Date of Hearing: April 25, 2019

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING
Marc Berman, Chair
AB 1217 (Mullin) – As Amended April 22, 2019

SUBJECT: Political Reform Act of 1974: campaign disclosures.

SUMMARY: Requires certain advertisements that are issue ads or electioneering communications to include disclosure statements identifying the entity responsible for the advertisements and the major funders of that entity, as specified. Specifically, **this bill**:

1) Requires an advertisement that is an issue advocacy advertisement or an electioneering communication, as defined, and that is paid for by a campaign committee or by a "major advertiser," as defined, to include disclosure statements that identify the entity that paid for the advertisement. Requires the advertisement to include the top funders, as defined, to the entity that is paying for the advertisement if the advertisement is paid for by either of the following:

    a) A recipient committee, other than a political party committee or a candidate controlled committee established for an elective office of the controlling candidate; or,

    b) A major advertiser that is not a recipient committee, and that has top funders.

2) Requires the disclosure statements described above in 1) to comply with existing formatting requirements that apply to specified campaign advertisements that are paid for by campaign committees.

3) Specifies that a provision of law that exempts electronic communications to recipients who opted-in to those communications from existing disclosure requirements for campaign advertisements only applies to communications from campaign committees or multipurpose organizations, as defined, or from a business to persons who have opted-in to receive messages from the business regarding political actions. Specifies that a customer of a business is not considered to have opted-in unless the customer explicitly indicated that they would like to receive messages of a political nature, as specified.

4) Requires an electioneering communication that is not paid for by a candidate to include a statement that it was not authorized by a candidate or a committee controlled by a candidate, as specified.

5) Clarifies various requirements for "online platform disclosed advertisements," for the purposes of a provision of law that will require online platforms that sell political ads, beginning on January 1, 2020, to make specified information about those political ads available to the public, as specified.

6) Defines the following terms, for the purposes of this bill:

    a) "Electioneering communication" to mean an advertisement that refers to a clearly identified candidate for elective office, but does not expressly advocate for the election or defeat of the candidate, and that is disseminated, broadcast, or otherwise communicated

during the period beginning 60 days before a general or special election, or 30 days before a primary election, where the candidate will appear on the ballot.

b) "Issue advocacy advertisement" to mean an advertisement that clearly refers to and reflects a view on the subject matter, description, or name of one or more clearly identified pending legislative actions, administrative actions, or ballot measures and does any of the following:

   i) Can only be reasonably interpreted as an appeal for the recipient of the advertisement to take action by contacting an employee or elected official of the state government or any local government or encouraging others to contact those persons;

   ii) Refers to a clearly identified pending legislative action and is disseminated within 60 days of the end of the legislative session; or,

   iii) Refers to a clearly identified ballot measure and is disseminated within 60 days of the election concerning that measure.

c) "Major advertiser" to mean a person who has made payments for electioneering communications or issue advocacy advertisements totaling $10,000 or more in a calendar year.

d) "Top funders" of a major advertiser that is not a committee but that has made payments for electioneering communications or issue advocacy advertisements totaling $50,000 or more in a calendar year, and that did not make the payments using only nondonor or small donor funds, as defined, to mean the lobbying donors from whom the advertiser has received its three highest cumulative lobbying-available donations of $10,000 or more beginning 12 months before the date of the expenditure and ending seven days before the time the advertisement is sent to the printer or broadcaster.

   i) "Lobbying-available donation" to mean 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 lobbying purposes. Provides that "lobbying-available donations" do not include either of the following:

      (1) Donations from a donor who designates or restricts the donation for purposes other than for lobbying, electioneering communications, or issue advocacy advertisements; or,

      (2) Donations from a donor who prohibits the multipurpose organization's use of its donation for lobbying, electioneering communications, or issue advocacy advertisements.

   ii) "Lobbying donor" to mean the person who made the lobbying-available donation, unless the donation was earmarked for lobbying for a clearly identified pending legislative action or administrative action, in which case the "lobbying donor" is the person who earmarked the lobbying-available donation.

iii) "Nondonor funds" to mean investment income, including capital gains, or income earned from providing goods, services, or facilities, whether related or unrelated to the multipurpose organization's program, sale of assets, or other receipts that are not donations.

iv) "Small donor funds" to mean donations from persons who made cumulative donations of less than $1,000 beginning 12 months before the date of the expenditure and ending seven days before the time the advertisement is sent to the printer or broadcaster.

