Date of Hearing: April 11, 2018

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING
Marc Berman, Chair
AB 2055 (Levine) – As Introduced February 6, 2018

SUBJECT: Political Reform Act of 1974: lobbyists: sexual harassment.

SUMMARY: Prohibits a lobbyist or a lobbying firm from engaging in sexual harassment, and permits the Fair Political Practices Commission (FPPC) to order a lobbyist who engages in sexual harassment to cease all lobbying activity for a period of up to four years. Specifically, **this bill**:

1) Defines “sexual harassment,” for the purposes of this bill, as unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature that arises out of or in the course of employment.

2) Prohibits a lobbyist or a lobbying firm from engaging in sexual harassment, as defined.

3) Permits the FPPC to order a lobbyist who is found to have engaged in sexual harassment to cease all lobbying activity for a period of up to four years.

EXISTING LAW:

1) Creates the FPPC, and makes it responsible for the impartial, effective administration and implementation of the Political Reform Act (PRA).

2) Requires the FPPC to investigate possible violations of the PRA relating to any agency, official, election, lobbyist, or legislative or administrative action. Permits the FPPC to subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence and require by subpoena the production of any books, papers, records or other items material to the performance of the FPPC’s duties or exercise of its powers.

3) Defines a "lobbyist," for the purposes of the PRA, as either of the following, except as specified:

   a) An individual who receives $2,000 or more in a calendar month or whose principal duties as an employee are to communicate directly or through his or her agents with an elective state official, agency official, or legislative official for the purpose of influencing legislative or administrative action; or,

   b) A placement agent, as defined.

4) Defines a "lobbying firm," for the purposes of the PRA, as any business entity, except as specified, including an individual contract lobbyist, which meets either of the following criteria:

a) The business entity receives or becomes entitled to receive any compensation, other than reimbursement for reasonable travel expenses, for the purpose of influencing legislative or administrative action on behalf of any other person, and any partner, owner, officer, or employee of the business entity is a lobbyist; or,

b) The business entity receives or becomes entitled to receive any compensation, other than reimbursement for reasonable travel expenses, to communicate directly with any elective state official, agency official, or legislative official for the purpose of influencing legislative or administrative action on behalf of any other person, if a substantial or regular portion of the activities for which the business entity receives compensation is for the purpose of influencing legislative or administrative action.

5) Prohibits a lobbyist or a lobbying firm from doing any of the following:

a) Doing anything with the purpose of placing an elected state officer, legislative official, agency official, or state candidate under personal obligation to the lobbyist, lobbying firm, or the lobbyist's or lobbying firm's employer.

b) Deceiving or attempting to deceive any elected state officer, legislative official, agency official, or state candidate with regard to any material fact pertinent to any pending or proposed legislative or administrative action.

c) Causing or influencing the introduction of a bill or an amendment to a bill for the purpose of thereafter being employed to secure its passage or defeat.

d) Attempting to create a fictitious appearance of public favor or disfavor of any proposed legislative or administrative action or to cause any communication to be sent to any elected state officer, legislative official, agency official, or state candidate in the name of any fictitious person or in the name of any real person, except with the consent of such real person.

e) Representing falsely, either directly or indirectly, that the lobbyist or lobbying firm can control the official action of any elected state officer, legislative official, or agency official.

f) Accepting or agreeing to accept payment that is contingent on the defeat, enactment, or outcome of any proposed legislative or administrative action.

6) Permits the FPPC to impose administrative penalties in situations where it determines that a violation of the PRA has occurred. Permits the FPPC, through this administrative enforcement procedure, to require the person who violated the PRA to do any of the following:

a) Cease and desist violation of the PRA;

b) File any reports, statements, or other documents or information required by the PRA; and,

c) Pay a monetary penalty of up to $5,000 per violation, payable to the General Fund of the state.

7) Provides that a person who violates any provision of the PRA, except as specified, for which no specific civil penalty is provided, shall be liable in a civil action for an amount of up to $5,000 per violation.

8) Provides that any person who knowingly or willfully violates any provision of the PRA is guilty of a misdemeanor. Prohibits a person who is convicted of a misdemeanor for a violation of the PRA from being a candidate for elective office or acting as a lobbyist for a period of four years following the date of the conviction unless the court at the time of the sentencing specifically determines that this provision shall not be applicable.

9) Requires an employer that knows or should have known about sexual harassment in its workplace to take immediate and appropriate corrective action, as specified. Provides that an employer may be responsible for the acts of sexual harassment committed by nonemployees in that employer's workplace if the employer knows or should have known of the conduct and fails to take immediate and appropriate corrective action, as specified.

