

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 921 (Newman)
Version: April 18, 2022
Hearing Date: April 26, 2022
Fiscal: Yes
Urgency: No
AWM

SUBJECT

Political Reform Act of 1974: digital political advertisements

DIGEST

This bill requires an online platform, as defined, to submit information and materials relating to political digital advertisements to the Fair Political Practices Commission (FPPC), as specified; and requires the FPPC to create an online, centralized, and publicly accessible database using the information collected from online platforms, as specified.

EXECUTIVE SUMMARY

The internet has proven to be a powerful tool for political campaigns. Online platforms' ability to gather information about their users allow campaigns to purchase ads to be displayed to a precisely targeted audience, and to quickly modify ads and campaign messaging based on online feedback. Unfortunately, the fast-paced and targeted nature of online campaign advertising also makes it more difficult to regulate. Current law requires online platforms, as defined, to obtain certain information from the committees purchasing campaign ads for at least four years. According to the FPPC, however, more is needed to ensure that regulators and voters can review digital campaign ads and the statements in them.

This bill establishes the Digital Advertisement Transparency and Accountability Act, or the DATA Act. The bill requires certain online platforms to provide information relating to online ads they displayed for candidates for state office or statewide ballot measures to the FPPC. The FPPC is required to create a public, searchable database for the ads and retain them for at least 12 years. The author has agreed to an amendment to clarify that online platforms not required by the bill to submit information to the FPPC will continue to retain their campaign ads as required by current law.

This bill is sponsored by the FPPC and supported by California Common Cause and the League of Women Voters of California. There is no known opposition. This bill passed out of the Senate Elections and Constitutional Amendments Committee with a 4-0 vote.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the Political Reform Act of 1974 (the Act), which governs campaign and lobbying activities related to elections. (Gov. Code, tit. 9, §§ 81000 et seq.)
- 2) Establishes the Fair Political Practices Commission (the FPPC), comprised of three members, no more than three of which may be members of the same political party, to impartially and effectively implement and administer the Act. (Gov. Code, tit. 9, ch. 3, §§ 83100 et seq.)
- 3) Establishes, as part of the Act, requirements relating to campaign advertisements and the disclosures that must be made on or along with those advertisements, including advertisements online. (Gov. Code, tit. 9, ch. 4, §§ 84100 et seq.)
- 4) Provides the following relevant definitions for purposes of the Act:
 - a) An “advertisement” is 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. An advertisement does not include:
 - i. A communication from an organization, other than a political party, to its members.
 - ii. An email communication, text message, or other electronic text message from an organization to persons who have opted in or asked to receive messages from the organization.
 - iii. Any communication solicited by the recipient.
 - iv. Campaign buttons, bumper stickers, or other promotional items within certain specified parameters.
 - v. Wearing apparel.
 - vi. Skywriting.
 - vii. Any other type of communication excluded by regulation by the FPPC. (Gov. Code, § 84501(a).)
 - b) A “committee” is any person or combination of persons who directly or indirectly receive or contributions or make expenditures of specified amounts to, or at the behest of, a candidate or committee. (Gov. Code, § 82013.)
 - c) A “person” is an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, limited liability company, association, committee, and any other organization or group of persons acting in concert. (Gov. Code, § 82047.)