7) Makes technical and corresponding changes.

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) Defines "advertisement," for the purposes of the PRA, as any general or public communication that is authorized and paid for by a committee for the purpose of supporting or opposing a candidate or candidates for elective office or a ballot measure or ballot measures, except as specified.

3) Requires advertisements that support or oppose candidates or ballot measures to include disclosure statements in specified circumstances. These required statements may include a disclosure of the committee that is paying for the advertisement, a disclosure of the top contributors to the committee paying for the advertisement, as specified, and a statement (in the case of an independent expenditure supporting or opposing a candidate) that the advertisement was not authorized by a candidate or a committee controlled by a candidate for that office.

4) Requires disclosure statements that are required to appear in advertisements pursuant to the PRA to comply with certain formatting, display, legibility, and audibility requirements.

5) Requires any person who makes a payment of $50,000 or more, as specified, for a communication that clearly identifies a candidate for elective state office, but that does not expressly advocate the election or defeat of the candidate, and that is disseminated within 45 days of an election, to file a disclosure report with the Secretary of State (SOS) disclosing specified information about the person and the payment.

6) Requires, with certain limited exceptions, a lobbyist employer and any person who directly or indirectly makes payments to influence legislative or administrative action of $5,000 or more in value in any calendar quarter to file periodic reports disclosing specified information, including the following:

a) The total amount of payments to each lobbying firm;

b) The total amount of all payments to lobbyists employed by the filer;

c) A description of the specific lobbying interests of the filer;

d) The total of all other payments to influence legislative or administrative action including overhead expenses and all payments to employees who spend 10% or more of their compensated time in any one month in activities related to influencing legislative or administrative action, except for payments to influence proceedings before the Public Utilities Commission which may be reported differently; and,

e) Any other information required by the FPPC.

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

COMMENTS:

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

> AB 1217 seeks to extend the California DISCLOSE Act, AB 249 (Mullin), to cover issue ads that are intended to influence legislative and administrative actions, and also close the loophole for electioneering communications that attack or support candidates during election season without expressly advocating for their election or defeat.
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> Issue advertisements that attempt to pressure legislators to influence legislative outcomes are a growing problem in California. For example, last year a group called "CALInnovates" placed over 400 ads on Facebook trying to kill the Net Neutrality bill (SB 822). In another example, while the legislature was debating bills on how to hold PG&E accountable for devastating wildfires, PG&E spent over $6 million on "grassroots and other advocacy related to state legislative proposals". At the same time, television ads from "The BRITE Coalition" blanketed the airwaves with messages defusing blame for wildfires, without saying who paid for the ads.
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> Electioneering communications that target candidates without expressly advocating for their election or defeat — also known as "sham" issue ads — are also a growing problem, with over $26 million in reported expenditures since 2010. They are a major loophole in AB 249's requirement that independent expenditure ads for and against candidates must clearly show their top 3 funders.
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> Currently, although payments for electioneering communications of $50,000 or more must be reported to the Secretary of State, and spending on issue ads attempting to influence legislation must be reported as lobbying expenditures, there are no disclosure requirements on such ads, nor even any way to look up who provided funding to the sometimes misleadingly named entities that reported the expenditures.

