

Date of Hearing: August 17, 2022

ASSEMBLY COMMITTEE ON ELECTIONS
Isaac G. Bryan, Chair
SB 746 (Skinner) – As Amended August 15, 2022

SENATE VOTE: (vote not relevant)

SUBJECT: Political Reform Act of 1974: business entities: online advocacy and advertisements.

SUMMARY: Requires a business entity that, for political purposes, uses its online products or services to target information to its users, to disclose that targeting on a public report that is filed with the Secretary of State (SOS), beginning on January 1, 2024, as specified. Specifically, **this bill:**

- 1) Requires a business entity to submit a report to the SOS following any six month period in which the business entity does either of the following:
 - a) Uses its products or services to alter the online search results its products or services generate in order to emphasize or deemphasize materials containing express advocacy, as specified. Provides, for these purposes, that a communication contains express advocacy if it contains express words of advocacy such as “vote for,” “elect,” “support,” “cast your ballot,” “vote against,” “defeat,” “reject,” “sign petitions for,” or, within 60 days before an election in which a candidate or measure appears on the ballot, the communication otherwise refers to the clearly identified candidate or measure so that the communication, taken as a whole, unambiguously urges a particular result in an election.
 - b) Uses its products or services to target online advertisements to individuals or groups, or generally to users or members of the public, without full and adequate consideration and for political purposes, as specified. Provides that a use is for political purposes if it is for influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate or candidates, or the qualification or passage of any measure.
- 2) Requires the report to contain all of the following information:
 - a) The name of each candidate or measure with regard to which search results were altered, as described above in 1) a), or that was the subject of an advertisement targeted as described above in 1) b).
 - b) For each candidate or measure, whether the search results or advertisements were to support or oppose the nomination or election of the candidate or the qualification or passage of the measure.
 - c) The full name, title, and business street address and telephone number of each person with final decision making authority as to which candidates or measures will be supported or opposed by the business entity’s search results or advertisements.

- d) The date or range of dates in which the search results were altered or the advertisements were targeted.
- 3) Requires the report to be filed by July 31 for activity occurring during the period of January 1 through June 30, and by January 31 for activity occurring during the period of July 1 through December 31.
- 4) Requires the report to be filed on paper or by email with the SOS and requires the SOS to make each report publicly available in a conspicuous location on the SOS's website. Permits the report to be included in an online filing and disclosure system if the SOS certifies that the system is able to incorporate that report, as specified.
- 5) Requires a business entity that is subject to this bill to maintain detailed accounts and records necessary to prepare the report required by this bill.
- 6) Provides that this bill does not apply to either of the following activities:
 - a) A business entity's use of its products or services exclusively to carry out its commercial activities, including, but not limited to, delivering user-generated content or a paid advertisement on behalf of another person.
 - b) Communications that are internal to a business entity or entities.
- 7) Specifies that this bill is not intended to expand or limit the definition of contribution or expenditure under the Political Reform Act (PRA).
- 8) Provides that the provisions of this bill will become operative on January 1, 2024.

EXISTING LAW:

- 1) Creates the Fair Political Practices Commission (FPPC), and makes it responsible for the impartial, effective administration and implementation of the PRA.
- 2) Defines "contribution," for the purpose of the PRA, as 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 political purposes.
- 3) Defines "expenditure," for the purpose of the PRA, as a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment, unless it is clear from the surrounding circumstances that it is not made for political purposes.
- 4) Requires political committees to file periodic campaign reports that disclose campaign contributions and expenditures, as specified.

FISCAL EFFECT: The FPPC estimates costs of \$295,253 for the first year and \$281,253 annually thereafter for one Commission Counsel (Enforcement) and one Political Reform Consultant (Legal). The SOS estimates costs of \$133,000 in the first year and at least \$128,000 annually thereafter for one staff position to provide technical assistance to filers subject to this

bill and accommodate the new filings required by this bill, and unknown one-time costs potentially of up to \$50,000 to develop regulations to implement this bill. The SOS further notes that there would be additional unknown costs if the reports required by this bill are added to an online disclosure system that the SOS is currently developing, and unknown filing, records management, and regulatory costs.

COMMENTS:

- 1) **Prior Committee Consideration of This Bill:** When this bill was heard by this committee earlier in the year, it would have required a business entity to disclose any campaign contributions or expenditures that resulted when the entity intentionally utilized its products or services to disseminate communications made for political purposes, among other provisions. That version of the bill was approved by this committee on a 7-0 vote on June 29, 2022.

On August 11, 2022, this bill was amended to delete the prior contents of the bill, and to add provisions related to business entities that use their online products or services to target information to its users for political purposes. Although the intent of the amended version of this bill is similar to the intent of the version that this committee heard and approved in June, the approach to achieving disclosure of actions taken for political purposes by business entities that operate online platforms differs substantially from the previous version of the bill. Accordingly, this bill was re-referred to this committee for further consideration of these new provisions in accordance with Assembly Rule 77.2.

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

Under current law, the only way a business can legally influence an election is by making a cash or in-kind campaign contribution to a candidate or political committee, or by making independent expenditures, and both actions must be disclosed to the public. Although the Constitution guarantees a business the right to influence an election, the Supreme Court has also held that there is ample reason to require public disclosure of such influence. Accordingly, California has extensive reporting requirements for both monetary and nonmonetary contributions to political campaigns. However, recent technological advancements have made it possible for digital companies to individually influence voter behavior in ways that do not have to be publicly disclosed.