FISCAL EFFECT: Unknown

COMMENTS:

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

> In October of 2017, over 140 female legislators, lobbyists, consultants, and women throughout the Capitol community signed an open letter condemning the culture of enabling harassment and assault in the Capitol community. The movement sparked an outpouring of stories from many survivors about their sexual harassment experiences with various individuals in California politics and government.
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> The Legislature is taking steps to address sexual harassment. People throughout the Capitol community need to be protected and perpetrators need to be held accountable as the scope of sexual harassment expands beyond the Legislature and other state and local government entities. There is a duty to protect the entire community.
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> Without a system of accountability in place for these individuals, a culture of silence and coercion can continue outside the Capitol grounds.

2) **Joint Rules Subcommittee**: Earlier this year, the Assembly Speaker and the Senate President pro Tempore announced the formation of a new subcommittee of the Joint Rules Committee tasked with establishing reforms to improve how the Legislature addresses sexual harassment and how it can better protect those who report harassment or abuse. That subcommittee—the Subcommittee on Sexual Harassment Prevention and Response—is expected to present recommendations to the full Joint Rules Committee for the adoption of new procedures and policies for the Legislature. The subcommittee is not a standing

committee and is not hearing legislation.

Since its formation, the subcommittee has held informational hearings on the topics of Best Practices for Changing Culture on Sexual Harassment; Defining Harassment and Identifying Challenges; Best Practices for Reporting Sexual Harassment & Providing Victim Support; Investigation and Response to Sexual Harassment Allegations; and Preventing Sexual Harassment Through Training and Culture Change. The subcommittee has not yet presented its recommendations to the full Joint Rules Committee.

3) **Scope of FPPC's Authority and Possible Amendments**: As currently drafted, this bill appears to permit the FPPC to investigate *any* allegation or complaint of sexual harassment that is made against a lobbyist, even if the alleged sexual harassment did not occur in the context of the person's lobbying activities. For instance, this bill appears to give the FPPC the authority to investigate a complaint that a lobbyist sexually harassed a server at a restaurant, or an administrative staffer who works in the lobbying firm that employs the lobbyist. It is unclear whether this is consistent with the author's intent.

   Generally, the FPPC's ability to investigate alleged misconduct by lobbyists under existing law is limited to situations where the alleged misconduct is related to the person's lobbying activities. In light of that fact, the author and the committee may wish to consider an amendment to narrow the scope of this bill so that it is limited to alleged acts of sexual harassment by a lobbyist that occurred within the scope of that person's lobbying activities.

4) **Due Process and Possible Amendments**: As detailed above, existing law permits the FPPC to bring enforcement actions for violations of the PRA through an administrative enforcement process. That enforcement process provides persons accused of violating the PRA with certain procedural protections, including the right to challenge a determination by the FPPC that probable cause exists to believe that the person has violated the PRA, the right to an administrative hearing to determine whether a violation of the PRA has occurred, and the right to seek reconsideration of any enforcement decision issued by the FPPC. Violations of the PRA are also punishable through civil or criminal actions, each of which provides the accused with a variety of due process protections.

   It is not clear, however, what procedure would apply under this bill in a case where the FPPC sought to order a lobbyist to cease lobbying activity due to a finding that the lobbyist engaged in sexual harassment. As such, it is unclear what sort of due process protections, if any, a lobbyist would have to challenge or appeal a decision of the FPPC to ban that person from engaging in lobbying activity for a period of time.

   Furthermore, the remedy that this bill seeks to authorize—allowing the FPPC to prohibit a lobbyist from engaging in lobbying activity for a period of time—is very different than the types of remedies that the FPPC currently has the power to impose through its administrative enforcement process. Generally, the administrative enforcement process found in the PRA allows the FPPC to impose monetary fines, to order a person to cease and desist violating the PRA, and to order a person to file any required reports or statements. While there is a limited precedent in existing law for prohibiting a person from lobbying for a period of time when that person is found to have violated the PRA, that remedy exists only in criminal

enforcement actions for violations of the PRA.

As currently drafted, this bill makes it a violation of the PRA for a lobbyist to engage in sexual harassment. As a result, even in the absence of any provision imposing a specific penalty for lobbyists who engage in sexual harassment, the enforcement options that exist for violations of the PRA generally (administrative, civil, and criminal enforcement) would be available in situations where a lobbyist engaged in sexual harassment. In a serious case that results in a criminal conviction for a violation of the PRA, one of the penalties that is available under existing law, as detailed above, is a four-year ban on acting as a lobbyist.

In light of the foregoing information, and given the unprecedented nature of allowing the FPPC to impose the remedy that this bill proposes (a four-year ban on lobbying) and the lack of a specific procedure for the FPPC to impose that remedy, the author and the committee may wish to consider amending this bill to delete the provision that permits the FPPC to order a lobbyist who is found to have engaged in sexual harassment to cease all lobbying activity for a period of up to four years. If that provision were to be deleted from the bill, a lobbyist who engaged in sexual harassment would still be subject to the penalties that generally apply for violations of the PRA including, in serious cases, the potential for misdemeanor charges that can result in a four-year ban on lobbying.