2) **Disclose Act**: Two years ago, the Legislature approved and the Governor signed AB 249 (Mullin), Chapter 546, Statutes of 2017, which significantly changed the content and format of disclosure statements required on specified campaign advertisements in a manner that generally required such disclosures to be more prominent. AB 249 also established new

requirements for determining when contributions are considered to be earmarked, and imposed new disclosure requirements for earmarked contributions to ensure that committees are able to determine which contributors must be listed on campaign advertisements. AB 249 is commonly known as the "Disclose Act." The passage of AB 249 marked the culmination of seven years of debate and negotiation over similar legislation. AB 249 took effect on January 1, 2018.

Last year, the Legislature approved and the Governor signed AB 2155 (Mullin), Chapter 777, Statutes of 2018, which made various changes to the Disclose Act that generally were minor, clarifying, or technical in nature, or otherwise were consistent with disclosure examples that were provided by supporters when AB 249 was being considered by the Legislature. Also enacted last year was AB 2188 (Mullin), Chapter 754, Statutes of 2018, which requires online platforms that sell political ads to make specified information about those political ads available to the public, and makes various changes to the required format for disclosures on electronic media ads that are required by existing law. AB 2188 is known as the "Social Media Disclose Act." Although AB 2188 was signed into law last year, it had a delayed implementation date, and it does not take effect until January 1, 2020.

This bill generally requires issue advocacy advertisements and electioneering communications, as defined, to contain disclosures that are similar to those required on campaign advertisements under the Disclose Act and the Social Media Disclose Act.

3) **Constitutional Concerns**: This measure could be interpreted as a violation of the United States and California Constitutions' guarantees to free speech. While the right to freedom of speech is not absolute, when a law burdens core political speech, the restrictions on speech generally must be "narrowly tailored to serve an overriding state interest," *McIntyre v. Ohio Elections Commission* (1995), 514 US 334.

In *ACLU v. Heller* (2004), 378 F.3d 979, the Ninth Circuit Court of Appeals struck down a Nevada law that required any published material concerning a campaign to identify the person paying for the publication. In that case, the state of Nevada argued that its law served three state interests, including helping voters evaluate the usefulness of information in a campaign communication, preventing fraud and libel, and furthering enforcement of disclosure and contribution election laws. The court concluded that Nevada failed to demonstrate that its statute was "narrowly tailored to serve an overriding state interest" in accordance with the test established in *McIntyre*. The court did note in its ruling, however, that "[a]n on-publication identification requirement carefully tailored to further a state's campaign finance laws, or to prevent the corruption of public officials, could well pass constitutional muster."

Supporters of this bill have argued that the provisions of this bill are constitutional in light of disclosure requirements that were upheld by the United States Supreme Court in *Citizens United v. Federal Election Commission* (2010), 130 S.Ct. 876. While the *Citizens United* case is probably best known as the case in which the United States Supreme Court struck down a 63 year old law that prohibited corporations and unions from using their general treasury funds to make independent expenditures in federal elections, in the same case, the Court also upheld certain disclaimer and disclosure provisions of the federal Bipartisan Campaign Reform Act (BCRA) of 2002.

The *Citizens United* case involved a nonprofit corporation (Citizens United) that sought to run television commercials promoting a film it produced that was critical of then-Senator and presidential candidate Hillary Clinton. Because federal law prohibited corporations and unions from using their general treasury funds to make expenditures for "electioneering communications" or for communications that expressly advocated the election or defeat of a candidate, Citizens United was concerned that the television commercials promoting its film could subject the corporation to criminal and civil penalties. Under BCRA, the film produced by Citizens United and the television commercials promoting that movie were subject to certain disclaimer and disclosure requirements—specifically, a requirement that televised electioneering communications must include a disclaimer indicating the name of the person or organization that was "responsible for the content" of the advertising. Additionally, each communication was required to include a statement that the communication was "not authorized by any candidate or candidate's committee," and was required to display the name and address of the person or group that funded the advertisement. Finally, under a different provision of BCRA, any person who spent more than $10,000 in a calendar year is required to file a disclosure statement with the Federal Elections Commission identifying the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of contributors in certain circumstances.