Just like with other types of media, voters should have the right to know if they're being purposely presented with information designed to influence how they vote. SB 746 addresses this gap in political reporting requirements and restores public trust in online content by allowing consumers to know if they are being manipulated in partisan ways. Specifically, SB 746 promotes Internet transparency by requiring businesses that alter search results or target online ads directly to users to emphasize or deemphasize express advocacy towards a candidate or ballot measure to disclose that activity to the Secretary of State. Users can then see from this annual, public report which online businesses have politically targeted consumers – potentially influencing the way consumers have voted. Taking this step is critical to ensuring that evolving technological capabilities do not interfere with our Constitutional right to free and fair elections.

- 3) **What is the Problem?** In describing the primary problem that this bill seeks to address, the author contends that existing law would allow a large online platform to manipulate the algorithm that determines the content that its users see in a manner that is designed to influence the outcome of an election, and that the company would not be required to disclose those activities under existing law. The author provided two examples where actions taken by large technology companies had the potential to influence elections without regulatory oversight or public disclosure.

First, the author points to reports that Google was providing skewed search results in connection with a proposition that it did not support. As *Politico* reported in October 2020:

Google searches for seven of the state’s 12 ballot proposals have surfaced campaign arguments from the state voter guide instead of neutral "snippets," said former cybersecurity executive Tom Kemp. He said those search results could sway voters who rely on those first impressions to understand what the measures do, on subjects ranging from stem cell research to commercial property taxes.

His findings about Google — a de-facto roadmap for voters making their way through lengthy ballots — suggest that algorithms can turn even neutral sources into biased ones, a problem that could extend well beyond the nation’s tech capital...

In one California example, a Google search of “Prop 24” on Thursday turned up this description of a November data privacy initiative from the state’s voter guide: “CON Proposition 24 reduces your privacy rights in California. Proposition 24 allows ‘pay for privacy’ schemes, makes workers wait years to learn what confidential ...”

In addition, the author points to a 2014 report by *Mother Jones* magazine that Facebook was “quietly conducting experiments on how the company’s actions can affect the voting behavior of its users.” *Mother Jones* further reported that “the process by which Facebook has developed this tool—what the firm calls the ‘voter megaphone’—has not been very transparent, raising questions about its use and Facebook’s ability to influence elections.” The tool described in the article is one that Facebook says is designed to encourage its users to vote. In response to questions from the *Mother Jones* reporter, Facebook claimed that the distribution of the tool was random (that is, Facebook did not push the tool to certain types of users).

- 4) **Will This Bill Achieve Effective Disclosure of Efforts by Online Platforms to Influence Elections?** The two examples discussed above may demonstrate that large online platforms have the potential to exert considerable influence over the voting behavior of their users with little or no public disclosure. It is not clear, however, that this bill would have required disclosure in either of those cases. The same former cybersecurity executive who called attention to Google’s search results (Tom Kemp) was quoted in the *Politico* article as saying that he believes the bias in Google’s search results was inadvertent. In the case of Facebook’s voter megaphone, nothing in the article indicates that Facebook’s activities were for “political purposes” as that term is defined in existing law and this bill.

Committee staff is unaware of and has not been provided with evidence of an online platform

intentionally modifying the algorithm that determines the content that its users see in an effort to support or oppose specific candidates or ballot measures. If an online platform *did* intentionally modify its algorithm in such a manner, this bill may require the platform to file a public report that discloses those activities. As a result, if online platforms *are* intentionally modifying their search results with the intent of supporting or opposing candidates and ballot measures, this bill could require additional disclosure of those activities in certain circumstances. In at least some circumstances, however, such actions would already be subject to reporting under the PRA pursuant to existing law, depending on the exact nature of the platform's actions.

Specifically, if a business entity uses its products or services to alter search results or to target online advertisements in a manner that is designed to influence voters to support or oppose candidates or ballot measures, the actions of business entity in making those changes to its products or services could be considered an in-kind contribution or an independent expenditure under the PRA that must be reported. In such a situation, state law may require public disclosure of the entity that made that contribution or expenditure, the value of the business entity's actions, and an identification of the candidate or measure that the entity's actions supported or opposed.

In at least some circumstances, however, state law may not require disclosure of a business entity's use of its products or services for political purposes. For example, if the value of the business entity's actions are less than the relevant reporting threshold in the PRA, those actions likely would not need to be disclosed. Additionally, an existing FPPC regulation permits an employer's payment of salary or other compensation to an employee to go unreported as a contribution or expenditure if 10% or less of the employee's compensated time in a month is spent rendering services for political purposes. This exception, which can serve as a safe harbor for employers that do not engage in significant political activities, could relieve a business entity of any obligation to report the value of compensated staff time devoted to altering search results or targeting online advertisements for political purposes. In either of these situations, this bill could result in disclosure of a business entity's activities that are not currently required to be disclosed under the PRA.

Unlike the versions of this bill that were considered in and approved by the Senate, however, nothing in the language of this bill gives an *individual consumer* the right or ability to determine how a business used that consumer's personal information for a political purpose. Furthermore, nothing in this bill gives an individual the right or ability to know whether the business targeted that individual with political communications or, if the individual *was* targeted, what those communications were and which candidate or ballot measure they were intended to support or oppose.

- 5) **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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