

Date of Hearing: April 23, 2013

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING
Paul Fong, Chair
AB 800 (Gordon) – As Amended: April 15, 2013

SUBJECT: Political Reform Act of 1974.

SUMMARY: Makes numerous significant changes to the Political Reform Act of 1974 (PRA). Specifically, this bill:

- 1) Provides that a committee is presumed to be a controlled committee of a candidate if the candidate or his or her agent satisfies any of the following conditions:
 - a) Is a voting member of the committee's governing body;
 - b) Is involved in the decisionmaking of the committee, or the development or implementation of the committee's campaign strategy;
 - c) Is involved in directing, planning, or implementing the committee's fundraising activities in a greater capacity than making endorsements or appearing at fundraisers; or,
 - d) Is substantially involved in directing the day-to-day operations of the committee.
- 2) Requires subagents and subcontractors that make expenditures on behalf of or for the benefit of a candidate or committee to make known to the agent or independent contractor of the candidate information about those expenditures. Requires the agent or independent contractor to make this information available to the candidate or committee not later than three working days prior to the time that the campaign statement reporting the expenditure is required to be filed. Provides that, in the case of an expenditure that is required to be reported by a candidate or committee within 24 hours of the time that it is made, the agent or independent contractor is required to make this information available to the candidate or committee within 24 hours.
- 3) Extends, for a period of 90 days, the period of time before campaign funds that are under the control of a former candidate or elected officer become surplus campaign funds, and thus subject to additional restrictions on how those funds can be spent.
- 4) Repeals a provision of law that prohibits the Fair Political Practices Commission (FPPC) from beginning audits or investigations of certain entities prior to the election.
- 5) Allows the FPPC and the Franchise Tax Board (FTB) to make audits and investigations regarding any statement or report that is required by any provision of the PRA, instead of allowing such audits and investigations only of specified statements or reports.
- 6) Repeals a one year limit on the amount of time that the FTB has to complete its report of any audit that it conducts under specified provisions of the PRA.

- 7) Prohibits a member, employee, or agent of the FPPC from divulging or making known in any manner the particulars of any record, documents, or information that he or she receives as part of an audit or investigation conducted pursuant to the PRA, except in furtherance of the work of the FPPC or in connection with a court proceeding or the lawful investigation of any agency.
- 8) Permits the FPPC, and the FTB at the direction of the FPPC, to audit any record required to be maintained under the PRA to ensure compliance with the PRA prior to an election, even if the record or statement has not yet been filed. Permits the FPPC, to further the purposes of this provision, to seek injunctive relief in superior court to compel disclosure. Permits a superior or appellate court to grant a stay of an order granting relief pursuant to these provisions. Requires the court to grant expedited review to an action filed pursuant to this procedure, as specified.
- 9) Makes various findings and declarations about the public disclosure of political contributions and expenditures.

EXISTING LAW:

- 1) Creates the FPPC, and makes it responsible for the impartial, effective administration and implementation of the PRA.
- 2) Defines a "controlled committee" to mean a committee that is controlled directly or indirectly by a candidate or state measure proponent or that acts jointly with a candidate, controlled committee, or state measure proponent in connection with the making of expenditures. Provides that a candidate or state measure proponent controls a committee if he or she has a significant influence on the actions or decisions of the committee.
- 3) Prohibits an expenditure of \$500 or more from being made by an agent or independent contractor of a candidate or committee unless it is reported by the candidate or committee as if the expenditure were made directly by the candidate or committee. Requires the agent or independent contractor to make known to the candidate or committee the information required to be reported pursuant to this provision.
- 4) Provides that campaign funds under the control of a former candidate or elected officer shall be considered surplus campaign funds at the time the person leaves office or at the end of the postelection reporting period following the defeat of a candidate for elective office, whichever occurs last. Provides that surplus campaign funds shall be used only for the following purposes:
 - a) The payment of outstanding campaign debts or elected officer's expenses;
 - b) The repayment of contributions;
 - c) Donations to a bona fide charitable, educational, civic, religious, or similar tax-exempt, nonprofit organization, where no substantial part of the proceeds will have a material financial effect on the former candidate or elected officer, any member of his or her

immediate family, or his or her campaign treasurer;

