

Date of Hearing: April 26, 2017

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Marc Berman, Chair

AB 774 (Harper) – As Introduced February 15, 2017

SUBJECT: Political Reform Act of 1974: contribution limitations.

SUMMARY: Prohibits foreign governments, foreign principals, and foreign nationals from making contributions or expenditures in connection with candidate elections. Prohibits foreign nationals from making contributions or expenditures in connection with the qualification or support of, or opposition to, a state or local ballot measure. Specifically, **this bill:**

- 1) Expands a provision of law that prohibits foreign governments and foreign principals, as defined, from making, directly or through any other person, a contribution, expenditure, or independent expenditure in connection with the qualification or support of, or opposition to, a state or local ballot measure, such that the prohibition also applies to foreign nationals, as defined.
- 2) Prohibits a foreign government, foreign principal, or foreign national, as defined, from making, directly or through any other person, a contribution, expenditure, or independent expenditure in connection with *any* election.
- 3) Prohibits a person or a committee from soliciting or accepting a contribution from a foreign government, foreign principal, or foreign national, as defined, in connection with an election, or from soliciting or accepting a contribution from a foreign national in connection with the qualification or support of, or opposition to, a state or local ballot measure.
- 4) Defines "foreign national," for the purposes of this bill, as a person who is not a citizen of the United States and who is not lawfully admitted for permanent residence.
- 5) Makes corresponding and technical changes.

EXISTING STATE 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 foreign government or foreign principal from making, directly or through any other person, a contribution, expenditure, or independent expenditure in connection with the qualification or support of, or opposition to, a state or local ballot measure. Prohibits a person or a committee from soliciting or accepting a contribution from a foreign government or a foreign principal in connection with the qualification or support of, or opposition to, any state or local ballot measure.
 - a) Defines "foreign principal," for the purposes of these restrictions, to include the following:
 - i) A foreign political party;

- ii) A person outside the United States (US), unless either of the following is established:
 - (1) The person is an individual and a citizen of the US; or,
 - (2) The person is not an individual, and is organized under or created by the laws of the US or of any state or other place subject to the jurisdiction of the US and has its principal place of business within the US;
 - iii) A partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country; or,
 - iv) A domestic subsidiary of a foreign corporation if the decision to contribute or expend funds is made by an officer, director, or management employee of the foreign corporation who is neither a citizen of the US nor a lawfully admitted permanent resident of the US.
- b) Provides that these restrictions do not prohibit a contribution, expenditure, or independent expenditure made by a lawfully admitted permanent resident.
 - c) Provides that a person who violates these provisions is guilty of a misdemeanor and shall be fined an amount equal to the amount contributed or expended.
- 3) Permits the FPPC to impose administrative penalties of up to \$5,000 per violation of the PRA.

EXISTING FEDERAL LAW:

- 1) Prohibits a foreign national, directly or indirectly, from doing either of the following in connection with a federal, state, or local election:
 - a) Making a contribution or donation of money or other thing of value, or an express or implied promise to make a contribution or donation; or,
 - b) Making an expenditure, independent expenditure, or disbursement for an electioneering communication.
- 2) Prohibits a person from soliciting, accepting, or receiving a contribution or donation made by a foreign national in connection with a federal, state, or local election.
- 3) Defines "foreign national," for the purposes of the prohibitions described above, as either of the following:
 - a) A government of a foreign country; a foreign political party; or a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country; or,

- b) An individual who is not a citizen or a national of the US and who is not lawfully admitted for permanent residence in the US.
- 4) Establishes the Federal Election Commission (FEC), and makes it responsible for the administration and enforcement of the Federal Election Campaign Act (FECA), including the restrictions on contributions and expenditures by foreign nationals described above.

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

COMMENTS:

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

Assembly Bill (AB) 774 will adopt the federal prohibition against foreign contributions to candidate elections into state law, to allow for state enforcement against foreign interference with our elections. AB 774 will also extend the current state ban on foreign contributions for or against ballot measures, to include foreign nationals residing in the U.S. And like federal law, this bill will include an exemption from these prohibitions for lawful permanent residents of the U.S.

Federal law protects our elections from foreign interference by prohibiting foreign governments, entities, and foreign nationals living both abroad and in the U.S. from making any political contribution to a candidate for any federal, state, or local office. This type of contribution is a monetary or nonmonetary payment made to a candidate or committee for which the candidate or committee has not provided full and adequate consideration in return.

The ban on political contributions and expenditures by foreign nationals was first enacted in 1966 as part of the amendments to the Foreign Agents Registration Act (FARA), an "internal security" statute. The goal of the FARA was to minimize foreign intervention in U.S. elections by establishing a series of limitations on foreign nationals. These included registration requirements for the agents of foreign principals and a general prohibition on political contributions by foreign nationals.

Currently, California law extends this ban to include foreign contributions for or against ballot measures, but provides an exception for foreign nationals residing in the U.S. Thus, such persons are not prohibited by state law from making contributions for or against ballot measures.

