

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 868 (Wilson)
Version: June 27, 2023
Hearing Date: July 11, 2023
Fiscal: Yes
Urgency: No
AM

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, in response to a report from the FPPC's Digital Transparency Task Force, establishes the Digital Advertisement Transparency and Accountability Act (DATA). The bill requires a political committee that pays for a digital advertisement to appear on an online platform, if that advertisement supports or opposes a candidate for elective state office or a state ballot measure, to provide specified information to the FPPC. The FPPC is required to create a public, searchable database for these ads and retain them for at least 12 years. The bill also requires an online platform to submit specified information to the FPPC regarding these digital advertisements, and retain that information for four years, as provided.

The bill is sponsored by the FPPC and supported by League of Women Voters of California. The bill is opposed by California Chamber of Commerce, the California Clean Money Campaign, and TechNet. It passed the Senate Elections and Constitutional Amendments Committee on a vote of 6 to 1.

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 require the FPPC 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, web application, or connected television platform.
 - c) "Online platform" means a public-facing internet website, web application, digital application, or connected television platform, including a social network, ad network, or search engine, that sells advertisements directly to advertisers. AN online platform does not include 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.
- 4) 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 local measures.
- 5) Requires a political committee that pays for a digital advertisement to appear on an online platform, if that advertisement supports or opposes a candidate for elective state office or a state ballot measure, to submit the following information to the FPPC in a format specified by the FPPC:
 - a) the name and identification number of the committee that paid for the advertisement, as specified;
 - b) one of the following, as applicable:

- i. the name of the candidate identified in the advertisement, whether the advertisement supported or opposed the candidate, and the office sought by the candidate; or
 - ii. the number or letter designation of the ballot measure, and whether the advertisement supported or opposed the measure;
 - c) the name of the online platform on which the digital advertisement was displayed;
 - d) the amount paid or agreed to be paid to the online platform for the advertisement;
 - e) the date range during which the advertisement was displayed;
 - f) a copy of the digital advertisement; and
 - g) the name, title, and contact information of the person submitting the information.
- 6) Requires a committee to submit the information submitted pursuant to 5) in accordance with the deadlines for semiannual statements and preelection statements if the committee spends \$1,000 or more during the period covered by the statement.
- 7) Requires the FPPC to make the information submitted related to digital advertisements available in a centralized and publicly accessible online format for no fewer than 12 years from the date the information was submitted.
- 8) Requires the FPPC to make the information submitted related to digital advertisements 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; and
 - f) content.
- 9) Provides that the above described reporting requirements will become operative 60 days after the FPPC certifies a system for accepting and maintaining digital advertisements.
- 10) Makes existing laws that require an online platform to make publicly available information regarding political advertisements that are disseminated through the platform inoperative on the date specified in 9), and instead requires the online platform to retain and transmit certain information to the FPPC regarding any advertisement that was disseminated on the online platform by a committee that purchased \$500 or more in advertisements on the online platform during the preceding 12 months, as specified.

11) 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.

12) Makes nonsubstantive technical and conforming changes.

COMMENTS

1. Stated need for the bill

The author writes:

AB 868 (Wilson) would create a centralized, searchable, and user-friendly public record of digital campaign advertisements that appear across multiple online platforms.

Access to copies of the campaign ads that voters see on their smartphones, computers, and other devices, and information about who paid for those ads, is crucial to empowering an informed electorate. This information enables the public to understand what interests and groups are funding these ad campaigns, weigh the value and veracity of the ads' messages, and hold speakers accountable for any false or misleading statements. Additionally, targeting and micro targeting tools create opportunities for political committees to send inconsistent or conflicting messages to appeal to different groups of people. The creation of a centralized public record would enable the public to discover these inconsistencies and hold speakers accountable.

Tools for effective transparency must keep pace with advancing technology and changing practices. Currently, voters have no ability to search for or access digital campaign ads that appear across multiple online platforms. AB 868 creates a common-sense, forward-thinking public resource that addresses this need and will create crucial improvements to campaign transparency.

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

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).

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

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

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 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>.

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).

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.

California is one of several 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

¹² *Ibid.*

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.

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 political committees. This differs from SB 921 (Newman, 2022), which was substantially similar to this bill but placed the reporting requirement on online platforms. SB 921 passed this Committee on a vote of 9 to 1, but was ultimately held in the Senate Appropriations Committee.

