Date of Hearing: April 27, 2022

ASSEMBLY COMMITTEE ON ELECTIONS
Isaac G. Bryan, Chair
AB 1783 (Levine) – As Amended April 19, 2022

SUBJECT: Lobbying: administrative actions.

SUMMARY: Provides that efforts to influence mergers and acquisitions of domestic insurance companies and health care service plans, as specified, are considered lobbying for the purposes of the Political Reform Act (PRA). Specifically, **this bill** expands the definition of an "administrative action," for the purposes of the PRA, to include a decision or approval pursuant to specified provisions of state law that govern the review and approval of either of the following:

1) Proposed mergers, consolidations, and acquisitions of health care service plans that are subject to the approval of the Director of the Department of Managed Health Care (DMHC), as specified.

2) Purchases, exchanges, mergers, and acquisitions of domestic insurers that are subject to the approval of the Insurance Commissioner, as specified.

EXISTING LAW:

1) Creates the Fair Political Practices Commission (FPPC), and makes it responsible for the impartial, effective administration and implementation of the PRA.

2) Defines a "lobbyist," for the purposes of the PRA, as an individual who receives $2,000 or more in a calendar month or whose principal duties as an employee are to communicate directly or through the individual's agents with an elective state official, agency official, or legislative official for the purpose of influencing legislative or administrative action, as specified.

3) Defines "administrative action," for the purposes of the PRA, as either of the following:

    a) The proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, regulation, or other action in any ratemaking proceeding or a quasi-legislative proceeding, as specified; or,

    b) With regard only to placement agents, as defined, the decision by any state agency to enter into a contract to invest state public retirement system assets on behalf of a state public retirement system.

4) Provides, pursuant to a regulation adopted by the FPPC, that a proceeding of a state agency is not a quasi-legislative proceeding for the purposes of the definition of the term "administrative action" if it is any of the following:

    a) A proceeding to determine the rights or duties of a person under existing laws, regulations, or policies.

b) A proceeding involving the issuance, amendment, or revocation of a permit or license.

c) A proceeding to enforce compliance with existing law or to impose sanctions for violations of existing law.

d) A proceeding at which an action is taken involving the purchase or sale of property, goods, or services by such agency.

e) A proceeding at which an action is taken which is ministerial in nature.

f) A proceeding at which an action is taken awarding a grant or contract.

g) A proceeding involving the issuance of a legal opinion.

5) Requires an individual who is considered a lobbyist, as defined, to register as a lobbyist with the Secretary of State (SOS) and to comply with various ethics and reporting rules. Requires lobbying firms and lobbyist employers to register with the SOS and to file periodic disclosure reports that contain information about the firms' and employers' lobbying interests and agencies lobbied.

6) Prohibits lobbyists from receiving any payment that is in any way contingent upon defeat, enactment, or outcome of any proposed legislative or administrative action.

7) Prohibits a lobbyist from making a contribution to an elected state officer or candidate for elected state office if the lobbyist is registered to lobby the governmental agency for which the candidate is seeking election or the governmental agency of the elected state officer.

8) Requires a health care service plan that intends to merge or consolidate with, or enter into an agreement resulting in its purchase, acquisition, or control by, any entity, including another health care service plan or a health insurer licensed under the Insurance Code, to give notice to, and secure prior approval from, the Director of DMHC, as specified.

9) Prohibits purchases, exchanges, mergers, or other acquisitions of control of domestic insurance companies from being made until the Insurance Commissioner approves those actions, as specified.

10) Prohibits, while an administrative adjudication proceeding is pending before a state agency, any communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.

11) Permits the PRA to be amended to further its purposes by a statute that is approved by a two-thirds vote of each house of the Legislature and signed by the Governor if specified conditions are met. Permits the PRA to be amended—including in a manner that does not further its purposes—by a statute that becomes effective only when approved by the electors.

FISCAL EFFECT: Unknown. State-mandated local program; contains a crimes and infractions disclaimer.

COMMENTS:

1) **Purpose of the Bill**: According to the author, “This bill closes an important loophole in current lobbying practices, by expanding the definition of administrative action. It furthers the intent of the Fair Political Practices Act by promoting ethical and transparent governmental advocacy that ultimately protects consumers and promotes the welfare of all Californians.”