In 2002, Congress strengthened the restrictions, after finding that foreign nationals were using soft-money contributions to political parties to buy access to American politicians.

AB 774 is needed to provide a state enforcement mechanism to protect our

elections from outside interference, and to mirror federal law by also prohibiting foreign nationals residing in the U.S. from making such contributions.

- 2) **Foreign Campaign Spending, Federal Law, and Previous Legislation:** As detailed above, federal law prohibits foreign nationals from making contributions in connection with federal, state, and local elections. According to information from the FEC, "[t]he ban on political contributions and expenditures by foreign nationals was first enacted in 1966 as part of the amendments to the Foreign Agents Registration Act (FARA), an 'internal security' statute. The goal of the FARA was to minimize foreign intervention in US elections by establishing a series of limitations on foreign nationals. These included registration requirements for the agents of foreign principals and a general prohibition on political contributions by foreign nationals. In 1974, the prohibition was incorporated into [FECA], giving the [FEC] jurisdiction over its enforcement and interpretation."

Until 2002, the restriction on contributions by foreign nationals specifically applied to contributions made "in connection with an election to any political office." Because that language was limited to elections for *office*, it was the position of the FEC that contributions from foreign nationals relating exclusively to ballot measures were not restricted by federal law. (In 2002, the restriction on foreign contributions was amended to make it applicable to any contribution made "in connection with a Federal, State, or local election," though it is unclear whether that change was intended to cover ballot measure elections.)

In 1997, the Legislature approved and Governor Wilson signed SB 109 (Kopp), Chapter 67, Statutes of 1997, to prohibit foreign governments or foreign principals from making contributions, expenditures, or independent expenditures in connection with state or local ballot measures. The legislative history suggests that SB 109 did not seek to regulate foreign contributions made in connection with elections for *office* because such contributions were already restricted by federal law. Instead, SB 109 was limited to foreign spending in connection with ballot measure elections, thereby restricting foreign spending that was not covered by federal law.

Aside from the fact that state law is limited to foreign spending made in connection with ballot measures, state and federal law differ in one other important respect. While federal law restricts contributions and expenditures by individuals who are not citizens or nationals of the US and who are not lawfully admitted for permanent residence in the US, state law does not restrict contributions or expenditures by individuals who are legally present in the US, even if those individuals are not legal permanent residents. The initial version of SB 109 (and an unsuccessful bill from the prior legislative session) would have restricted contributions by foreign nationals who were legally present in the US but who did not have legal permanent residency. That restriction was amended out of the bill to address opposition: specifically, the Mexican American Legal Defense and Educational Fund (MALDEF) and the American Civil Liberties Union of California (ACLU-California) alleged that the restriction on contributions by foreign nationals who were legally admitted into the United States was an unconstitutional limitation on the rights of free speech of those individuals. In their opposition letters, MALDEF and ACLU-California both noted that courts had held that foreign nationals who were legally admitted into the US had the same First Amendment Rights as citizens in *Rafedie v. INS* (1992), 795 F.Supp. 13.

Last year, this committee approved AB 2250 (Ridley-Thomas), which proposed to expand the existing prohibition against contributions, expenditures, and independent expenditures from foreign governments and foreign principals in connection with state and local ballot measures such that the prohibition also applied to contributions, expenditures, and independent expenditures made in connection with *any* election. Consistent with existing state law, AB 2250 did not propose to restrict contributions, expenditures, or independent expenditures from foreign nationals who were legally present in the US. When AB 2250 was on the floor of the Assembly, the author of this bill proposed amendments that would have expanded AB 2250 to prohibit contributions, expenditures, or independent expenditures from foreign nationals who were legally present in the US but who were not legal permanent residents. Those amendments were tabled (i.e., not adopted), and AB 2250 ultimately failed passage on the Assembly Floor on a 51-0 vote (because AB 2250 proposed to amend the PRA without being submitted to voters for their approval, it required a two-thirds vote of each house of the Legislature for passage, or 54 votes in the case of the Assembly).

This bill differs from AB 2250 in two key respects. First, this bill prohibits foreign nationals who are legally present in the US, but who are not legal permanent residents, from making contributions, expenditures, or independent expenditures in connection with candidate elections. Those contributions, expenditures, and independent expenditures are already illegal under federal law. Second, this bill prohibits foreign nationals who are legally present in the US, but who are not legal permanent residents, from making contributions, expenditures, or independent expenditures in connection with state or local ballot measures. Because federal law does not regulate contributions and expenditures made in connection with ballot measure campaigns, foreign nationals who are legally present in the US currently are free to make contributions, expenditures, or independent expenditures in connection with ballot measures.

