

Date of Hearing: July 5, 2023

ASSEMBLY COMMITTEE ON ELECTIONS
Gail Pellerin, Chair
SB 724 (Glazer) – As Introduced February 16, 2023

SENATE VOTE: 32-0

SUBJECT: Political Reform Act of 1974: communications.

SUMMARY: Requires a person who spends \$25,000 or more on a communication that identifies an elected state official within 150 days of an election to file a public disclosure report, and requires the report to include the identity of any person who paid \$5,000 or more for the purpose of making that communication. Specifically, **this bill:**

- 1) Requires any person who makes or promises a payment of \$25,000 or more for a communication that clearly identifies an elected state officer to file a report with the Secretary of State (SOS) that discloses the person's name, address, occupation, employer, and the amount of the payment within 48 hours if both of the following are true:
 - a) The communication is made with the intent to influence the officer or public opinion; and,
 - b) The communication is disseminated, broadcast, or otherwise published within 150 days of an election.
- 2) Requires a person who receives or is promised a payment of \$5,000 or more from another person for the purpose of making a communication described above in 1) to submit a report as described above, and to disclose on the report the name, address, occupation, and employer of, and date and amount received from, the person. Provides that this requirement does not apply to a person who is in the business of providing goods or services and receives or is promised the payment for the purpose of providing those goods or services.
- 3) Specifies that this bill is not intended to modify the definitions of contribution or expenditure under the Political Reform Act (PRA) or to modify the obligations of any person whose activity otherwise meets those definitions.

EXISTING LAW:

- 1) Creates the Fair Political Practices Commission (FPPC), and makes it responsible for the impartial, effective administration and implementation of the PRA. (Government Code §§83100, 83111)
- 2) 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 SOS disclosing specified information about the person and the payment. Requires a person who receives or is promised a payment of \$5,000 or more from another person for the purpose of making such a communication to submit a report as described above, and to disclose on the report the name, address,

occupation, and employer of, and date and amount received from, the person. Provides that this requirement does not apply to a person who is in the business of providing goods or services and receives or is promised the payment for the purpose of providing those goods or services. (Government Code §85310)

- 3) Requires the SOS, in consultation with the FPPC, to develop and certify a new online filing and disclosure system for public use that provides public disclosure of campaign finance and lobbying information in a user-friendly, easily understandable format, as specified. This system commonly is referred to as the Cal-Access Replacement System (CARS). (Government Code §84602(b))
- 4) Requires an issue lobbying advertisement to clearly and conspicuously identify the person that authorized and paid for the advertisement, as specified. Requires a person that pays or makes enforceable promises to pay \$5,000 or more during a calendar quarter for issue lobbying advertisements to file a report with the SOS within 72 hours, as specified. Defines “issue lobbying advertisement,” for the purpose of these provisions, as any advertisement made for purposes of influencing a clearly identified legislative or administrative action, including an advertisement soliciting or urging a person to communicate directly with an elective state official, agency official, or legislative official for the primary purpose of attempting to influence a clearly identified state legislative or administrative action, except as specified. Provides that these provisions shall become operative one year after the SOS certifies that the CARS system is operational, or January 1, 2023, whichever is later. (Government Code §§84602, 86119; Section 7 of Chapter 873 of the Statutes of 2022)

FISCAL EFFECT: According to the Senate Appropriations Committee:

- The FPPC indicates that it would incur first-year costs of \$127,000, and \$120,000 annually thereafter, to fund one position to implement the provisions of the bill (General Fund). FPPC also notes the potential of up to \$200,000 for litigation costs due to potential Constitutional challenge.
- The bill would result in initial General Fund costs to the SOS of \$722,000, with ongoing costs annual costs of \$277,000.

COMMENTS:

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

This bill seeks to close a gap in California’s transparency and disclosure laws. Under current law, a disclosure is required for communication that clearly identifies a candidate for elective state office, but does not advocate for the election or defeat of the candidate within 45 days of an election. Additionally, an issue lobbying advertisement is an advertisement made for purposes of influencing a clearly identified legislative or administrative action, including an advertisement soliciting or urging a person to communicate directly with an elective state official, agency official, or legislative official for the primary purpose of attempting to influence a clearly identified state legislative or administrative action. As a result, it is unclear whether communication that does not advocate for a specific action (i.e. an issue lobbying advertisement) for elected

state officials who are not candidates at an upcoming election requires a disclosure of who is funding the communication.

This bill is a modest approach that only targets large spenders of these types of communication. For state officials, these types of communication do not specifically mention an action but influences future legislation action. Californians deserve to know who is trying to influence legislators and this bill seeks to provide that information.