Citizens United (the corporation) challenged these disclaimer and disclosure requirements as applied to the film and the television advertisements promoting that film. Specifically, Citizens United argued that the disclaimer and disclosure requirements were unconstitutional on the grounds the governmental interest in providing information to the electorate did not justify requiring disclaimers for commercial advertisements. The court disagreed, finding that the disclaimers provided the electorate with important information, helping to ensure that voters were informed, and "avoid[ed] confusion by making clear that the ads are not funded by a candidate or political party."

While some of the requirements of this bill are comparable to provisions of federal law that were at issue in *Citizens United* (for instance, certain disclaimer requirements included in this bill are similar to those required under federal law that were upheld by the court in *Citizens United*), other requirements in this bill go beyond what is required by federal law, and beyond what was considered by the court in *Citizens United*. Specifically, the provisions of this bill that require the identities of certain donors to organizations that fund issue advertisements and electioneering communications—donors that were not individually responsible for the content or the production of the advertising—to be included in those advertisements go beyond what is required by federal law. In light of that fact, while the court in *Citizens United* did uphold certain federal disclaimer requirements, it is unclear whether the broader requirements in this bill would similarly be upheld against a constitutional challenge on the grounds that those requirements violate the First Amendment.

4) **Existing Disclosures of "Electioneering Communications" and "Issue Advocacy Advertisements"**: As detailed above, existing law already requires disclosures of certain payments made for electioneering communications and issue advocacy advertisements, though the existing disclosures are considerably more limited than what would be required by this bill.

Specifically, existing law requires a disclosure report to be filed when a person makes payments of $50,000 or more for communications that clearly identify a candidate for

elective state office, but that do not expressly advocate the election or defeat of the candidate, and that are disseminated within 45 days of an election. That disclosure report is a public document that is filed with the SOS, and must contain information about the identity of the person who paid for the communications and about payments of $5,000 or more that the person received for the purpose of making that communication.

The number of "electioneering communications" reported—and the amount of money reported as having been spent on those communications—has been relatively small when compared to the amount spent on campaign advertising during that time. While the author notes that there have been over $26 million in reported payments for electioneering communications since 2010, more than 60% of that amount was reported in 2010, and more than three-quarters of the 2010 total came from electioneering communications that mentioned the two main candidates for Governor in 2010.

While reports are required to be filed disclosing when electioneering communications are made, the PRA generally does not require the communication itself to include a disclosure of the person that pays for the communication. (Other laws, including federal communications laws, require certain types of advertisements to include a disclosure of the entity that is responsible for the advertisement.) Additionally, the PRA does not require disclosure of electioneering communications that only identify a candidate for *local* office.

For issue advocacy advertisements, existing law requires payments in connection with those advertisements to be disclosed on lobbying disclosure reports, under certain circumstances. Specifically, lobbyist employers and persons who do not employ an in-house lobbyist or contract with a lobbying firm, but who directly or indirectly make payments of $5,000 or more in any calendar quarter to influence or attempt to influence legislative or administrative action, must file periodic lobbying disclosure reports. This second category of filer is commonly known as a "$5,000 filer." Among the types of expenditures that count toward the $5,000 filing threshold are payments for or in connection with soliciting or urging other persons to enter into direct communication with state officials, including payments made for advertisements that urge voters to communicate with elected officials on pending legislation.

The information that is required to be disclosed by $5,000 filers and lobbyist employers with respect to payments made for issue advocacy communications, however, is limited. Lobbyist employers and $5,000 filers must disclose the total of all payments to influence legislative or administrative action, and must provide information about the recipients of payments of $2,500 or more made to influence legislative or administrative action. They are not required, however, to link specific payments with the legislative or administrative action that those payments were designed to influence. As is the case with electioneering communications, the PRA generally does not require the content of an issue advocacy communication to include a disclosure of the person that pays for the communication, nor does it require disclosure of issue advocacy communications in connection with *local* issues.