- d) An “online platform” is a public-facing internet website, web application, or digital application, including a social network, ad network, or search engine, that sells advertisements directly to advertisers. A public-facing internet website, web application, or digital application is not an online platform for purposes of this article to the extent that it displays advertisements that are sold directly to advertisers through another online platform. (Gov. Code, § 84504.6(a)(1).)
 - e) An “online platform disclosed advertisement” is either of the following:
 - i. A paid electronic media advertisement on an online platform made via a form of electronic media that allows users to engage in discourse and post content, or any other type of social media, for which the committee pays the online platform, unless all advertisements are video that comply with separate video disclosure requirements (*see* Gov. Code, § 84504.1); but individual posts, comments, or similar communications are not online platform disclosed advertisements if they are posted without payment to the online platform.
 - ii. A paid electronic media advertisement that is not an image or graphic with a hyperlink to a website with otherwise-required disclosures, video, audio, or email. (Gov. Code, § 84504.6(a)(2)(A).)
- 5) Requires a committee that disseminates an online platform disclosed advertisement to do all of the following:
- a) Upon requesting the dissemination, expressly notify the online platform through which the advertisement would be disseminated, using the online platform’s chosen notification method, that the advertisement is one governed by the Act.
 - b) Provide the online platform with the disclosure name of the committee, as defined.
 - c) Provide the online platform with the name of the candidate to which the advertisement refers and the office to which the candidate is seeking election, as applicable, or number or letter of the ballot measure and the jurisdiction to which the advertisement refers.
 - d) Provide the online platform with the name and identification number of the committee that paid for the advertisement. (Gov. Code, § 84504.6(b).)
- 6) Requires an online platform that disseminates a committee’s online platform disclosed advertisement to do one of the following:
- a) Display a “Paid for by” or “Ad Paid for by” followed by the disclosure name provided by the committee, easily readable to the average viewer, located adjacent to any text stating that the advertisement is an advertisement or is promoted or sponsored. The online platform may display only one hundred or more characters of the disclosure name if it is followed by an ellipsis that is clearly clickable and that links to a page as described in 6)(c), below.

- b) Display a hyperlink, icon, button, or tab with the text “Who funded this ad?,” “Paid for by,” or “Ad Paid for by” that is clearly clickable in the same or similar font and in at least the same font size as the online platform’s text, and easily readable to the average viewer, stating that the advertisement is an advertisement or is promoted or sponsored, that links to a page as described in 6)(c), below.
 - c) Hyperlinks, icons, buttons, or tabs used for the purposes described in 6)(a) or (b) above must be linked to the profile or landing page of the committee that paid for the advertisement, to another page to which the average viewer would normally navigate to learn about a committee containing the disclosure name in an easily seen location, or to an internet website containing specified disclosures. (Gov. Code, § 84504.6(c).)
- 7) Requires an online platform that disseminates a committee’s online platform disclosed advertisement to meet all of the following requirements:
- a) Maintain, and make available for online public inspection in a machine readable format, a record of any advertisement disseminated on the online platform by a committee that purchased \$500 or more in advertisements on the online platform during the preceding 12 months. Each record shall contain a digital copy of the advertisement, the approximate number of views, the date and time range during which it was displayed, information relating to the rate charged or total amount spent on the advertisement, the name of the candidate and the office sought or the ballot measure and jurisdiction to which the advertisement relates, and the name and identification number of the committee.
 - b) Make the information available as soon as practicable and retain it for at least four years.
 - c) Display a prominent button, icon, tab, or hyperlink with the text “View Ads” or similar text in either (i) the top of a profile, landing page, or similar location of a committee that paid for an advertisement in a position that the average viewer will readily see upon viewing the page, (ii) on a page that displays the committee’s profile information or biographical information, or (iii) on a page on which the average viewer would normally navigate to view any additional information about a committee. The button, icon, tab, or hyperlink shall link to a page clearly showing all of the advertisement records that the online platform must maintain under 7)(a). (Gov. Code, § 84504.6(d).)
- 8) Provides that an online platform that creates a mechanism for a committee requesting dissemination of an online platform disclosed advertisement to expressly notify the online platform whether the advertisement is an advertisement under the Act and to provide all information necessary for the online platform to comply with the online platform disclosure requirements may rely in good faith on the information provided by the committee to the online platform to satisfy its disclosure and record obligations. (Gov. Code, § 84504.6(e).)

This bill:

- 1) Makes legislative findings relating to campaigns' increasingly frequent use of digital media as a means of delivering campaign advertisements and the unique challenges associated with regulating online advertisements, and declares that it is the intent of the Legislature to create a state-run archive to collect and make publicly available copies of, and information about, specified digital political advertisements.
- 2) Establishes the Digital Advertisement Transparency and Accountability Act, or the DATA Act.
- 3) Provides the following definitions:
 - a) "Archive" means the centralized collection of information maintained pursuant to 7), below.
 - b) "Digital advertisement" means a paid advertisement, as defined above in 4)(a), that appears in a digital format, including, but not limited to, on an internet website, digital application, or web application.
 - c) "Online platform" means a public-facing internet website, web application, or digital application, including a social network, ad network, or search engine, that sells advertisements directly to advertisers, but does not include:
 - i. A public-facing internet website, web application, or digital application to the extent that it displays advertisements that are sold directly to advertisers through another online platform.
 - ii. The internet website, web application, or digital application of a newspaper, magazine, or other periodical of general circulation that generally carries news commentary of general interest.
- 4) Modifies the existing requirements for committees that disseminate online platform disclosed advertisements to impose the same requirements for committees that disseminate digital advertisements as defined in 3)(b).
- 5) Provides that the DATA Act applies to digital advertisements supporting or opposing a candidate or candidates for elective office or a state ballot measure or measures, and that it is the intent of the Legislature that the archive may be expanded with future legislation to, e.g., advertisements for local candidates and measures.
- 6) Requires an online platform that disseminates a committee's digital advertisements and that receives \$50,000 or more from digital advertisement sales in a calendar month to submit to the FPPC, in a format specified by the FPPC, a record of any digital advertisement disseminated on the online platform by a committee that purchased \$500 or more in advertisements during the preceding 12 months. Each record must contain:
 - a) A digital copy of the advertisement;

- b) The approximate number of views generated from the advertisement and the date and time that the advertisement was first and last displayed;
 - c) Information regarding the range charged or the total amount spent on the advertisement;
 - d) The name of the candidate to which the advertisement refers and the office to which the candidate is seeking election, as applicable, or the number or letter of the ballot measure and the jurisdiction to which the advertisement refers; and
 - e) The name and identification number of the committee that paid for the advertisement, if the committee is assigned an identification number.
- 7) Provides that an online platform required to comply with 5) to submit to the FPPC the record of information required by the fifth day of each month for digital advertisement disseminated on the online platform in the previous calendar month.
- 8) Requires the FPPC to make the information submitted pursuant to 5) available in a centralized and publicly accessible online format for no fewer than 12 years from the date the information was submitted.
- 9) Requires the FPPC to make the information obtained pursuant to 5) available to the public in a user-friendly format that includes search capabilities, including searching by various parameters, and the ability to download raw data. The available search parameters must include, but are not limited to:
 - a) Committee payor name.
 - b) The dates the advertisements ran.
 - c) The candidate or ballot measure at issue.
 - d) The platforms used.
 - e) Keywords.
 - f) Content.
- 10) Provides that the requirements in 5)-6) will become operative 60 days after the FPPC certifies a system for accepting and maintaining digital advertisements pursuant to 7)-8).
- 11) Provides that existing law setting forth an online platform that disseminates committees' online disclosed advertisements, set forth in item 7) of the "Existing Law" section above, will become inoperative after the requirements in 5)-6) become operative. Information obtained pursuant to the existing law must be retained by the online platform no fewer than four years or transferred to the FPPC in a form and manner prescribed by the FPPC.
- 12) States that the Legislature finds and declares that this bill furthers the purpose of the Act within the meaning of section 81012(a) of the Government Code.

13) Makes nonsubstantive technical and conforming changes.

COMMENTS

1. Author's comment

According to the author:

SB 921 creates an easily accessible online archive of every digital political ad employed by a political campaign or committee. This repository will provide voters and stakeholders more information about campaign activity, including their funding sources, and the amounts paid to the platforms or persons. Digital advertisements serve as powerful tools for campaigns, yet the inherently ephemeral nature of these ads makes locating them, correcting false statements, and holding speakers accountable a huge challenge for the media, researchers, government agencies, watchdog groups, and the public. The use of these digital ads has skyrocketed in recent years. In the 2015-2016 election cycle, digital media accounted for only 2-3 percent of political ad spending. By 2020, this figure had ballooned to 18% of total spending. Presently, the available tools for locating and reviewing digital political advertisements have been modeled after those appearing in print or on television and fail to provide sufficient levels of transparency. This outdated model of enforcement has created regulatory gaps, as new technologies are developed and deployed. SB 921 will give the public the ability to hold the creators of digital political advertisements accountable, in terms of both their assertions and their funding.