- 2) **Advertisements Identifying State Officials:** According to background information provided by the author, this bill is a response to online advertisements that appeared in the summer of 2022. These advertisements identified six legislators, five of whom were candidates for elective state office at the November 2022 statewide general election. The advertisements did not mention the election or the legislators' candidacies. While the advertisements referred in a general manner to the legislators' votes on legislation related to a topic, it did not mention specific bills or encourage any action regarding the legislators or legislation.

As detailed above, the PRA requires a person to file a disclosure report with the SOS if the person spends \$50,000 or more on a communication that clearly identifies a candidate for elective state office, but does not advocate for the election or defeat of the candidate, but only if the communication is disseminated within 45 days of an election. Since the advertisements that prompted this bill were disseminated more than 45 days before the November 2022 general election, the entity responsible for those advertisements was not required to file a public disclosure report under that law.

Last year, the Legislature passed and the Governor signed SB 459 (Allen), Chapter 873, Statutes of 2022. That bill will require an issue lobbying advertisement, as defined, to include a disclosure of the person who authorized and paid for the advertisement. Additionally, that bill will require a person that pays \$5,000 or more in a calendar quarter for issue lobbying advertisements to file a disclosure report with the SOS within 72 hours. SB 459 was not in effect at the time the advertisements ran. Even if it had been effect, it is unlikely that the advertisements identified by the author would have triggered the requirements of SB 459, since it applies only to advertisements made for purposes of influencing a clearly identified legislative or administrative action. Moreover, SB 459 will not become effective until one year after the SOS certifies that CARS is operational. The SOS does not expect to fully deploy CARS until late 2026 at the earliest.

- 3) **Constitutional Issues:** This bill raises significant constitutional concerns and could be susceptible to a challenge on the grounds that it violates the guarantees of free speech and freedom of association under the United States (US) Constitution. Courts have consistently recognized that laws that compel a person to disclose information can impact First Amendment rights, because the associated burden and penalties for noncompliance may discourage people from speaking altogether.

Regarding laws that compel disclosure, the US Supreme Court generally has held that such laws must survive *exacting scrutiny*, a standard that requires "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Doe v. Reed* (2010), 561 US 186, 196 (internal quotation marks omitted). Under that standard, the Supreme Court has upheld requirements that people who pay for campaign advertisements

and electioneering communications must file public disclosure reports with a federal agency, finding that providing the electorate with information about the sources of election-related spending is a sufficiently important governmental interest. (*Buckley v. Valeo* (1974) 424 US 1; *Citizens United v. Federal Election Commission* (2010) 558 U.S. 310.) Similarly, the Court has upheld registration and disclosure requirements for lobbyists, finding an important governmental interest in allowing public officials and the public to know “who is being hired, who is putting up the money, and how much” is being spent to influence legislation. (*United States v. Harriss* (1954), 347 US 612, 625.)

However, it is unclear whether a court would uphold the disclosure requirements outlined in this bill. First, the bill lacks a clear statement regarding the specific governmental interest it aims to promote. The author’s statement suggests that the governmental interest may lie in providing information about those who spend money to influence the legislative process (arguing that “Californians deserve to know who is trying to influence legislators”). Some elements of the bill seem to be drafted with such a governmental interest in mind, such as its application to communications that clearly identify an elected state officer, regardless of whether that officer is a candidate or will appear on the ballot at a future election.

On the other hand, other elements of the bill suggest that the governmental interest relates to providing information about those who are seeking to influence *elections*, as evidenced by this bill’s requirements for disclosure of communications that are made within a specific time frame around elections. Without a clear statement regarding the governmental interest that this bill seeks to further, it is challenging to assess whether a court would find that there is a substantial relation between this bill’s disclosure requirements and a sufficiently important governmental interest. Accordingly, this bill may benefit from the addition of findings and declarations that clearly identify the governmental interest being served by the new disclosure requirements.

Even if there is a sufficiently important governmental interest underlying this bill’s disclosure requirements, it remains unclear whether a substantial relation exists between the disclosure and the governmental interest. If the governmental interest involves providing information about efforts to influence the legislative process, it is not clear that there is a substantial relation to the disclosure requirement given that this bill is not limited to advertisements that mention pending legislative action or that encourage contacting elected officials regarding legislative matters. Furthermore, the bill may not apply to many communications that seek to influence legislative matters if they are made in odd-numbered years.

If the governmental interest relates to providing information about efforts to affect elections, this bill’s disclosure requirements similarly will cover many communications that are unrelated to that interest. For instance, the disclosure requirements are not limited to advertisements that identify a *candidate* who will appear on the ballot. Relatedly, the requirements apply to communications that occur five months before an election, when those communications are considerably less likely to have an impact on the electoral process.

