

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

SB 746 (Skinner)
Version: March 25, 2021
Hearing Date: April 6, 2021
Fiscal: Yes
Urgency: No
CK

SUBJECT

California Consumer Privacy Act of 2018: personal information: political purpose

DIGEST

This bill requires businesses to disclose whether they use the personal information of consumers for political purposes, as defined, to consumers, upon request, and annually to the Attorney General or the California Privacy Protection Agency.

EXECUTIVE SUMMARY

The California Consumer Privacy Act of 2018 (CCPA) grants consumers certain rights with regard to their personal information, including enhanced notice, access, and disclosure; the right to deletion; the right to restrict the sale of information; and protection from discrimination for exercising these rights. (Civ. Code § 1798.100 et seq.) It places attendant obligations on businesses to respect those rights. In the November 3, 2020, election, voters approved Proposition 24, which established the California Privacy Rights Act of 2020 (CPRA). The CPRA amends the CCPA, limits further amendment, and creates the California Privacy Protection Agency (PPA).

In recent years, worries about the influence social media and other online platforms has had on the democratic process have escalated, from the Cambridge Analytica scandal, to viral “fake news,” to allegations of tilted search results on ballot measures. This bill addresses one facet of the issue, the situation where a business uses personal information it has collected in order to influence, or attempt to influence, the action of consumers for or against certain political candidates or ballot measures. This bill grants consumers the right to request these businesses disclose such activity in detail. Businesses will also be required to disclose this information, annually, to the Attorney General or the PPA, as provided. Leaders of these businesses are required to certify, under penalty of perjury, whether and how they engage in such political purposes, as specified. This bill is author sponsored. It is supported by Californians for Consumer

Privacy, Consumer Watchdog, and Common Sense. It is opposed by the California Chamber of Commerce, TechNet, and the Internet Association.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the CCPA, which grants consumers certain rights with regard to their personal information, including enhanced notice, access, and disclosure; the right to deletion; the right to restrict the sale of information; and protection from discrimination for exercising these rights. It places attendant obligations on businesses to respect those rights. (Civ. Code § 1798.100 et seq.)
- 2) Grants a consumer the right to request that a business that collects personal information about the consumer disclose to the consumer the following:
 - a) the categories of personal information it has collected about that consumer;
 - b) the categories of sources from which the personal information is collected;
 - c) the business or commercial purpose for collecting or selling personal information;
 - d) the categories of third parties with whom the business shares personal information; and
 - e) the specific pieces of personal information it has collected about that consumer. (Civ. Code § 1798.110.)
- 3) Provides consumers the right to request that a business that sells the consumer's personal information, or that discloses it for a business purpose, disclose to the consumer the following:
 - a) the categories of personal information that the business collected about the consumer;
 - b) the categories of personal information that the business sold about the consumer and the categories of third parties to whom the personal information was sold, by category or categories of personal information for each third party to whom the personal information was sold; and
 - c) the categories of personal information that the business disclosed about the consumer for a business purpose. (Civ. Code § 1798.115.)
- 4) Provides a consumer the right, at any time, to direct a business that sells personal information about the consumer to third parties not to sell the consumer's personal information. It requires such a business to provide notice to consumers, as specified, that this information may be sold and that consumers have the right to opt out of the sale of their personal information. (Civ. Code § 1798.120.)

- 5) Prohibits a business from discriminating against a consumer because the consumer exercised any of the consumer's rights under the CCPA. (Civ. Code § 1798.125(a)(1).)
- 6) Defines "personal information" as information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household. The CCPA provides a nonexclusive series of categories of information deemed to be personal information, including identifiers, biometric information, and geolocation data. (Civ. Code § 1798.140(o)(1).)
- 7) Establishes the CPRA, which amends the CCPA and creates the PPA, which is charged with implementing these privacy laws, promulgating regulations, and carrying out enforcement actions. (Civ. Code § 798.100 et seq.; Proposition 24 (2020).)
- 8) Permits amendment of the CPRA by a majority vote of each house of the Legislature and the signature of the Governor provided such amendments are consistent with and further the purpose and intent of this act as set forth therein. (Proposition 24 § 25 (2020).)

This bill:

- 1) Grants consumers the right to request that a business that collects personal information about the consumer disclose to the consumer whether or not the business uses that personal information for a political purpose. Upon receiving such a request, the business, if applicable, must disclose the following information:
 - a) the name of any candidate or committee for which the consumer's personal information was used for a political purpose;
 - b) the title of any ballot measure for which the consumer's personal information was used for a political purpose; and
 - c) if the consumer's personal information was used to support or oppose the candidate, committee, or measure.
- 2) Amends relevant portions of the CCPA and CPRA to facilitate such requests for information.
- 3) Defines "political purpose" to mean activity undertaken by a business with the actual knowledge, or at the direction, of one or more of the officers of the business for the purpose of influencing, or attempting to influence, the action of the voters for or against the nomination or election of a candidate or the qualification or passage of a ballot measure. Commercial transactions on behalf

of another person, including political advertisements, are explicitly excluded from this definition.