4) **Expertise in Sexual Harassment Law**: Under the PRA, the FPPC has the responsibility for enforcing state laws regulating campaign financing, conflicts of interest, lobbying, and governmental ethics. The FPPC does not generally have enforcement or investigative authority over employment or anti-discrimination laws, including laws regarding sexual harassment. In light of that fact, it is unclear whether the FPPC is likely to have much expertise over sexual harassment matters.

5) **Assembly Policy on Sexual Harassment and Lobbyists**: Even though lobbyists are not employed by the Assembly, an employer (including the Assembly) may be responsible for acts of sexual harassment committed by nonemployees (including lobbyists) in the employer's workplace if the employer knows or should have known of the conduct and fails to take immediate and appropriate corrective action, as specified. Accordingly, the Assembly Policy Against Sexual Harassment includes misconduct by lobbyists within the scope of conduct that is covered by the policy.

   Specifically, the Assembly policy provides that "[h]arassment may involve outside vendors, lobbyists, visitors or other members of the public," and "[i]f the harassment is by a person who is not employed by the Assembly, or if a person who is not employed by the Assembly believes he or she has been harassed, the conduct should nevertheless be reported."

   While a complaint made against a lobbyist for sexual harassment may result in an Assembly investigation, the Assembly policy does not specifically address the potential consequences for lobbyists or other members of the public who are found to have sexually harassed Assembly employees.

6) **Definition of Sexual Harassment**: Although the term "sexual harassment" is used in many provisions of California law, it appears that there are few instances where the term is defined

in state statute. One example where state law expressly defines the term is Section 212.5 of the Education Code, which defines "sexual harassment" as follows:

> "Sexual harassment" means unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting, under any of the following conditions:
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> (a) Submission to the conduct is explicitly or implicitly made a term or a condition of an individual's employment, academic status, or progress.
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> (b) Submission to, or rejection of, the conduct by the individual is used as the basis of employment or academic decisions affecting the individual.
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> (c) The conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment.
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> (d) Submission to, or rejection of, the conduct by the individual is used as the basis for any decision affecting the individual regarding benefits and services, honors, programs, or activities available at or through the educational institution.

Other areas of state law describe "sexual harassment" in a more indirect manner, using terminology that is similar to that found in Section 212.5 of the Education Code. Furthermore, the definition in Education Code Section 212.5 is similar to the manner in which sexual harassment is described in the Assembly's Policy Against Sexual Harassment.

The definition of the term "sexual harassment" that is found in this bill is similar to the first part of the definition found elsewhere in California law and policy. Specifically, this bill defines sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature that arises out of or in the course of employment." Unlike the definition found in Section 212.5 of the Education Code and the indirect definitions found elsewhere in California law, however, this bill does not include the second part of the definition that generally limits the definition of sexual harassment to situations where the unwelcome sexual conduct interferes with an individual's work or school environment or where submission to or rejection of the conduct is used in making employment or schooling decisions.

Because this bill's definition does not include the limiting factors that typically are found in other areas of law where the term is defined, conduct that is not generally understood to be "sexual harassment" under existing law may nonetheless be considered "sexual harassment" under this bill. While establishing an appropriate definition of conduct that constitutes sexual harassment is beyond the scope of this analysis or of this committee's jurisdiction, having a definition of the term for lobbyists that is broader than the manner in which the term is generally defined under state law could create confusion and could complicate compliance with and enforcement of this bill. Given the number and scope of bills dealing with the issue

of sexual harassment that have been introduced this year, the policy committee that has jurisdiction over sexual harassment issues generally should be in a better position to consider and develop an appropriate and generally applicable definition of the term "sexual harassment."

7) **Arguments in Opposition**: In opposition to this bill, the Institute of Governmental Advocates (IGA) writes:

> IGA has supported many of the Legislature's recent actions in response to revelations of misconduct and inappropriate behavior by a handful of Members and Staff. We have sponsored educational panels for our members and worked with the Senate and Assembly to establish protocols for the future receipt of complaints, investigation, and punishment. While much work remains, AB 2055 misdirects its focus solely on lobbyists who are more commonly the victims of unwanted sexual advances or harassment – not the perpetrators of such conduct.
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> Moreover, as private business owners and/or employees in California, registered lobbyists are already subject to numerous state laws concerning harassment in the workplace. AB 2055 is simply unnecessary.
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> Lastly, empowering the [FPPC] which is charged with investigating and punishing violations of the Political Reform Act, with no current ability or expertise to handle complaints, investigations, and enforcement of the type proposed by AB 2055, is ill-advised. The FPPC has its hands-full receiving and investigating the over 1,500 campaign finance and disclosure complaints it receives each year.

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.

9) **Double-Referral**: This bill is double-referred to the Assembly Judiciary Committee, which has received referrals on a large number of bills on the subject of sexual harassment. This committee analysis focuses primarily on those issues that are within the jurisdiction of the Assembly Elections & Redistricting Committee; issues related to sexual harassment law generally are more squarely within the jurisdiction of the Assembly Judiciary Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

None on file.

Opposition

Institute of Governmental Advocates

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