This bill’s scope encompasses a broad range of communications, subject to four main conditions triggering reporting requirements:

- (1) The communication must clearly identify an elected state officer;

(2) A person must make a payment or promise of a payment of \$25,000 or more for the communication;

(3) The purpose of the communication is to influence the elected state officer or public opinion; and,

(4) The communication must be disseminated, broadcast, or published within 150 days of an election.

While the first two conditions effectively limit the number of communications triggering reporting obligations, the latter two conditions do little to narrow the scope of regulated communications. Advertising generally aims to influence public opinion, so it is unclear whether the third condition excludes any communications from falling under the purview of this bill. Finally, depending on how the fourth condition is interpreted and applied, it could encompass anywhere from 40% of a four-year period (if interpreted to mean only the 150-day period immediately before a statewide primary or general election) to the entirety of a four-year period (if interpreted to mean the 150-day period before and after any election in the state).

Consequently, this bill likely will require disclosure reports to be filed in connection with communications that do not seek to influence the legislative or electoral processes. For instance, a public service announcement (PSA) featuring an elected state officer encouraging donations for disaster relief could trigger reporting requirements if payments totaling \$25,000 or more are made for the production and dissemination of that PSA. Similarly, during Arnold Schwarzenegger's tenure as Governor, advertisements funded by the California Travel & Tourism Commission promoting California as a global tourism destination, in which he appeared, would likely have triggered reporting requirements had this bill been in effect, even when Governor Schwarzenegger was not a candidate for any other office. Given the broad applicability of this bill, it remains uncertain whether a court would find a substantial relation between its disclosure requirements and a sufficiently important governmental interest.

Notably, the US Supreme Court ruled two years ago that a California disclosure law was unconstitutional due to its burden on First Amendment rights, despite addressing an important governmental interest. Specifically in *Americans for Prosperity v. Bonta* (2021), 141 S. Ct. 2373, the Court found that a California law mandating charitable organizations that solicit funds in California to disclose their major donors to the state Attorney General (AG) was unconstitutional.

In that case, the Court acknowledged that preventing fraud by charities was a substantial governmental interest, stating that the court “do[es] not doubt that California has an important interest in preventing wrongdoing by charitable organizations.” (*Id.* at 2385-86.) Nonetheless, the Court found that the “disclosure requirement imposes a widespread burden on donors’ associational rights,” that “cannot be justified on the ground that the regime is narrowly tailored to investigating charitable wrongdoing, or that the State’s interest in administrative convenience is sufficiently important.” (*Id.* at 2389.) It is worth noting that the disclosure at issue in *Americans for Prosperity* (unlike the disclosure in this bill) was confidential and not publicly available, though the Court noted that potential donors would

be reasonably justified in fearing their identities could become public in light of prior security breaches in the AG's office resulting in the disclosure of confidential information.

- 4) **Amendments Requested:** Although she does not have an official position on the bill, Secretary of State Shirley N. Weber, Ph.D. has requested that this bill be amended to delay its implementation until the CARS system is certified. In her letter to the committee, Secretary Weber writes:

In recent years, similar amendments have been added to legislative measures that seek to create new online reporting within the CAL-ACCESS financial disclosure system. Senate Bill 459 (*Allen - Ch. 873, St. of 2022*), which would have created a new electronic CAL-ACCESS filing, was amended to state, " ... this act shall not become operative until one year after the date the Secretary of State certifies an online filing and disclosure system pursuant to paragraph (7) of subdivision (b) of Section 84602 of the Government Code or January 1, 2023, whichever is later." In addition, Assembly Bill 2528 (*Bigelow - Ch. 500, St. of 2022*) included language that delayed implementation of its new online filing requirement until January 1 following certification by the Secretary of State that CAL-ACCESS is modified to accommodate these additional filings.

If implementation cannot be delayed, an alternative filing process with the form being filed in paper format by electronic mail would need to be established for SB 724 until CARS is certified. Additional language would be needed to allow the SOS to accept a new form by paper. However, this option presents additional costs because it requires immediate paper-based filings and would still entail costs necessary to include in CARS the filing required by SB 724. In addition, information collected on a paper form cannot be integrally displayed in CAL-ACCESS and, unlike filings processed through CAL-ACCESS or, in the future, through CARS, would not have searchable features including links to candidates. A paper filing could still be posted to the SOS website.

- 5) **Previous Legislation:** AB 1217 (Mullin) of 2019 would have required certain advertisements that are issue ads or electioneering communications to include disclosure statements identifying the entity responsible for the ads and the entity's major funders. AB 1217 was approved by the Assembly Elections & Redistricting Committee (the predecessor to this committee) on a 6-0 vote, and on the Assembly Floor by a 65-4 vote, but was never heard in committee in the Senate.
- 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

None on file.

Opposition

None on file.

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