2) **Lobbying Regulation**: Under existing law, individuals and entities that make or receive specified levels of payments for the purpose of influencing legislative or administrative actions may be required to comply with the state's lobbying rules, including requirements to register with the SOS and to file periodic reports. Not all governmental actions, however, are considered legislative or administrative actions; attempts to influence governmental decisions that are *not* legislative or administrative actions under the PRA do not trigger lobbyist registration and reporting requirements. For example, in its Lobbying Disclosure Information Manual, the FPPC identifies the following types of actions as examples of ones that generally do not trigger lobbyist registration and reporting requirements:

   - Attempting to influence state contracting decisions.

   - Attempting to influence the Governor or the Governor’s staff regarding an executive branch appointment (though efforts to influence the Legislature to support or oppose an appointment can trigger lobbyist registration and reporting requirements).

   - Obtaining applications for tax credits.

   As detailed above, the term "administrative action" is defined primarily to include rule- and rate-making, the adoption of regulations, and quasi-legislative proceedings. FPPC regulations expressly provide that certain types of proceedings before state agencies are not “quasi-legislative proceedings,” including proceedings to determine the rights or duties of a person under existing laws, regulations, or policies, and proceedings involving the issuance, amendment or revocation of a permit or license. In light of that definition, proceedings before the Insurance Commissioner or the Director of the DMHC regarding proposals for sales, mergers, and acquisitions of insurance companies likely are not considered “administrative actions,” and therefore attempts to influence those proceedings likely would not trigger lobbyist registration and reporting requirements.

   By adding these reviews and approvals of insurance mergers and acquisitions to the definition of "administrative action," this bill brings those decisions within the types of governmental decisions that are covered by the state's lobbying rules. For individuals and entities that frequently attempt to influence insurance merger and acquisition approvals, but that do not regularly attempt to influence other actions by state agencies, this bill could require those individuals and entities to comply with the state's lobbying rules, including registering with the SOS and filing periodic disclosure reports.

   Many individuals and entities that attempt to influence insurance mergers and acquisitions, however, may already be registered as lobbyists, lobbying firms, or lobbyist employers because those individuals and entities are involved in attempting to influence other actions by the Legislature or state agencies. For those entities and individuals, this bill will require them

to disclose details about their insurance merger and acquisition lobbying on the periodic disclosure reports that they already file.

Broadening the types of decisions that are covered by the state's lobbying rules will also broaden the application of certain restrictions that apply to lobbyists, lobbyist employers, and lobbying firms. For example, existing law prohibits a lobbyist or lobbying firm from accepting any payment that is contingent upon the outcome of any administrative action. As a result, if insurance merger approvals are included within the types of decisions that constitute "administrative action," then this bill could prohibit individuals or firms from being paid in exchange for successfully securing approval of a merger with a state agency. Other restrictions that apply to lobbyists and lobbying firms that could be broadened in application if this bill is enacted include restrictions on campaign contributions, limits on gifts to public officials, restrictions on placing public officials under personal obligation, and restrictions on deceiving or attempting to deceive public officials.

3) **Exclusion of Quasi-Judicial Proceedings from PRA Lobbying Rules**: Because the PRA defines the term "administrative action" as it applies to the regulation of lobbying to include the process for proposing and adopting rules and regulations, ratemaking proceedings, and quasi-legislative proceedings, the FPPC has long interpreted the term "administrative action" to exclude governmental proceedings that are quasi-judicial in nature. As a result, efforts to influence quasi-judicial proceedings generally are not considered to be lobbying under the PRA.

   The term "quasi-judicial" is not actually used in the provisions of the PRA that regulate lobbying (it is used in provisions of the PRA that restrict the activities of former public officials, though those provisions were not part of the original PRA). Nonetheless, the FPPC explained the distinction between quasi-legislative and quasi-judicial proceedings as it relates to the PRA's lobbying rules in a written opinion issued four years after the PRA was enacted by voters. In that opinion (*In re Evans* (1978) 4 FPPC Ops. 84), the FPPC was asked whether certain proceedings before the Public Utilities Commission were quasi-legislative, and therefore "administrative action" under the PRA.