As detailed above, prior efforts to restrict the ability of foreign nationals who are legally present in the US to make contributions and expenditures in connection with ballot measures were unsuccessful due in part to concerns that such restrictions were unconstitutional. While federal courts upheld the federal restrictions that prohibit foreign nationals who are not legal permanent residents from making contributions in connection with candidate races in *Bluman v. Federal Election Commission* (2011), 800 F. Supp. 2d 281, it appears that courts have not had the opportunity to determine whether similar limitations on contributions and expenditures in connection with ballot measure races would be permissible. The distinction between contributions and expenditures made in connection with candidate races and those made in connection with ballot measures is not inconsequential, as courts have been willing to uphold restrictions on contributions to candidates while striking down similar restrictions on contributions in connection with ballot measures. For instance, courts have upheld the constitutionality of monetary limits on contributions to candidates (*Buckely v. Valeo* (1976), 424 US 1), but found similar monetary limits on contributions to ballot measure campaigns to be unconstitutional (*Citizens Against Rent Control v. Berkeley* (1981), 454 U.S. 290). In fact, when upholding the restriction on foreign nationals making candidate contributions in *Bluman*, the court rejected the argument that its ruling necessarily meant that bans on issue advocacy would be upheld against a constitutional challenge.

- 3) **Recent Enforcement Action Related to Foreign Contributions:** The FPPC recently brought an enforcement action for the first time in a case involving foreign contributions made in connection with a ballot measure. That enforcement action was initiated after the FEC considered an enforcement action of its own, and declined to take action in that case.

Measure B was a Los Angeles County initiative dealing with adult film production that appeared on the ballot at the November 2012 general election. In October 2012, one of the proponents of Measure B filed a complaint with the FEC alleging that the committee opposing Measure B had received contributions made by a foreign national, and further alleging that those contributions violated FECA. In August 2014, the Associate General Counsel of the FEC recommended dismissing the complaint due in part to a "lack of clear legal guidance" on whether federal law restricts contributions made by foreign nationals in connection with ballot measures. The FEC was equally divided on whether to dismiss the complaint, and in March 2015, it ultimately closed the file on the complaint without taking further action.

In July 2015, after the FEC's action to close its file, the FPPC received a sworn complaint in connection with the same matter. In December 2015, the FPPC reached a stipulated settlement in that case. As detailed in that settlement, Manwin USA, a Delaware-based subsidiary of Manwin International, a Luxembourg-based corporation, made contributions totaling more than \$268,000 to the committee opposing Measure B. In addition, Froytal, a Cyprus-based subsidiary of Manwin International, made a contribution of \$75,000 to the committee opposing Measure B, although that contribution subsequently was returned by the committee. Even though Manwin USA was incorporated under Delaware-law, its contributions violated California law because it was a subsidiary of a foreign corporation and the decision to contribute funds was made by an officer of the foreign corporation who was neither a US citizen nor a lawfully admitted permanent resident of the US.

The FPPC fined Manwin USA a total of \$20,000 for the unlawful contributions that it made, fined Froytal \$5,000 for the unlawful contribution that it made, and fined the committee opposing Measure B and its treasurer a total of \$20,000 for accepting unlawful contributions made by foreign principals. The FPPC also imposed an additional \$16,500 in fines for violations of reporting and disclosure laws that occurred in connection with the unlawful foreign contributions.

- 4) **Arguments in Support:** The Election Integrity Project, California, Inc., supports this bill "with minor reservations." In their support letter, they write:

The citizens of this nation and this state are constitutionally guaranteed a republican form of government, which, by definition, means that all political business must be conducted by and for the benefit of its citizens only. While foreign nationals, whether permanent or temporary lawful residents, or unlawful residents, are to be afforded civil rights and protections due any human being, their participation in political business or the electoral process is completely and at all times inappropriate.

Therefore, we recommend that you strengthen AB 774 to state that *no* foreign nationals be exempted.

- 5) **Arguments in Opposition:** In opposition to this bill, the American Civil Liberties Union of California writes:

The Supreme Court has made clear that financial contributions to an electoral campaign are a form of political speech. It is likewise clear that non-citizens have the same First Amendment rights as citizens. While immigrants are not accorded the right to vote, the protections of the Bill of Rights are extended not only to citizens, but to all "persons." In addition, distinctions in state law based on immigration status may violate the Equal Protection Clause of the 14th Amendment. It would be ironic indeed if corporations enjoyed free speech rights to make political donations, but real people who make up our communities did not.

Immigrants pay taxes, contribute their labor and business expertise to the strength of our economy, and are vital members of our communities – equally subject to the obligations imposed by laws passed both by the legislature and by ballot initiatives...

Existing law, enacted in 1997 by SB 109 (Kopp), Chapter 67, Statutes of 1997, prohibits foreign governments and foreign principals from making contributions, expenditures, or independent expenditures in connection with state or local ballot measures. In its consideration of that measure, the legislature specifically contemplated applying the same ban to "foreign nationals," just as AB 774 proposes now. That provision was rightly stricken from the SB 109 in light of concerns that the restriction would be unconstitutional.

Nothing has changed in the interim, except that California is home to many more immigrants than it was then, many of whom would be stripped of fundamental rights by this bill.

- 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

Election Integrity Project, California, Inc.

Opposition

American Civil Liberties Union of California

Analysis Prepared by: Ethan Jones / E. & R. / (916) 319-2094