5) **Arguments in Support**: According to a coalition letter sent to a prior version of this bill by most of the organizations listed in support, including the California Clean Money Campaign:

> The *Issue Ad DISCLOSE Act* will build upon the improvements to campaign advertisement disclosure that the *California DISCLOSE Act* and *Social Media DISCLOSE Act* established in 2017 and 2018. It:

- Defines "issue advocacy advertisement" as an "advertisement" that must follow the *California DISCLOSE Act* rules and clearly disclose the top 3 funders...

- Defines "electioneering communication" as an "advertisement" that must follow the *California DISCLOSE Act* rules and clearly disclose the top 3 funders…

- States that a non-committee only must follow *California DISCLOSE Act* disclosure rules for issue ads if it is a "major advertiser" that spends $10,000 or more on advertisements in a calendar year.

- Defines "top funders" to be shown on issue ads from major advertisers that are not committees as the "lobbying donors" who gave the 3 largest lobbying-available donations of $10,000 or more. Has exceptions for donors who restrict the use of their funds, and for ads paid for entirely with nondonor or small donor funds…

AB 1217 will provide needed transparency about the true funders of issue ads that are intended to influence legislative or administrative actions, and will close the "electioneering communication" loophole for ads about candidates during election season.

6) **Arguments in Opposition**: In opposition to a prior version of this bill, the California School Employees Association wrote:

> The California School Employees Association (CSEA), AFL-CIO, opposes Assembly Bill 1217 (Mullin), to expand the definition of "electioneering communications" and "issue advocacy," and make these communications subject to political disclaimer requirements. These types of communications should be treated separately from other political advertisements…
>
> Issue advocacy is already heavily regulated under the lobbying statutes and this bill would add additional requirements with little public value.
>
> AB 1217 attempts to regulate these issue advertisements the same as political advertisements and would result in unintended consequences. If it is to move forward, disclosure requirements for issue advocacy should be drafted separately from the political disclaimer rules.

7) **Related Legislation and Suggested Amendment**: AB 864 (Mullin), which was approved by this committee on April 10, 2019 by a 7-0 vote, makes various, mostly technical changes to the Disclose Act and other provisions of state law governing the content and format of disclosure statements that are required to appear on communications disseminated by candidates and committees. AB 864 was scheduled to be heard in the Assembly Appropriations Committee after this committee analysis was prepared and released but before the hearing on this bill.

Under existing law, an electronic communication generally is not considered an "advertisement" for the purpose of the PRA, and thus is not required to include disclosures, if the communication is sent by an organization to individuals who have opted-in to communications from the organization. Both AB 864 and this bill seek to clarify that this exception does not apply to political messages that are sent by an organization with which the recipient has a *commercial* relationship, unless the recipient specifically has opted-in to receiving electronic communications of a political nature. The language in AB 864 that seeks to address this issue differs from the language in this bill. Those differences could result in slightly different—and potentially conflicting—applications of the exception. Accordingly, committee staff recommends that this bill be amended so that the relevant provisions governing electronic communications to individuals who have opted-in to receiving those communications conforms to the language that is used in AB 864.

8) **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

California Clean Money Campaign (prior version)
California Common Cause (prior version)
California League of Conservation Voters (prior version)
Consumer Federation of California (prior version)
Courage Campaign (prior version)
Democracy for America (prior version)
End Citizens United Action Fund (prior version)
Endangered Habitats League (prior version)
GMO Free California (prior version)
Greenpeace USA (prior version)
Indivisible CA: StateStrong (prior version)
League of Women Voters of California (prior version)
Money Out Voters In (prior version)
New Progressive Alliance (prior version)
Pax World Funds (prior version)
Public Citizen (prior version)
RootsAction (prior version)
Voices for Progress (prior version)
Two individuals (prior version)

Opposition

California School Employees Association (prior version)
California Teachers Association (prior version)
Service Employees International Union California (prior version)

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