   In its analysis, the FPPC noted that "[t]he line drawn by the [PRA's] definition of administrative action appears to be the line traditionally drawn by the courts and legislative bodies between actions of administrative agencies that are quasi-legislative in nature and those which are quasi-judicial. Although this line was not developed for the purposes of disclosure of the lobbying activity regulated by the [PRA], it is a line which has a long history and is generally understood" (internal footnote omitted). The opinion went on to note that "[p]ermit and licensing decisions have been considered to be quasi-judicial ones because they most often involve application of a general standard to a particular set of facts presented by an individual applicant," and described the FPPC's understanding of the rationale behind excluding quasi-judicial actions from the lobbying regulations found in the PRA as follows:

   > [I]t is our opinion that the purpose of the [PRA] in drawing the line between quasi-legislative and quasi-judicial action was to limit disclosure to activity aimed at influencing those decisions which, by their very nature, are most likely to be applicable to classes of persons or situations, not just an individual applicant. In certain cases such a dividing line may require disclosure where there is no great interest in disclosure and dispense with disclosure where there is a great interest

> in disclosure. However, we believe that as a general matter, the dividing line we have articulated here will work to require disclosure in those situations where it is most useful because of the wide applicability of the administrative decision, yet limit disclosure where it is least useful because of the narrow applicability of the decision. (Internal footnote omitted)

The types of actions that this bill seeks to include within the definition of "administrative action"—insurance mergers and acquisitions—are ones that seem to be quasi-judicial in nature, since they involve the application of general standards that govern such mergers and acquisitions to a specific set of facts presented by the applicant. To be sure, an insurance merger or acquisition may have a significant public impact. But the decision of whether to approve or reject a merger or acquisition applies only to the applicant, and the proceeding is not something that is more broadly applicable to mergers and acquisitions generally.

As a result, it appears that this bill would bring quasi-judicial proceedings within the scope of the PRA's lobbying regulations for the first time. Given that the PRA's lobbying rules traditionally have not applied to quasi-judicial actions, it is unclear whether those rules are appropriately tailored for quasi-judicial proceedings. For instance, because quasi-judicial proceedings involve the examination of a set of facts against general standards, those proceedings may involve greater levels of direct communication between staff of a governmental agency and technical experts who are employed by or working on behalf of the subject of such a proceeding. Although those technical experts may be communicating with agency officials in an effort to influence the decision of the agency, these are not necessarily the types of communications that are typically thought of as "lobbying." Nonetheless, those communications could result in technical experts being classified as lobbyists under this bill. Although FPPC regulations exclude specified administrative testimony from the types of communications that are considered lobbying, it is unclear whether that exception would apply to these types of proceedings.

Furthermore, while this bill brings only two specific types of quasi-judicial proceedings within the scope of the PRA's lobbying rules, a broader expansion to include other types of quasi-judicial proceedings could significantly expand the number of people who are required to register as lobbyists. To the extent that this bill sets a precedent and prompts efforts to incorporate other types of quasi-judicial proceedings into the PRA's lobbying regulation scheme, the effect on the FPPC's workload could be substantial.

While the lobbying regulation rules in the PRA are designed to promote transparency and to protect against improper influence of public officials, they are not the only laws that serve those purposes. Accordingly, to the extent that there are concerns about transparency or influence in connection with certain types of quasi-judicial proceedings, those concerns could be addressed through additional regulations that are applicable specifically to those types of proceedings, rather than by including those proceedings within the PRA's regulation of lobbying activity. For example, various provisions of state law prohibit, or otherwise require disclosure of, ex parte communications with public officials in connection with their official actions (see, for example, Public Resources Code Section 30324 related to the Coastal Commission; Water Code Section 8578 related to the Central Valley Flood Protection Board; Business and Professions Code Section 19872 related to the California Gambling Control Commission; Government Code Section 11430.10 related to administrative adjudication proceedings before state agencies). To the extent that the concerns surrounding insurance

acquisitions and mergers are unique to those types of quasi-judicial proceedings, this type of tailored approach may achieve the author's objectives without requiring the FPPC to regulate lobbying in connection with specific proceedings that are conducted by only two agencies.

4) **Contingency Fee Ban**: As noted above, existing California law prohibits lobbyists from receiving payment that is contingent upon the outcome of any proposed legislative or administrative action. The ban on lobbyists receiving compensation contingent on the passage or defeat of legislation predates the PRA; that ban was first enacted during a special session of the Legislature in 1950 that was held (in part) to respond to lobbying scandals in the Legislature in the prior year. That ban remained unchanged until the PRA was approved by voters at the 1974 statewide primary election, when the ban that was enacted in 1950 was repealed and replaced with a similar ban. Unlike the ban enacted in 1950, however, the contingency fee ban in the PRA was broader, applying not only to payments contingent upon the passage or defeat of legislation, but also to payments contingent on the outcome of any proposed administrative action. Since the enactment of the PRA, the contingency fee ban has not significantly changed.