- d) Contributions to a political party committee, provided that the campaign funds are not used to support or oppose a candidate for elective office, provided, however, that the campaign funds may be used by a political party committee to conduct partisan voter registration, partisan get-out-the-vote activities, and slate-mailers;
 - e) Contributions to support or oppose a candidate for federal office, a candidate for elective office in a state other than California, or a ballot measure; or,
 - f) The payment for professional services reasonably required by the committee to assist in the performance of its administrative functions, including payment for attorney's fees for litigation that arises directly out of a candidate's or elected officer's activities, duties, or status as a candidate or elected officer, including, but not limited to an action to enjoin defamation, defense of an action brought for a violation of state or local campaign, disclosure, or election laws, and an action from an election contest or recount.
- 5) Prohibits an audit or investigation of any candidate, controlled committee, or committee primarily supporting or opposing a candidate or measure in connection with a report or statement required by specified provisions of law from beginning until after the last date for filing the first report or statement following the general, runoff, or special election for the office for which the candidate ran, or following the election at which the measure was adopted or defeated, except as specified.
 - 6) Permits the FTB and the FPPC to make investigations and audits with respect to any reports or statements required by specified provisions of the PRA.
 - 7) Requires the FTB to complete its report of any audit conducted on a random basis pursuant to specified provisions of law within one year after the person or entity subject to the audit is selected by the FPPC to be audited.
 - 8) Prohibits a member, employee, or agent of the FTB from divulging or making known in any manner the particulars of any record, documents, or information that he or she receives as part of an audit or investigation conducted pursuant to the PRA, except in furtherance of the work of the FTB or in connection with a court proceeding or the lawful investigation of any agency.

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

COMMENTS:

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

More and more, voters receive information from or see advertisements funded by entities other than the candidate for office or the committee proposing a ballot measure. It is vital for a fully informed electorate that the public knows, in a timely manner, who if not the candidate or ballot measure committee, is paying

for political messaging. Moreover, there must be a means of inhibiting improper practices and holding entities involved with election campaigns accountable.

The Political Reform Act governs campaign financing and spending, including disclosure of political campaign contributions and expenditures by candidates and committees. AB 800 contains several distinct changes to the Political Reform Act intended to clarify the Fair Political Practices Commission's authority to carry out the provisions of the PRA in a manner that ensures information is provided to the public in an expedited manner prior to elections.

- 2) Audits and Investigations: This bill makes a number of significant changes to state law governing audits and investigations that are conducted under the PRA. Some of these provisions appear to be in response, in part, to an \$11 million campaign contribution made to the Small Business Action Committee PAC (SBAC PAC) three weeks prior to the November 2012 statewide general election.

The SBAC PAC, which was a primarily formed committee that was opposing Proposition 30 and supporting Proposition 32 at the time the contribution was received, reported that the \$11 million contribution was made by Americans for Responsible Leadership (ARL), an Arizona-based non-profit organization. ARL, in turn, initially refused to disclose the names of its contributors, arguing that it was not required to do so under California law because it had not "solicited earmarked contributions for any particular project" and because "[n]o contributors to ARL at any time specified where any of their donations 'must go.'"

After receiving a complaint regarding the \$11 million contribution, the FPPC requested to review certain records held by ARL to ensure compliance with state campaign disclosure laws, and subsequently commenced a discretionary audit of ARL. When ARL did not produce records as requested by the FPPC, the FPPC sued ARL in Sacramento Superior Court seeking an order to compel ARL to produce those records. ARL opposed that request on a variety of grounds, including arguing that the FPPC was prohibited from conducting an audit or an investigation prior to the election. The Court ultimately granted the FPPC's request for an order for ARL to produce the requested records, finding that the statutory prohibition against pre-election audits and investigations applied only to candidates and certain types of committees, and was not applicable to ARL. After an unsuccessful appeal, ARL and the FPPC reached a settlement in which ARL revealed that it was not the true source of the \$11 million contribution, but instead was an intermediary for that contribution. ARL disclosed that the actual source of the \$11 million was another nonprofit organization, Americans for Job Security (AJS), and that the contribution was then passed through a second intermediary (and another nonprofit organization), the Center to Protect Patient Rights (CPPR). CPPR, in turn, made the contribution to ARL. AJS has not disclosed its donors.

