

Department of Legislative Services
Maryland General Assembly
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FISCAL AND POLICY NOTE
Enrolled - Revised

Senate Bill 875

(Senator Zucker)

Education, Health, and Environmental Affairs

Ways and Means

Online Electioneering Transparency and Accountability Act

This bill establishes requirements applicable to qualifying paid digital communications and establishes the State Administrator of Elections' and State Board of Elections' (SBE) authority to enforce the requirements. The bill also prohibits purchases of campaign material or an electioneering communication with currency other than U.S. currency. Finally, the bill modifies requirements applicable to independent expenditures, disbursements for electioneering communications, and campaign material authority lines. **The bill takes effect July 1, 2018.**

Fiscal Summary

State Effect: General fund expenditures may increase in certain fiscal years to hire an investigator, depending on the number of investigations that need to be undertaken. The cost of a contractual investigator is approximately \$50,000 on an annual basis. Revenues are not expected to be materially affected.

Local Effect: None.

Small Business Effect: Minimal.

Analysis

Bill Summary:

Requirements Applicable to Qualifying Paid Digital Communications

A person who directly or indirectly requests placement of a qualifying paid digital communication (defined below) on an online platform (defined below) must expressly

notify the online platform at the time the request for placement is made that the communication is a qualifying paid digital communication. The notice must be provided using the method prescribed by the online platform and the notice may not be provided through the inclusion of the required authority line on the qualifying paid digital communication.

An online platform must maintain specified records for each qualifying paid digital communication a purchaser requests to disseminate through the online platform and for which the purchaser has provided notice of it being a qualifying paid digital communication. Certain records must be made available to the public (regarding those responsible for the qualifying paid digital communication and the amount paid for its placement) on the Internet, in a clearly identifiable location on the online platform's website and searchable by purchaser, within 48 hours of the purchase of a qualifying paid digital communication. Other records must be made available to SBE on request (regarding the content of the qualifying paid digital communication, the timing of the dissemination, the geographic and audience focus of the dissemination, and the exposure generated by the dissemination), within 48 hours after a qualifying paid digital communication is first disseminated.

An online platform may apply to SBE for a temporary waiver ("compliance waiver") from the requirements that the records which must be made available to the public be available on the Internet (1) in a clearly identifiable location on the online platform's website and (2) within 48 hours of the purchase of a qualifying paid digital communication. Under a compliance waiver, the records instead may simply be made available for public inspection on the Internet within up to 7 days after the purchase. SBE must require an applicant for a compliance waiver to (1) describe why complying with the requirements presents an unreasonable burden on the applicant and (2) present measures the applicant will take to meet the requirements within six months after the date the compliance waiver is granted. SBE may not grant more than one compliance waiver to an online platform and a compliance waiver is not effective during the 30 days immediately preceding an election. An online platform must apply for a compliance waiver before receiving payment for a qualifying paid digital communication.

The records maintained by an online platform pursuant to the bill must remain available for at least one year after the general election following the dissemination of a qualifying paid digital communication.

A purchaser of a qualifying paid digital communication must provide the online platform with the information necessary in order for the online platform to maintain the required records, and an online platform may rely in good faith on the information provided by a purchaser. The records made available to and obtained by SBE are not subject to inspection under the Public Information Act.

If an online platform does not provide a method for a requester of a qualifying paid digital communication to give notice that the communication is a qualifying paid digital communication, the requester must notify SBE that the online platform has not provided a method for notification, and the requester must provide to SBE the records regarding those responsible for the qualifying paid digital communication and the amount paid for its placement.

An online platform must make reasonable efforts to (1) allow SBE to take specified actions, generally relating to implementation and enforcement of the requirements applicable to qualifying paid digital communications, and (2) in accordance with specified federal law, comply with any subpoena issued in connection with an investigation concerning the compliance of a purchaser of a qualifying paid digital communication with the bill's requirements or campaign material authority line requirements.

“Online platform” is defined as any public-facing website, web application, or digital application, including a social network, ad network, or search engine, that (1) has 100,000 or more unique monthly U.S. visitors or users for a majority of months during the immediately preceding 12 months and (2) receives payment for qualifying paid digital communications.

“Qualifying paid digital communication” is defined as any electronic communication that (1) is campaign material; (2) is placed or promoted for a fee on an online platform; (3) is disseminated to 500 or more individuals; and (4) does not propose a commercial transaction.

Enforcement of the Requirements

The State Administrator of Elections is authorized to (1) investigate a potential violation – by a purchaser of a qualifying paid digital communication – of qualifying paid digital communication requirements or campaign material authority line requirements and (2) issue a subpoena in furtherance of an investigation. The State administrator may also petition a circuit court to compel compliance with a subpoena. At the conclusion of an investigation, SBE may request that the Attorney General institute an action in a circuit court for injunctive relief to (1) require a purchaser of a qualifying paid digital communication to comply with qualifying paid digital communication requirements or campaign material authority line requirements or (2) require an online platform to remove a qualifying paid digital communication that does not comply with the campaign material authority line requirements or if the purchaser does not comply with the qualifying paid digital communication requirements.

Before requesting that the Attorney General seek an injunction, SBE must notify the purchaser of the circumstances that gave rise to the investigation and provide the purchaser

reasonable opportunity to be heard at a SBE public meeting. A circuit court may only grant injunctive relief if the Attorney General shows by clear and convincing evidence that a violation is being committed. A person who violates an injunction is (1) in criminal contempt and (2) guilty of a misdemeanor and subject to a fine of up to \$250 and/or imprisonment for up to 30 days.