2. The federal-state framework for regulating election-related advertisements

As a general matter, the federal and state governments have overlapping authority to regulate elections. The United States Constitution (U.S. Constitution) delegates certain matters relating to elections for federal office to Congress and other matters to state legislatures.¹ The Fourteenth and Fifteenth Amendments to the U.S. Constitution also grant Congress the authority to regulate elections as necessary to ensure that persons are provided equal protection under the law and that the right to vote is not denied or abridged on account of race.² But the U.S. Constitution generally leaves the regulation of state elections, and many of the details relating to federal elections, to the states.³

¹ *E.g.*, U.S. Const., art. I, § 4 (providing that the time, places, and manner of holding Congressional elections may be decided by each state's legislature, but Congress may make overriding laws except as to the places for choosing senators), art. II, § 1, cl. 3 (each state may determine its procedure for appointing electors to vote for president), cl. 4 (Congress may determine the time for choosing electors to vote for president).

² U.S. Const., 14th & 15th amends.

³ *See, e.g.*, Congressional Research Service, *Congressional Authority to Direct How States Administer Elections* (Dec. 14, 2022), at p. 6 ("Although the Constitution is silent on various aspects of the voting process, the

The states' authority to regulate elections is also circumscribed by the other U.S. Constitutional amendments, even though they do not directly regulate elections. The most prominent limitation on the ability to regulate election-related communications and advertisements is the First Amendment to the U.S. Constitution, and specifically the protection of the right to free speech.⁴ Laws that impose limitations on political speech based on its subject or viewpoint, or the identity of the speaker, are subject to strict scrutiny review, which places the highest burden on the government seeking to justify the restriction.⁵ Government-mandated disclaimer and disclosure requirements, however, are subjected to the less-severe " 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' government interest."⁶

In 1974, the voters approved an initiative measure to add the Political Reform Act of 1974 (the Act) to the Government Code.⁷ The measure was one of the first state political reform measures passed in the aftermath of the Watergate scandal.⁸ The Act addressed a range of measures relating to the ethics and conflicts of interest of elected officials, and also added provisions relating to campaign finance and campaign expenditures.⁹ The Act has been amended many times since, including to require disclosures in campaign literature.¹⁰

The rise of the internet – as is the case in many fields – has made it more difficult to effectively regulate campaign ads and statements. "The problem of online political ads pushing disinformation is growing, according to experts, with ongoing and potential threats to campaigns from both within and without the United States."¹¹ As of 2021, two platforms – Google and Facebook – made up a majority of the online market for campaign advertisements.¹² Yet, as the author points out, the ephemeral nature of online ads makes it difficult for regulators to monitor and oversee the full extent of campaign advertisements online.

Constitution seems to anticipate that states would be primarily responsible for establishing procedures for elections").

⁴ See, e.g., *Citizens United v. Federal Election Com'n* (2010) 558 U.S. 310, 339 ("The First Amendment ' "has its fullest and most urgent application" to speech uttered during a campaign for political office' ").

⁵ *Id.* at pp. 340-341.

⁶ *Id.* at pp. 366-367.

⁷ See Gov. Code, tit. 9, §§ 81000 et seq., added by initiative measure approved by the electors June 4, 1974, eff. Jan. 7, 1975.

⁸ See California Fair Political Practices Commission, *History of the Political Reform Act*, <https://www.fppc.ca.gov/about-fppc/about-the-political-reform-act.html> (last visited Apr. 12, 2022).

⁹ *Ibid.*

¹⁰ See *Griset v. Fair Political Practices Commission* (1994) 8 Cal.4th 851, 859-860.

¹¹ Ekstrand & Fox, *Regulating the Political Wild West: State Efforts to Disclose Sources of Online Political Advertising*, 47 J. Legis. 74, 76 (2021).

