmed nor refused confirmation by both the Senate and the Assembly within 90 days of the submission of the nomination, the nominee shall take office as if he or she had been confirmed by a majority of the Senate and Assembly. Provides that if the 90-day period ends during a recess of the Legislature, the period shall be extended until the sixth day following the day on which the Legislature reconvenes.

11) Makes violations of the PRA subject to administrative, civil, and criminal penalties.

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

COMMENTS:

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

According to the FPPC, in the aftermath of Watergate scandal, California was the first state to pass a comprehensive political reform package. The Political Reform Act passed by voters in 1974 was championed by then-Secretary of State Jerry Brown as a response to the culture of corruption that was believed to be so pervasive in the pre-Watergate years.

The coalition of political reformers hoped the initiative would “put an end to corruption in politics” by subjecting the campaign activities and personal financial affairs of state and local officials to greater public scrutiny and tasking the newly created Fair Political Practices Commission with enforcement. The FPPC, in part, exists to advise public officials with regard to the Political Reform Act, to, “...know the purpose of the law, which is to prevent biases, actual and apparent, that result from the financial interests of the decision-makers.” Its mission is, “to promote the integrity of state and local government in California through fair, impartial interpretation and enforcement of political campaign, lobbying, and conflict of interest laws.”

State Government officials, legislators, local public officials, lobbyists, and other individuals and organizations who interact with the policy making process are subject to different requirements under the Political Reform Act. However, under existing law, political appointees, who have not yet been confirmed by the Senate, face no reporting requirements and no additional scrutiny by the FPPC. As a result, an individual seeking the confirmation vote of a Senator for personal gain is free to provide gifts and/or contributions to those Senators.

Many of the cabinet and political appointees of the Trump Administration have drawn public outrage for actual and/or perceived conflicts of interest as well an apparent lack of qualification to perform the job to which they were nominated.

Many of those appointees, and companies operating on their behalf, also made large political contributions to the members of the Senate committees tasked with evaluating their nominations. This arrangement created the public perception that the Senate's vetting and confirmation process was compromised by political considerations as opposed to the serving the best interest of the general public.

AB 2689 prohibits a political appointee from making a contribution or providing a gift to a Senator during the period in which the appointee is seeking confirmation.

2) Governor's Appointees and Senate-Confirmable Positions and Possible Amendment:

According to information from the Senate Rules Committee, the Governor is responsible for making appointments to approximately 3,000 positions; of those, approximately 700 are subject to Senate confirmation, and the Senate considers about 200 gubernatorial appointees in a typical year.

As detailed above, existing law does not require the Governor to notify the Senate immediately upon appointing someone to a Senate-confirmable position. In fact, an appointee in a Senate-confirmable position theoretically can serve in that position for as long as 60 days (in the case of a new appointee) to 90 days (in the case of a reappointment) after being appointed (or reappointed) before the Senate is notified.

Even once the Senate is notified that a person has been appointed to a Senate-confirmable position, it is possible—perhaps even likely given the number of positions that are subject to Senate confirmation—that some Senators will not know the identities of all individuals who are in Senate-confirmable positions whose confirmations are pending.

This bill not only prohibits a person whose appointment is pending before the Senate from *making* a contribution or a gift to a Senator, but it also prohibits a Senator from *receiving* any such contribution or gift. In other words, if a gift or contribution were made in violation of the provisions of this bill, the FPPC could bring an enforcement action not only against the appointee who made the gift or contribution, but also against the Senator who received the gift or contribution.

Given the possibility, as detailed above, that a Senator wouldn't necessarily know the identities of all individuals who are in Senate-confirmable positions and whose confirmations are pending, the prohibition against Senators *receiving* contributions or gifts from those individuals could result in inadvertent violations of the law.

To protect Senators from having enforcement actions brought against them for receiving contributions or gifts from individuals that they did not know were gubernatorial appointees who were awaiting Senate confirmation, the author and the committee may wish to consider an amendment to delete the prohibition against a Senator *receiving* a contribution or a gift from a gubernatorial appointee whose Senate confirmation was pending. Because the gubernatorial appointee would still be prohibited from *making* such a contribution or gift, this bill should still accomplish the author's intent of ensuring that such contributions or gifts do not influence or appear to influence the Senate's vetting and confirmation process.

- 3) **Assembly Confirmation of Appointees and Possible Amendment:** Although it is rare, there are a small number of circumstances, as detailed above, in which the Assembly has a role in either confirming or refusing the confirmation of a person who has been appointed by the Governor. Specifically, when a vacancy occurs in an elective statewide office (other than Governor) or on the BOE, the Governor has the responsibility of filling that vacancy through appointment, and both the Senate and the Assembly have the responsibility of either confirming or refusing confirmation of the Governor's appointee.