Under this bill, political committees that pay for a digital advertisements to appear on an online platform, if that advertisement supports or opposes a candidate for elective state office or a state ballot measure, must submit the following information to the FPPC in a format specified by the FPPC:

- the name and identification number of the committee that paid for the advertisement, as specified;
- one of the following, as applicable: the name of the candidate identified in the advertisement, whether the advertisement supported or opposed the candidate, and the office sought by the candidate; or the number or letter designation of the ballot measure, and whether the advertisement supported or opposed the measure;
- the name of the online platform on which the digital advertisement was displayed;
- the amount paid or agreed to be paid to the online platform for the advertisement;
- the date range during which the advertisement was displayed;
- a copy of the digital advertisement; and
- the name, title, and contact information of the person submitting the information.

A covered political committee is required to submit the above information in accordance with the deadlines for semiannual statements and preelection statements, if the committee spends \$1,000 or more during the period covered by the statement. The obligation to submit records to the FPPC begins 60 days after the FPPC's platform is certified.

Common Cause writes that they would support the bill if it was amended to revert the bill back to placing the reporting requirement on the online platforms instead of the political committees writing:

AB 868 currently places the obligation for submitting specified advertisement information to the FPPC in order to be included in the archive on campaign committees. While the committees are the ones who create the advertisements, this may unintentionally negatively impact smaller and less politically sophisticated or

well-funded campaigns that wish to engage with voters. AB 868 may increase their need to hire outside legal counsel to ensure compliance, or require the devotion of additional staff hours, and indirectly make their political participation harder or more confusing.

In comparison, there are relatively few large online platforms in which most digital advertisements are concentrated, and these platforms already under existing law must collect and save certain digital political advertisements, and make them available to the FPPC. Placing the burden to submit advertisement information instead on the online platforms has potential benefits, including the platforms having more potential capacity and expertise to comply, compared to temporarily existing campaigns. The fact that online platforms already must store some of this information also lends itself to placing additional obligations on the platform.

4. Arguments in support

The League of Women Voters of California writes in support stating:

The League of Women Voters supports state campaign finance practices that increase transparency in funding sources in political campaigns so that voters can be more informed when making decisions. The League also supports the effective monitoring and enforcement of campaign finance laws. The methods of financing political campaigns should protect representative democracy from being distorted by big spending in election campaigns and undue influence. Political campaigns are increasingly turning to advertising via digital media, including social media and internet websites. Current law does not address these forms of political advertising. As we have seen during recent election cycles, digital campaign ads have been used as vehicles for misinformation, disinformation, and amplifying "fake news." The nature of these ads makes it difficult for the public to correct and/or to respond to these ads or to understand who is trying to influence the public.

5. Arguments in opposition

The California Federation of Teachers writes in opposition unless amended stating:

While we strongly support increased transparency in campaign finance, establishing a new and distinct filing process for digital advertisements is a step in the wrong direction for several reasons. First, it will impose a substantial compliance burden on smaller, less sophisticated campaign committees, putting them at a high risk of inadvertent noncompliance. Second, to the extent that the Legislature wishes to create a digital advertisement archive, this requirement should be harmonized with existing electronic filing requirements and the burden of archiving these advertisements should be placed either on the state or the online platforms where the ads are displayed. Finally, the State has invested significant time and resources into

the Cal-Access Replacement System (“CARS), which is expected to be certified within the next several years. Therefore, appropriating additional funds to create a new filing system for digital advertisements in the interim is redundant, fiscally wasteful, and will increase confusion by promoting two separate campaign disclosure filing systems.[...]

AB 868 will significantly burden smaller unions that engage in state campaign activity who have less resources to devote to building familiarity with new campaign disclosure rules. AB 868 not only creates a lengthy new disclosure obligation, but also requires that this disclosure occur through a new, yet-to-be determined submission process over which the FPPC has discretion. Unlike requiring new information to be included on an existing campaign reporting form or requiring a new type of form to be filed through a familiar filing system such as Cal-Access, AB 868 will require committees to learn how to utilize a new and unknown filing process. This will require additional administrative resources and time, which will increase the likelihood of non-compliance and associated financial penalties for less sophisticated committees.

SUPPORT

California Clean Money Campaign
League of California Women Voters
Northern California Recycling Association

OPPOSITION

California Chamber of Commerce
California Federation of Teachers
TechNet

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

SB 921 (Newman, 2022) was substantially similar to this bill, *see* Comment 3. SB 921 was held in the Senate Appropriations Committee.

SB 1360 (Umberg, Ch. 887, Stats. 2022) changed 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.

AB 1798 (Bryan, Ch. 862, Stats. 2022) modified 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 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.

PRIOR VOTES

Senate Elections and Constitutional Amendments Committee (Ayes 6, Noes 1)

Assembly Floor (Ayes 58, Noes 17)

Assembly Appropriations Committee (Ayes 11, Noes 4)

Assembly Elections Committee (Ayes 6, Noes 2)