- 4) Requires a business that engages in such activities to annually disclose to the Attorney General or the PPA, as provided, all of the following:
 - a) the name of any candidate or committee for which personal information was used for a political purpose;
 - b) the title of any ballot measure for which personal information was used for a political purpose; and
 - c) if personal information was used to support or oppose the candidate, committee, or measure.
- 5) Requires businesses to submit to the Attorney General or the PPA, as provided, a statement certified, under penalty of perjury, by the CEO, or the equivalent person, of the business that the business has correctly disclosed all such political activity. For businesses that do not engage in such activity, and that have gross revenue exceeding \$100,000,000 in the preceding calendar year, the bill requires them to annually submit a statement certified, under penalty of perjury, by the CEO, or equivalent person, of the business, that the business does not engage in those activities.
- 6) States the Legislature finds and declares that the bill furthers the purposes and intent of the CPRA.

COMMENTS

1. Stated intent 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 new gap in political reporting requirements and restores public trust in online content by allowing voters to know if they are being manipulated in partisan ways. Specifically, SB 746 promotes Internet transparency by requiring online platforms that use personal information to directly target voters on behalf of a candidate or ballot measure to disclose that activity to voters if they request it. Taking this step is critical to ensuring that evolving technological capabilities do not interfere with our Constitutional right to free and fair elections.

2. Bringing more transparency to elections

In addition to relevant federal laws, California regulates monetary and in-kind contributions to political campaigns and requires a degree of transparency, pursuant to the Political Reform Act. (Gov. Code § 81000 et seq.) Recently, AB 249 (Mullin, Ch. 546, Stats. 2017) reformed the Political Reform Act and enacted the California Disclose Act. AB 249 overhauled California's campaign finance disclosure laws. It required disclosures regarding top contributors and required disclosure statements in connection with political advertisements in various media. The California Disclose Act also refined what expenditures for "political purposes" meant. It provides that a payment is made for a political purpose when it is made by certain entities, including candidates or committees, or when it is made "[f]or purposes of 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." (Gov. Code § 82025.)

The stated purpose of the California Disclose Act is twofold:

- "For voters to make an informed choice in the political marketplace, political advertisements should not intentionally deceive voters about the identity of who or what interest is trying to persuade them how to vote."
- "Disclosing who or what interest paid for a political advertisement will help voters be able to better evaluate the arguments to which they are being subjected during political campaigns and therefore make more informed voting decisions."

Given the rapid changes to the "political marketplace," this bill helps build upon these protections and further these same purposes by empowering consumers with the right to request that businesses that collect personal information disclose whether they use that information for political purposes. The term's definition is nearly identical to that used in the California Disclose Act:

"Political purpose" means activity undertaken by a business with the actual knowledge, or at the direction, of one or more of the officers of the business for the purpose of influencing, or attempting to influence, the action of the voters for or against either of the following:

- (i) The nomination or election of a candidate.

(ii) The qualification or passage of a ballot measure.

Businesses that use the personal information collected for political purposes are required to identify, upon request, the name of the candidate or committee for which the information was used, the title of any relevant ballot measures, and whether the information was used to support or oppose. For greater transparency, such businesses are also required to disclose this information annually to the Attorney General and, once formed and up and running, the PPA. The CEO or equivalent at these businesses must also certify, under penalty of perjury, that all such activity has been properly disclosed. The bill further requires extremely large companies, those with gross revenue in excess of \$100 million in the preceding year, that do not use personal information for political purposes to submit a statement certified, under penalty of perjury, by their CEO, or the equivalent, that they do not engage in such activities.

The bill is prompted by concerns that larger technology companies have the means to influence elections without much regulatory oversight and without our knowledge. The author points to reports that Google was providing skewed search results in connection with a proposition they did not support. As reported by Politico:

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 ..." ¹

In addition, it has been previously reported that Facebook was "quietly conducting experiments on how the company's actions can affect the voting behavior of its users." ²

¹ Katy Murphy, *Google algorithms blamed for giving California voters a biased look at ballot initiatives* (October 29, 2020) Politico, <https://www.politico.com/states/california/story/2020/10/29/google-algorithms-blamed-for-giving-california-voters-a-biased-look-at-ballot-initiatives-1332651> [as of Mar. 25, 2021].

² Micah L. Sifry, *Facebook Wants You to Vote on Tuesday. Here's How It*

Concerns have been raised about the lack of transparency with the relevant Facebook tool, “raising questions about its use and Facebook’s ability to influence elections.”

Californians for Consumer Privacy, the group behind Proposition 24, writes in support of the bill and explains the need for it:

[I]f a large social media company had a preferred candidate in an election, it could alter its algorithm to target specific voters with news reports and other types of information that favor the company’s preferred candidate – or portray the opposing candidate in a negative light.

Under current California law, such an action by a social media company would not have to be disclosed to the public, even though the action was designed to influence the outcome of the election, as long as the social media company was not coordinating directly with a campaign, and did not specifically encourage a consumer to vote for or against a specific candidate.