In light of the author's rationale for this bill, the author and the committee may wish to consider an amendment to make the provisions of this bill applicable to members of the Assembly and Assembly candidates for those limited circumstances in which the Assembly plays a role in the confirmation of a Governor's appointee. Because the Assembly's consideration of appointees subject to Assembly confirmation is limited to 90 days, committee staff recommends that the applicability of any such amendment to Assembly candidates be limited to those whose term of office would begin within 90 days of the appointment.

- 4) **Hosted Fundraisers:** The PRA, among other things, requires candidates and committees to disclose contributions made and received and expenditures made in connection with campaign activities. The term "contribution" is defined as any payment for political purposes for which full and adequate consideration is not provided to the donor. When individuals or entities make payments in connection with holding a fundraiser for a candidate, such payments ordinarily are considered contributions to the candidate. There are, however, some exceptions.

For instance, payments made by the occupant of a home or office for costs related to a meeting or fundraising event in the occupant's home or office are not considered contributions under the PRA if the costs for the meeting or fundraising event are five hundred dollars (\$500) or less, except for fundraising events held at the home of a lobbyist or the office of a lobbying firm, as specified.

This bill provides that the ban on contributions to a Senator or Senate candidate by an appointee who is pending Senate confirmation apply to costs related to a fundraising event held at the home of the appointee, even in situations where those costs would not otherwise be considered a contribution. As a result, an appointee whose confirmation was pending would be prohibited from hosting a fundraiser in his or her home for a Senator or a Senate candidate, unless the appointee received payment for the fair market value of the use of the home as a fundraising event venue, and for any other event expenses that he or she incurred.

- 5) **Constitutional Issues:** By imposing restrictions on campaign contributions and gifts made by gubernatorial appointees who are pending Senate confirmation, it could be argued that this bill violates the free speech rights of those appointees. In *Buckley v. Valeo* (1976), 424 US 1, the United States Supreme Court held that "contribution ... limitations operate in an area of the most fundamental First Amendment activities," and such limitations "impinge on protected associational freedoms." The *Buckley* Court, however, also held that restrictions on contributions could be justified in situations where "the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of

associational freedoms.” It could be argued that the restrictions found in this bill are similarly closely drawn to other restrictions found in the PRA that have already been upheld in a constitutional challenge.

Specifically, in *Institute of Governmental Advocates v. Fair Political Practices Commission* (2001), 164 F.Supp.2d 1183, the United States District Court for the Eastern District of California upheld a California law that prohibits a lobbyist from making a contribution to an elected state officer or candidate for elected state office if the lobbyist is registered to lobby the governmental agency for which the candidate is seeking election or the governmental agency of the elected state officer. In that case, the Institute of Governmental Advocates, an association that represents the interests of lobbyists, challenged that law claiming that it violated their First Amendment rights of freedom of speech and association, among other grounds. In upholding the law, the court concluded that California had “a legitimate state interest in avoiding the potential for corruption and the appearance of corruption that could occur if lobbyists, whose continued employment depends on their success in influencing legislative action, are allowed to make campaign contributions to the very persons whose decisions they hope to influence” and that the lobbyist contribution restrictions in state law were narrowly tailored to serve those important state interests.

Similar to the rationale behind the lobbyist contribution restrictions upheld in *Institute of Governmental Advocates*, the contribution and gift restrictions included in this bill are intended to avoid the potential for corruption or the appearance of corruption that could occur if gubernatorial appointees are allowed to make contributions or gifts to the persons who will make the decision of whether those appointees can continue to serve in their public offices. Furthermore, this bill’s restrictions on contributions and gifts only apply (1) to a gubernatorial appointee who is subject to Senate confirmation, (2) in a situation where the appointee’s Senate confirmation has not yet occurred, and (3) with respect to contributions or gifts made to a Senator or Senate candidate who may have the opportunity to vote on the confirmation of that appointee in the following year. In light of the court’s decision in *Institute of Governmental Advocates*, if this bill were to be challenged on constitutional grounds, a court could similarly find that this bill is narrowly tailored to serve the state’s important interests.

- 6) **Arguments in Support:** In support of this bill, the League of Women Voters of California writes:

The League believes that campaign finance regulations should enhance political equality for all citizens, ensure transparency, protect representative democracy from distortion by big money, and combat corruption and undue influence in government.

Gifts from appointees to senators or their committees just before a vote on Senate confirmation could clearly give a public appearance of bribes and corruption. This bill would prevent that. It also would prevent potential extortion of appointees by senators.

- 7) **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

League of Women Voters of California

Opposition

None on file.

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