This bill seeks to give the FPPC additional tools to ensure compliance with the PRA by permitting the FPPC to seek injunctive relief to compel disclosure that is required by the PRA, and by requiring the court to grant expedited review to any such action in order to ensure that campaign contributions and expenditures are disclosed prior to the election. This bill additionally gives the FPPC the authority to audit any record that is required to be maintained prior to an election in order to ensure compliance with the PRA, and permits the

FPPC to make investigations and audits with respect to any report or statement that is required to be filed pursuant to the PRA. Finally, this bill repeals a prohibition against an audit or investigation of a candidate, controlled committee, or committee primarily supporting or opposing a candidate or measure in connection with a report or statement required by certain provisions of the PRA from being commenced prior to the election.

- 3) Controlled Committees & Suggested Amendment: Under the PRA, a committee is considered a "controlled committee" if it is controlled directly or indirectly by a candidate or state measure proponent, or it acts jointly with a candidate, controlled committee, or state measure proponent in connection with the making of expenditures. A candidate or state measure proponent controls a committee if he or she, or his or her agent or any other committee he or she controls, has a significant influence on the actions or decisions of the committee. Controlled committees are subject to certain reporting requirements and restrictions that do not apply to other types of committees, including, in the case of a committee that is controlled by a candidate, a prohibition against making independent expenditures and against contributing funds to another committee for the purpose of making independent expenditures to support or oppose other candidates.

While the PRA provides that a candidate or state measure proponent controls a committee if he or she has a significant influence on the actions or decisions of the committee, it does not include greater detail about what types of actions would constitute having a "significant influence" on the actions or decisions of the committee. Furthermore, the FPPC has not adopted regulations to clarify what constitutes having "significant influence" over the actions or decisions of a committee. Instead, the FPPC has provided guidance about what constitutes "significant influence" through a series of advice letters. Among other things, the FPPC has advised that a candidate is presumed to be controlling a committee if the candidate is a voting member of the committee's leadership, and can be considered to be controlling a committee if the candidate has extensive involvement in the committee's fundraising activities.

This bill establishes a presumption that a committee is significantly influenced by a candidate, and thus is a "controlled committee," if the candidate is a voting member of the committee's governing body, the candidate or his or her agent is involved in the decision-making of the committee or the development or implementation of the committee's campaign strategy, the candidate or his or her agent is involved in directing, planning, or implementing the committee's fundraising activities in a greater capacity than making endorsements or appearing at fundraisers, or the candidate, or his or her agent, is substantially involved in directing the day to day operations of the committee. These provisions are intended to codify advice that the FPPC has given regarding what constitutes having "significant influence" over the actions or decisions of a committee.

It is not clear, however, that the current language of this bill accomplishes that goal. Under the provisions of this bill, a committee is deemed to be a controlled committee if a candidate is involved in "directing, planning, or implementing the committee's fundraising activities in a greater capacity than making endorsements or appearing at fundraisers." This appears to differ from the standard that the FPPC established through advice letters, where it has advised that an elected official's participation in fundraising activities for a committee can result in that committee being considered a controlled committee of the official, but has also advised that an official's participation in fundraising activities for a committee that go beyond

making endorsements or appearing at fundraisers will not necessarily result in that committee being deemed a controlled committee of the official. For instance, the FPPC has previously advised that, under certain circumstances, a candidate could provide access to a committee to his or her contributor list, solicit funds for the committee in writing over the telephone, be featured on invitations to fundraising events for the committee, speak at such events, and distribute a committee's funds in person or by mail, and still not be considered to control that committee (*Erenbaum* Advice Letter, No. I-01-242). This conduct appears to be more extensive than making endorsements or appearing at fundraisers, and thus under this bill would result in the committee being presumed to be a controlled committee of the candidate.