Prohibition on Purchases with Non-U.S. Currency

The bill prohibits a person from purchasing campaign material or an electioneering communication using any currency other than U.S. currency. In addition, a person may not willfully and knowingly sell campaign material or an electioneering communication to a person who uses any currency other than U.S. currency to pay for the campaign material or electioneering communication. “Campaign material” is specifically defined in the bill to include a qualifying paid digital communication.

Reporting/Recordkeeping Relating to Expenditures and Campaign Material

The bill makes qualifying paid digital communications subject to existing independent expenditure and electioneering communication reporting requirements, requiring reporting (by those responsible for the expenditures or disbursements) of specified independent expenditures for qualifying paid digital communications and disbursements for electioneering communications through qualifying paid digital communications. The bill also modifies a provision that specifies that an “electioneering communication” does not include news stories, commentaries, or editorials disseminated from certain sources that are not controlled by a candidate or political party, to specify that “electioneering communication” also does not include news stories, commentaries, or editorials disseminated by a website, newspaper, magazine, or other periodical publication, including any Internet or electronic publication, that is not controlled by a candidate or political party.

The bill requires all persons filing independent expenditure reports and electioneering communication reports to, similar to a campaign finance entity, keep a sample copy of an item of campaign material that the person is responsible for, publisher of, and distributor of for at least one year after the general election following the date when the item was published or distributed.

Campaign Material Authority Line Requirement

The bill modifies a provision that allows, in cases where campaign material is too small to include all authority line information required in statute in a legible manner, for the authority line to only contain the name and title of the treasurer or other person responsible for it. The bill modifies the provision to instead specify that the authority line need only contain the information required by regulations adopted by SBE.

Current Law:

Campaign Material

Campaign material must have an “authority line” identifying those responsible for the production and distribution of the campaign material, whether a campaign finance entity or any other person. Each campaign finance entity responsible for, publisher of, and distributor of, an item of campaign material must keep a sample copy of the item for at least one year after the general election following the date when the item was published or distributed.

“Campaign material” is defined as any material that (1) contains text, graphics, or other images; (2) relates to a candidate, a prospective candidate, or the approval or rejection of a question or prospective question; and (3) is published or distributed. “Campaign material” includes (1) material transmitted by or appearing on the Internet or other electronic medium and (2) an oral commercial campaign advertisement.

Independent Expenditure and Electioneering Communication Reporting

Independent expenditures in general – political spending by individuals or organizations without coordination with a candidate – cannot be limited or prohibited, pursuant to the 2010 Supreme Court decision *Citizens United v. FEC*. Requirements for disclosure of independent expenditures, however, have been upheld by courts. Under Maryland’s disclosure requirements, independent expenditures are expenditures for public communications that are not made in coordination with a candidate or campaign finance entity and that expressly advocate the success or defeat of a clearly identified candidate or ballot question. Electioneering communications, on the other hand, do not expressly advocate the success or defeat of a candidate or ballot question, but refer to a clearly identified candidate or ballot question, are made within 60 days of an election, are capable of being received by a certain amount of individuals (with the amount depending on the type of communication) in the constituency where the candidate or ballot question is on the ballot, and are not made in coordination with a candidate or campaign finance entity.

Within 48 hours after a person makes aggregate independent expenditures or disbursements for electioneering communications of \$5,000 or more in an election cycle, the person must file a registration form with SBE. Within 48 hours after a day on which a person makes aggregate independent expenditures or disbursements for electioneering communications of \$10,000 or more in an election cycle, the person must file a report with SBE providing information on the person, the expenditures or disbursements, and persons who made cumulative donations of \$6,000 or more to the person during the period covered by the report. Further, a person who files an independent expenditure or electioneering communication report must file an additional report within 48 hours after a day on which

the person makes aggregate independent expenditures or disbursements for electioneering communications of \$10,000 or more following the closing date of the person's previous report.

Contributions by Foreign Nationals/Foreign Principals

Federal law prohibits a foreign national from making, directly or indirectly, a contribution or donation of money or other thing of value, or making an express or implied promise to make a contribution or donation, in connection with a federal, State, or local election. A foreign national also may not make, directly or indirectly, a contribution or donation to a committee of a political party or an expenditure, independent expenditure, or disbursement for an electioneering communication.

Chapter 282 of 2017 established a prohibition, under State law, against a foreign principal (defined under federal law) making a contribution to a ballot issue committee or making a donation to a person that makes independent expenditures or electioneering communications relating to a ballot issue.

“Foreign national” is defined under federal campaign finance law in a similar manner as the federal law definition of “foreign principal.” However the definitions are somewhat different with respect to individuals that are included in the definition. “Foreign national” does not include any individual who is a U.S. citizen. It includes an individual who is not a citizen or national of the United States and is not lawfully admitted for permanent residence. “Foreign principal” includes an individual outside of the United States, unless the individual is a citizen of and domiciled within the United States. Both the “foreign national” and “foreign principal” definitions include foreign governments, businesses, and other entities.

State Expenditures: General fund expenditures may increase for SBE to hire an investigator, potentially only on a contractual basis during election seasons and/or part-time, to the extent that investigations of potential violations by purchasers of qualifying paid digital communications undertaken by the State Administrator of Elections cannot be handled with existing SBE resources. The cost of an additional contractual investigator working full-time is approximately \$50,000 annually.

Additional Information

Prior Introductions: None.

Cross File: HB 981 (Delegate A. Washington, *et al.*) - Ways and Means.

Information Source(s): State Board of Elections; State Prosecutor's Office; Department of Legislative Services

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Analysis by: Scott D. Kennedy

Direct Inquiries to:
(410) 946-5510
(301) 970-5510