¹² *Ibid.*

California is one of eight states that passed legislation following the 2016 election to more effectively regulate online political advertising.¹³ AB 2188 (Mullin, Ch. 754, Stats. 2018) added specific requirements for electronic media campaign ads and communications in the state.¹⁴ The bill added specific disclosure requirements for ads posted online and required the campaign committee behind the ad to provide specified information, including the disclosure name and identification number of the committee and the name of the candidate or ballot measure addressed in the ad.¹⁵ An online platform that accepts campaign ads must maintain, and make available for public inspection, a record of ads purchased from a committee that spent more than \$500 on the platform in the last 12 months, which must include:

- A digital copy of the ad.
- The approximate number of views generated from the ad.
- The date and time the ad was first and last displayed.
- Information regarding the rate charged or the total amount spent on the ad.
- The name of the candidate to which the ad refers and the office to which the candidate is seeking election, or the number or letter of the ballot measure and the jurisdiction to which the ad refers.
- The name and identification number of the committee that paid for the ad, if applicable.¹⁶

The platform is required to maintain the above information for no fewer than four years.¹⁷ AB 2188 was clarified the next year through AB 864 (Mullin, Ch. 558, Stats. 2019) and became operative on January 1, 2020.¹⁸

3. This bill establishes the DATA Act to create a searchable online database of campaign ads posted online

This bill builds on the Legislature's efforts to regulate and preserve campaign advertisements posted online. Titled the DATA Act, the bill requires the FPPC to create a centralized, publicly accessible online database of certain digital advertisements in elections for state office and for statewide ballot measures. The database must retain the stored ads for at least 12 years, and the database must be searchable for parameter categories including the candidate or ballot measure addressed, the committee that paid for the ad, and keywords.

After the FPPC has created the database, the obligation to provide content for it falls on the platforms that are running the advertisements. This bill uses the same definition of

¹³ *Id.* at pp. 85-92 (discussing measures enacted by Colorado, Vermont, Wyoming, California, New Jersey, New York, Washington, and Maryland).

¹⁴ *See* Gov. Code, § 84504.6.

¹⁵ *Id.*, § 84504.6(b).

¹⁶ *Id.*, § 84504.6(d)(1).

¹⁷ *Id.*, § 84504.6(d)(2).

¹⁸ AB 2188 (Mullin, Ch. 754, Stats. 2018), § 7.

an “online platform” as is currently in place for online campaign ads, but exempts two types of platforms from the DATA Act: platforms wherein the ads are sold to ads through a different online platform; and websites and applications for a newspaper, magazine, or other periodical of general circulation that routinely carries news and commentary of general interest. The bill’s obligations also kick in only when a platform has received \$50,000 or more from digital advertisement sales in a calendar month.

The platforms covered by this bill must submit to the FPPC records of their digital advertisements, in a format specified by the FPPC, when the committee that purchased the ad spent at least \$500 on advertisements on the platform in the past 12 months. The record submitted by the platform to the FPPC must contain:

- A digital copy of the advertisement.
- The approximate number of views generated from the advertisement and the date and time the advertisement was first and last displayed.
- Information regarding the range charged or the total amount spent on the advertisement.
- The name of the candidate to which the advertisement refers and the office to which the candidate is seeking election, or the number or letter of the ballot measure and the jurisdiction to which the advertisement refers.
- The name and identification number, if any, of the committee that submitted the ad.

A covered platform must submit the records specified above by the fifth day of each month following the month in which the advertisements were disseminated. The obligation to submit records to the FPPC begins 60 days after the FPPC’s platform is certified. This obligation to submit digital advertisement data to the FPPC will supplant the existing requirement that platforms maintain records of their digital ads for at least four years. The author has agreed to amend the bill to clarify that online platforms that are currently required to retain their ads and are not covered by this bill will continue to be required to retain information pursuant to the four-year retention statute.

4. Amendments

As noted above, the author has agreed to amend the bill to ensure that online platforms not covered by this bill’s requirement to submit information to the FPPC remain subject to the four-year retention statute. The author’s most recent amendments excluded certain online platforms from the bill’s ambit, so the platforms that have been exempted should continue to be required to retain their own digital advertisements to ensure that individuals can still access all ads for at least for years. The amendments also make nonsubstantive conforming changes. The amendments are as follows:

Amendment 1

On page 6, in line 30, strike out “and identification number”

Amendment 2

On page 6, in line 31, after the comma insert “and the identification number assigned to the committee by the Secretary of State pursuant to subdivision (a) of Section 84101,”

Amendment 3

On page 7, in line 8, strike out “Subdivision (d) shall become inoperative on” and insert “On”

Amendment 4

On page 7, in line 10, strike out “84553.” and insert “84553, subdivision (d) shall no longer apply to an online platform that is required to submit a record of a digital advertisement disseminated on the online platform pursuant to subdivision (a) of Section 84553.”