Because the intent of this portion of the bill is to codify FPPC advice, committee staff recommends removing the provisions of this bill that presume that a committee is significantly influenced by a candidate if the candidate or his or her agent is involved in certain fundraising activities. By removing this provision of the bill, longstanding FPPC advice about the extent that a candidate may be involved in fundraising activities for a committee without that committee being considered to be controlled by the candidate will remain unaffected, while other, objective criteria that the FPPC has used to determine that when a candidate is deemed to be controlling a committee will be codified.

- 4) Subcontractor Reporting: As noted above, the PRA requires a candidate or committee to report payments of \$500 or more that are made by an agent or independent contractor as if the candidate or committee had made the payment directly. For example, if a candidate pays a media buying company \$50,000 to pay for advertisements supporting that candidate, and the company arranges for the placement of individual advertisements with numerous television and radio stations, the candidate would be required to report the identity of and the amount paid to any television or radio station that received \$500 or more from the media buying company for the purpose of broadcasting those advertisements. In order that the candidate can comply with this requirement, existing law also requires the agent (in this case, the media buying company) to provide the candidate with details about the payments that it made sufficient for the candidate to report those payments. However, if a subagent or subcontractor makes a subsequent payment of \$500 or more on behalf of the candidate, there is no explicit requirement for that subagent or subcontractor to provide the relevant information to the agent or independent contractor on a timely basis so that the agent or independent contractor, and the candidate or committee, can comply with their obligations under the law. This bill imposes such a requirement, which should help candidates and committees comply with their disclosure obligations under the law.
- 5) Surplus Funds: Existing law provides that campaign funds that are held by a candidate or elected official become surplus campaign funds once the person leaves elective office or at the end of the postelection campaign reporting period following the defeat of the candidate for elective office, whichever occurs last. Once funds are considered surplus campaign funds, they are subject to additional restrictions on how the funds may be used, including a prohibition against the candidate using the funds for a future election. Because of the short period of time that a candidate or officeholder has to determine what to do with these campaign funds before they become surplus funds, FPPC staff indicates that many candidates simply create new committees as placeholders until they can decide whether they want to run for another office in the future, and the tight timelines under which those new committees must be created and money must be transferred generates additional workload for the FPPC

in the form of requests for advice. This bill increases the period of time before campaign funds become surplus funds by 90 days, thereby allowing candidates and officials to make decisions about the use of those funds in a more deliberate manner.

6) Repeal of Time Limit on FTB Audits and Possible Amendment: This bill repeals an existing requirement for the FTB to complete certain audits within a one year period from the time that the person or entity subject to the audit is selected to be audited by the FPPC. According to FPPC staff, this provision will give the FTB the ability to adjust their workload to work more rapidly on major audits, rather than rushing to complete lower-priority audits within the one year time limit. By repealing the time limit entirely, however, candidates and committees that are being audited could be stuck in a state of uncertainty for long periods of time even in situations where those candidates and committees have fully complied with the law. In order to provide the FPPC and the FTB with greater flexibility to prioritize audits, while providing greater certainty to candidates and committees about the potential duration of those audits, the committee may wish to consider amending this bill to extend the time limit for the FTB to complete these audits from one year to two years, rather than repealing the time limit altogether.

7) Arguments in Support: In support of this bill, California Common Cause writes:

As the complainant in the ongoing investigation against Americans for Responsible Leadership, the Arizona-based 501(c)4 that attempted to launder \$11 million into two ballot campaigns, we are in strong support of AB 800 that will give the Fair Political Practices Commission the tools it needs to further investigate money laundering and other dark money schemes. Since the United States Supreme Court decision in *Citizens United v. FEC*, we have seen an explosion of deceptive and shadowy tactics developed by political operatives to sneak money into campaigns while avoiding public disclosure. California should adopt common sense measures like AB 800 that will further shine a light on money in politics.

8) Related Legislation: AB 45 (Dickinson), which is also being heard in this committee today, permits the FPPC to seek injunctive relief to compel disclosure, among other provisions.

9) 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 Common Cause
Fair Political Practices Commission

Opposition

None on file.