The author elaborates on this point:

Tech businesses regularly track all of our Internet activity, from our social media use to what we shop for online. The companies then use our Internet histories to create algorithms that target us with specific online content – from news reports that align with our political beliefs to products that fit our shopping habits.

This type of consumer targeting has also had a corrosive impact on our politics. Algorithms based on our personal histories routinely feed us information that reinforces our pre-existing political beliefs and block information that does not. It’s no wonder that we have become a polarized nation that cannot agree on what is true and what is false.

The bill’s provisions enable consumers to reveal hidden political influence and empowers them to make more informed political decisions. The United States Supreme Court has highlighted such principles in upholding similar disclosure laws, indicating that “providing the electorate with information” and “detering actual corruption and avoiding any appearance thereof” are important state interests that support disclosure requirements. (*McConnell v. FEC* (2003) 540 U.S. 93, 196.)

In ruling on the campaign disclosure laws before it in *McConnell v. FEC* (2003) 540 U.S. 93, 201, the United States Supreme Court specifically asserted that the “disclosure requirements are constitutional because they d[o] not prevent anyone from speaking” and upheld disclosure requirements regarding a broader set of “electioneering communications.” (internal quotation marks omitted.) This bill does not prevent businesses from using personal information for political purposes, and does not even apply to situations where a business uses the information to carry out a commercial transaction on behalf of another, such as political advertisements. The bill simply lifts the veil and provides greater transparency so that the state’s greater political marketplace provides access to better information.

3. Furthering the purpose and intent of the CPRA

Section 25 of the CPRA, passed by voters in November 2020, requires any amendments thereto to be “consistent with and further the purpose and intent of this act as set forth in Section 3.” Section 3 declares that “it is the purpose and intent of the people of the State of California to further protect consumers’ rights, including the constitutional right of privacy.” It then lays out a series of guiding principles. These include various consumer rights such as:

- consumers should know who is collecting their personal information;
- consumers should have control over how their personal information is used; and
- consumers should benefit from businesses’ use of their personal information

Section 3 also includes a series of responsibilities that businesses should have. These include:

- businesses should specifically and clearly inform consumers about how they use personal information; and
- businesses should only collect consumers’ personal information for specific, explicit, and legitimate disclosed purposes.

Section 3 also lays out various guiding principles about how the law should be implemented.

The CCPA already requires businesses to disclose when they collect personal information and to disclose the uses to which the information is put. (Civ. Code §§ 1798.100, 1798.110.) This bill builds upon these rights and provides consumers greater access, knowledge, and control over how their personal information is being used. It gives them the right to specific disclosures about how businesses are using the consumer’s own personal information to affect their political decisions. It also establishes more systemic transparency by requiring businesses to disclose whether they engage in such political conduct to the regulatory body overseeing them. Therefore, as it explicitly states, this bill “furthers the purposes and intent of The California Privacy Rights Act of 2020.”

4. Support for the bill

Writing in support, Common Sense argues:

While the Constitution guarantees a business the right to influence an election, the United States Supreme Court has also held that there is ample reason to require public disclosure of such influence. California has extensive reporting requirements for both monetary and nonmonetary contributions to political campaigns, many of which were adopted through Political Reform Act and subsequent regulations adopted by the Fair Political Practices Commission. While this has historically covered the manner with which a business can influence an election, recent technological advancements have made it possible for online platforms to influence voter behavior in specialized ways that are not currently required to be publicly disclosed.

...

SB 746 restores public trust in online content by allowing voters to know if they are being manipulated in partisan ways. California must ensure that evolving technological capabilities do not interfere with our Constitutional right to free and fair elections.

Consumer Watchdog writes in support: "SB 746 allows voters to know if they are being manipulated in partisan ways. California must ensure that evolving technological capabilities do not outpace the ability to protect our fundamental rights to life, liberty, and fair and free elections."

A coalition in opposition, led by the California Chamber of Commerce, argues that the bill is premature, overbroad, and creates an unnecessary criminal penalty. These groups write:

SB 746 requires businesses to disclose to consumers whether or not the businesses uses personal information for a political purpose, and if so, to disclose various details about the use of information. However, the term "political purpose" as used in the bill is vague and overbroad because it captures wholly non-partisan situations and fails to deploy a clear, specific intent standard. By repurposing a concept from election law without sufficient consideration for this new context, SB 746 deploys an ambiguous consent standard lacking limitations.

SUPPORT

Californians for Consumer Privacy
Common Sense
Consumer Watchdog

OPPOSITION

California Chamber of Commerce
Internet Association
TechNet

RELATED LEGISLATION

Pending Legislation:

AB 335 (Boerner Horvath, 2021) exempts from the CCPA certain vessel information retained or shared between a vessel dealer and the vessel's manufacturer. This bill is currently in the Assembly Privacy and Consumer Protection Committee.

AB 1490 (Chau, 2021) requires members of the PPA to have qualification, experience, and skills in consumer rights. This bill is currently in the Assembly Privacy and Consumer Protection Committee.

Prior Legislation:

AB 249 (Mullin, Ch. 546, Stats. 2017) *See* Comment #2.

AB 375 (Chau, Ch. 55, Stats. 2018) established the CCPA.