Amendment 5

On page 7, in line 11, strike out “becomes inoperative pursuant to” and insert “no longer applies to an online platform described in”

Amendment 6

On page 7, in line 12, strike out “an” and insert “that”

Amendment 7

On page 8, in line 23, strike out “a”

5. Arguments in support

According to the FPPC, the sponsor of the bill:

Advancing technology has brought new ways to communicate, connect, and influence, and political committees are increasingly harnessing this technology to persuade voters to support their campaigns through the use of digital campaign ads. Now that these ads can be delivered almost anywhere, it has become even more important for the public to know who and what interests are behind the campaign ads they see on their phones and other devices. This information helps voters weigh the value and veracity of the ad’s message, empowering them to make informed decisions at the ballot box. Because of the impermanent nature of these ads, it can be difficult and sometimes impossible for a voter to track down

an ad they saw previously or to find other digital ads associated with a campaign or election.

By creating a publicly accessible, centralized location for digital campaign ads, SB 921 would effectively address these transparency and accountability issues by providing the voters with a central location to view all ads associated with a campaign.

SUPPORT

FPPC (sponsor)
California Common Cause
League of Women Voters of California

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation:

SB 1360 (Umberg, 2022) changes the disclosure requirements for certain campaign advertisements based on the media in which they appear, including for video advertisements disseminated over the internet and electronic media advertisements. SB 1360 is pending before the Senate Appropriations Committee.

AB 1798 (Bryan, 2022) modifies the requirements for electronic media advertisements by allowing an advertisement to state the required disclosures in the ad rather than providing a link to the disclosures. AB 1798 is pending before the Senate Rules Committee.

Prior Legislation:

AB 2885 (Eduardo Garcia, 2020) would have required an online platform to maintain and make available for online public inspection a description of the audience requested by the committee and the types of personal information, as defined, used by the online platform to target the advertisement, including use by the online platform of characteristics such as age, gender, race, or other protected classifications under law; and would have required the online platform's chief executive officer, chief financial officer, chief operating officer, chief privacy officer, or the equivalent position of any of these officers, to personally certify, under penalty of perjury, that to their knowledge the online platform has correctly disclosed all activity under this law. AB 2885 died in the Assembly Committee on Elections and Redistricting.

AB 864 (Mullin, Ch. 558, Stats. 2019) among other things, excluded certain online communications from the Act's campaign advertisement disclosure requirements, including communications opted into by the recipient, added certain requirements for campaign text messages, and added certain definitions to the provisions imposing requirements for advertisements on online platforms.

AB 2188 (Mullin, Ch. 754, Stats. 2018) among other provisions, added the current requirements for online platforms that sell political ads to make specified information about those political ads available to the public, with an operative date of January 1, 2020.

AB 2155 (Mullin, Ch. 777, Stats. 2018) among other things, excluded certain electronic communications from the Act's definition of "advertisement" and modified the disclosure requirements for online advertisements.

AB 1458 (Friedman, 2017) would have required a candidate for elective state office to include and display conspicuously on their campaign website a link to the Secretary of State's web page that displays the candidate's campaign finance information. AB 1458 failed passage in the Assembly.

AB 14 (Gomez, 2016) among other things, would have recast and modified the Act's disclosure requirements for video and online advertisements. AB 14 died in the Assembly Committee on Elections and Redistricting.

SB 1104 (Padilla, 2014) would have required a candidate for elective state office, a slate mailer organization, or a committee that authorizes an expenditure for a campaign communication to file an electronic copy of the campaign communication with the Secretary of State, and required the Secretary of State to maintain an archive of the filed campaign communications and make the campaign communications available for public inspection on the Secretary of State's website. SB 1104 died in the Assembly Appropriations Committee.

PRIOR VOTES:

Senate Elections and Constitutional Amendments Committee (Ayes 4, Noes 0)
