

Department of Legislative Services  
Maryland General Assembly  
2020 Session

FISCAL AND POLICY NOTE  
First Reader

House Bill 198  
Ways and Means

(Delegate Cain, *et al.*)

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**Election Law - Online Campaign Material - Use of Deepfakes**

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This bill establishes a prohibition against specified use of online campaign material that is a “deepfake.” The bill authorizes (1) the State Administrator of Elections to investigate potential violations of the prohibition and (2) a circuit court to grant injunctive relief requiring a person to comply with the prohibition or requiring an online platform to remove a deepfake that does not comply with the prohibition. The bill also establishes criminal penalties for a violation of the prohibition. **The bill takes effect January 1, 2021.**

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**Fiscal Summary**

**State Effect:** General fund expenditures increase by \$7,000 annually, beginning in FY 2021, and potentially by additional amounts in future years, as discussed below. Special fund revenues may increase as a result of any monetary penalties imposed under the bill.

**Local Effect:** None.

**Small Business Effect:** None.

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**Analysis**

**Bill Summary:**

*“Deepfake” Prohibition*

The bill prohibits specified individuals or entities from willfully or knowingly influencing or attempting to influence a voter’s decision to go to the polls or to cast a vote for a

particular candidate by publishing, distributing, or disseminating a “deepfake” online within 90 days before an election.

“Deepfake” is defined as an audio recording, a video recording, or a photograph that (1) is campaign material; (2) is enhanced or otherwise altered by computer-generated software; and (3) depicts an action, a sound, or a vocalization that did not occur as enhanced or otherwise altered.

“Online” is defined as appearing on any public-facing Internet website, web application, or digital application, including a social network or publication.

The prohibition applies to (1) any candidate; (2) any campaign finance entity; (3) any person required to register with the State Board of Elections (SBE) as a result of making independent expenditures or disbursements for electioneering communications; (4) any participating organization required to register with SBE as a result of making political disbursements; or (5) an agent of any of the preceding individuals or entities.

The prohibition, however, does not apply to an individual or entity listed above if the individual or entity discloses, in a clear and conspicuous manner at the beginning of the audio recording or video recording or on the photograph (1) that the substance of the audio recording, video recording, or photograph has been enhanced or otherwise altered and (2) authority line information applicable to campaign material.

The bill does not require service providers of online platforms, including web hosting and Internet service providers, to ensure that persons publishing, distributing, or disseminating campaign material comply with campaign material authority line and copy retention requirements.

### *Injunctive Relief*

The bill authorizes the State Administrator of Elections to investigate a potential violation of the bill’s deepfake prohibition by a person that publishes, distributes, or disseminates a deepfake. In furtherance of an investigation, the State Administrator may issue a subpoena for the attendance of a witness to testify or the production of records, and a circuit court may 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 person that publishes, distributes, or disseminates a deepfake to comply with the deepfake prohibition or (2) require an online platform to remove a deepfake that does not comply with the deepfake prohibition. Before requesting that the Attorney General seek an injunction, SBE must

notify a person that publishes, distributes, or disseminates a deepfake and that is the subject of an investigation of the circumstances that gave rise to the investigation.

A circuit court may grant injunctive relief only if the Attorney General shows by a preponderance of the evidence that a violation of the deepfake prohibition is being committed.

### *Criminal Penalties*

A person who violates the deepfake prohibition is guilty of a misdemeanor and subject to a fine of up to \$5,000 and/or imprisonment for up to one year.

### **Current Law/Background:**

#### *Individuals or Entities Required to Register with the State Board of Elections*

Persons who make independent expenditures or disbursements for electioneering communications of \$5,000 or more in a four-year election cycle must file a registration form with SBE within 48 hours and are subject to reporting requirements after spending \$10,000 or more. Independent expenditures and disbursements for electioneering communications are political spending by individuals or entities without coordination with a candidate.

Participating organizations that make aggregate political disbursements of more than \$6,000 in a four-year election cycle must file a registration form with SBE within 48 hours, and are subject to reporting/disclosure requirements after spending \$10,000 or more. A “participating organization” is an entity that is organized under §501(c)(4) or (6) or §527 of the Internal Revenue Code and makes political disbursements (contributions to a campaign finance entity, disbursements to persons making independent expenditures or disbursements for electioneering communications in the State, or disbursements to out-of-state political committees that make a disbursement in the State).