5) **Arguments in Support**: In support of this bill, Consumer Watchdog writes (internal citations and footnotes omitted from this excerpt):

> AB 1783, as amended on April 19, seeks to correct a problem recently reported on in the Sacramento Bee in which "consultants" (who are also lobbyists) were to be paid a $2 million contingency fee to influence the approval of an insurance company acquisition while evading public disclosure laws directed at lobbying activity…
>
> State law already considers anyone being paid $2,000 or more in any calendar month to influence "any elective state official['s]" decision regarding an "administrative action" to be a "lobbyist." However, a regulation adopted by the [FPPC] excludes from the definition of "administrative action" both a "proceeding to determine the rights or duties of a person under existing laws, regulations or policies," and a "proceeding involving the issuance, amendment or revocation of a permit or license." This regulation has been interpreted to exclude from the definition of lobbying efforts to influence a decision over an insurance company merger or acquisition. AB 1783 would simply amend the statutory definition of "administrative action" that constitutes lobbying to explicitly include efforts to influence any decision or approval regarding mergers and acquisitions of insurance companies…
>
> [M]ergers and acquisitions of insurance companies are uniquely important to consumers, and transparency in efforts to influence these decisions is necessary to protect the interest of consumers as well as to promote a healthy democracy. Insurance is an essential service, and changes in control of these companies can have dramatic implications for consumers, including increased costs and loss of access to care. Underscoring the dramatic impact that such mergers can have on consumers, as well as the importance of an unbiased determination of the merits of such actions, in 2018 the legislature adopted a bill (later signed into law) to require prior approval of mergers and acquisitions by the Director of the [DMHC]. (A.B. 595, ch. 292, 2018.) Similar requirements were already in place

for mergers and acquisitions of companies regulated by the Department of Insurance ("DOI"). AB 1783 (Levine) would simply make efforts to influence those decisions subject to existing lobbying requirements. Moreover, it is reasonable and necessary that the bill apply to merger and acquisition decisions by both the DOI and DMHC. Health insurance companies like Anthem Blue Cross, for example, have two licenses in California—one under the DOI and another under the DMHC—that sell nearly identical products. When those companies are sold or merged, they require approval by both the Commissioner at the DOI and the Director at the DMHC.

6) **Previous Legislation**: AB 1200 (Gordon) of 2016 would have provided that communicating with state governmental officials in order to influence state governmental procurement, as defined, could result in a person being considered a "lobbyist" under the PRA. AB 1200 was vetoed by Governor Brown. In his veto message, the Governor stated "[g]iven that the laws regulating state procurement are voluminous and already contain ample opportunity for public scrutiny, I don't believe this bill is necessary."

   AB 2002 (Mark Stone) of 2016 would have provided that communicating with the Coastal Commission in order to influence specified actions could result in a person being considered a lobbyist under the PRA, among other provisions. AB 2002 was approved by the Assembly on a 54-23 vote, but failed passage on the Senate Floor on a 22-13 vote (27 votes were required for passage).

   AB 1743 (Hernandez), Chapter 668, Statutes of 2010, prohibits a person from acting as a placement agent in connection with any potential investment made by a state public retirement system unless that person is registered as a lobbyist in accordance with the PRA.

7) **Political Reform Act of 1974**: California voters passed an initiative, Proposition 9, in 1974 that created the FPPC and codified significant restrictions and prohibitions on candidates, officeholders and lobbyists. That initiative is commonly known as the PRA. Amendments to the PRA by the Legislature must further the purposes of the proposition and require a two-thirds vote of each house of the Legislature, or the Legislature may propose amendments to the proposition that do not further the purposes of the act by a majority vote, but such amendments must be approved by the voters to take effect. This bill provides that it would take effect only if approved by the voters.

REGISTERED SUPPORT / OPPOSITION:

Support

California Clean Money Campaign
Consumer Federation of California
Consumer Watchdog

Opposition

None on file.

Analysis Prepared by: Ethan Jones / ELECTIONS / (916) 319-2094