#### *Requirements Specific to Political Communications on Online Platforms*

Certain requirements applicable to political communications on online platforms were established in State law in 2018. Under Chapters 833 and 834 of 2018, a person who directly or indirectly requests placement of a “qualifying paid digital communication” on an online platform must expressly notify the online platform at the time the request for placement is made that the communication is a qualifying paid digital communication.

“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.

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.

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.

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.

Similar to the injunctive relief provisions under this bill, the State Administrator may investigate a potential violation of requirements applicable to a purchaser of a qualifying paid digital communication (including campaign material authority line requirements), and in furtherance of an investigation, the State Administrator may issue a subpoena and a circuit court may 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 applicable requirements or (2) require an online platform to remove a qualifying paid digital communication if the qualifying paid digital communication or the purchaser does not comply with applicable requirements. Before requesting that the Attorney General seek an injunction, SBE must notify a purchaser of a

qualifying paid digital communication who is the subject of an investigation of the circumstances that gave rise to the investigation.

A circuit court may grant injunctive relief only if the Attorney General shows by clear and convincing evidence that a violation of applicable requirements is being committed.

#### *Enforcement of Chapters 833 and 834 Against Certain Entities Enjoined*

The U.S. District Court for the District of Maryland, in a lawsuit brought by various media outlets (*The Washington Post, et al., v. David J. McManus, Jr., et al.*), has granted a preliminary injunction preventing the State from enforcing – against the plaintiff media outlets – the requirements under Chapters 833 and 834 that are applicable to online platforms. The 4th Circuit U.S. Court of Appeals recently upheld, in December 2019, the District Court’s decision to grant the preliminary injunction. The District Court and Court of Appeals both held that the requirements applicable to online platforms were likely unconstitutional, due to violating First Amendment rights of free speech and a free press, as applied to the plaintiffs in the case.

#### *Campaign Material Requirements*

“Campaign material” means 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, distributed, or disseminated. “Campaign material” includes (1) a qualifying paid digital communication; (2) any other material transmitted by or appearing on the Internet or other electronic medium; and (3) an oral commercial campaign advertisement.

Each item of campaign material generally must contain an authority line that states (1) as to campaign material published, distributed, or disseminated by a campaign finance entity, the name and address of the treasurer of each campaign finance entity responsible for the campaign material and the name of each campaign finance entity for which each treasurer is acting and (2) as to campaign material published, distributed, or disseminated by any other person, the name and address of the person responsible for the campaign material. The authority line may omit an address that is on file with SBE or a local board.

Campaign material that is published or distributed in support of or in opposition to a candidate, but is not authorized by the candidate, must include the statement “This message has been authorized and paid for by (name of payor or any organization affiliated with the payor), (name and title of treasurer or president). This message has not been authorized or approved by any candidate.”

With the exception of billboards and signs, each campaign finance entity and each independent expenditure or electioneering communication registrant 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 next following the date the item was published or distributed.

SBE is required to adopt (and has adopted) regulations governing the application of statutory campaign material requirements to campaign material transmitted through electronic media.

**State Fiscal Effect:** General fund expenditures increase by \$7,000 annually, beginning in fiscal 2021, reflecting the cost for the Office of the State Prosecutor to purchase a license for advanced software and for ongoing training on computer forensics for the office's election law investigator. In pursuing civil or criminal enforcement actions for violations of the deepfake prohibition, the office will need to establish that an audio or video recording or a photograph is a deepfake and to establish its source.

General fund expenditures may also increase, beginning in fiscal 2022, for SBE to hire an investigator, to pursue potential violations under the investigative authority the bill provides to the State Administrator. An investigator may potentially be needed only on a contractual basis during election seasons and/or part-time, to the extent that investigations of potential violations of the deepfake prohibition cannot be handled with existing SBE resources. The cost of an additional contractual investigator working full-time is approximately \$50,000 annually.

Special fund (Fair Campaign Financing Fund) revenues may increase from any monetary penalties imposed for violations of the deepfake prohibition. The magnitude of any increase cannot be reliably estimated.

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### **Additional Information**

**Prior Introductions:** None.

**Designated Cross File:** None.

**Information Source(s):** State Board of Elections; Office of the State Prosecutor; Judiciary (Administrative Office of the Courts); Department of Legislative Services

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