F I S C A L I M P A C T R E P O R T

SPONSOR SJC **ORIGINAL DATE** 01/30/13 **LAST UPDATED** 03/15/13 **HB**

SHORT TITLE Campaign Finance Requirements **SB** CS/CS/15/aSFl#1/ aHVEC

ANALYST Cerny

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	$60.0	$0.0	$0.0	$60.0	Nonrecurring	Election Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to SB 16, SB 88, HB 232, HB 68, SB 336

SOURCES OF INFORMATION
LFC Files

Responses Received From
Attorney General's Office (AGO)
Department of Finance and Administration (DFA)
Administrative Office of the Courts (AOC)
Secretary of State (SOS)

SUMMARY

Synopsis of HVEC Amendment

The House Voters and Elections Committee amendment changes the language as follows:

1. On page 4, line 5, strikes the semicolon and inserts in lieu thereof a period, strikes the remainder of the line and strikes lines 6 through 10 in their entirety.

Amendment 1 would no longer exempt from being reported contributions where the contributor requested in writing that the contribution not be used to fund independent or coordinated expenditures or make contributions to a candidate, campaign committee, political committee or independent expenditure committee.

2. On page 10, line 8, after "candidate", insert ", independent expenditure committee".
3. On page 10, lines 8 through 11, remove the brackets and line-through.

4. On page 10, line 10, after "political", insert "or independent expenditure".
5. On page 10, line 11, strike the comma and insert in lieu thereof a semicolon, strike the remainder of the line and strike line 12 in its entirety.

Amendments 2-5 taken together clarify that the definition of “contribution” that is specifically related to donations to a person who makes independent expenditures of more than $3 thousand in aggregate and choose not to establish as segregated bank account, does not include the value of volunteered services, unreimbursed travel or personal expenses on behalf of a candidate independent expenditure committee or political committee, nor does it include the administrative or solicitation expenses of a political committee that are paid by an organization that sponsors the committee.

6. On page 10, line 17, strikes ", suggestion" in the definition of “coordinated expenditure”;
7. On page 11, line 9, strikes "deemed to constitute";
8. On page 11, line 12, strike ", suggested";

Amendments 6-8 eliminate language that is either vague or based on hearsay.

9. On page 12, line 4, after "debt", remove the bracket and line-through and on lines 5 through 8, remove the bracket and line-through.
10. On page 12, line 7, before "committee", insert "or independent expenditure".

Amendments 9 and 10 reinstate language from the existing statute thus defining “expenditure” to include payment of a debt incurred in an election campaign or pre-primary convention but not to include the administrative or solicitation expenses of a political committee that are paid by an organization that sponsors the committee. However, Amendment 10 then qualifies that the committee is an “independent expenditure committee.”

11. On page 13, line 6, strike "in New Mexico".
12. On page 14, line 9, strike "in New Mexico".

Amendments 11 and 12 stipulate that the definitions of an “independent expenditure committee” and a “political committee” will apply to those entities whose primary purpose is not limited to New Mexico alone.

13. On page 15, lines 17 through 24, remove the brackets and line-through and strike the underscored language and insert in lieu thereof a period.

Amendment 13 requires a political committee to appoint and maintain a treasurer and file a statement of organization with the SOS within three days of “receiving, contributing or expending in excess of five hundred dollars ($500) by paying a filing fee of fifty dollars ($50) and filing a statement of organization.

14. On page 19, line 3, strikes "or G" and insert in lieu thereof ", G or H". This amendment makes language consistent with amendment 28.
15. On page 20, line 6, strikes "made or"
16. On page 20, line 8, after "such," strikes the remainder of the line and on line 9, strikes the underscored language such that reporting of

17. On page 20, line 16, strike ", or of being made,".
18. On page 20, line 19, strike "expenditure or".
19. On page 20, line 20, strike "made or".

Amendments 15 to 19 clean up superfluous language in the bill as well as no longer requiring that expenditures, as well as contributions and pledges, be reported pursuant to Section 6 subsection B (5).

20. On page 20, between lines 22 and 23, inserts:

"(6) by the earlier of midnight on the Thursday before a primary or general election, or within twenty-four hours of the independent expenditure, a report of each independent expenditure made after 5:00 p.m. on the Tuesday before the election that is for more than five hundred dollars ($500) in a legislative or non-statewide judicial election or more than two thousand five hundred dollars ($2,500) in a statewide election. Such expenditures shall be reported to the proper filing officer either in a supplemental report on a prescribed form within twenty-four hours of being made or in the report to be filed by midnight on the Thursday before a primary or general election, except that any such expenditure that is made after 5:00 p.m. on the Friday before the election may be reported by 12:00 noon on the Monday before the election;".

Amendment 20 adds a new subsection (6) that requires reporting of independent expenditures consistent with the contributions and pledges that are required to be reported in subsection (5).

21. Renumbers the succeeding paragraphs accordingly.
22. On page 21, line 9, after the comma, inserts "political committee,".
23. On page 22, line 2, after the comma, inserts "political committees,".
24. On page 22, line 4, after the comma, inserts "political committee,".
25. On page 22, lines 15 through 19, removes- the brackets and line-through.

Amendments 22-25 extend reporting requirements under Section 6 subsection C to include political committees.

26. Reletters the succeeding subsections accordingly.
27. On page 22, strikes lines 20 through 25 in their entirety, and on page 23 strikes line 1 in its entirety.

Amendment 27 strikes language that would have allowed independent expenditure committees or political committees to forego filing reports pursuant to section 6 if they had not made or received any contributions, or made any coordinated or independent expenditures, since they last filed their last report.

28. On page 23, line 2, before "An", insert the subsection designation "H.".
29. On page 23, lines 2 and 6, strike "or political committee".
30. On page 23, line 3, strike "or coordinated".

Amendments 28-30 create a new subsection for language relating to cancellation of registrations by independent expenditures committees and obligations for re-registration. This subsection

would no longer apply for political committees per amendment 29 and would exempt coordinated contributions made by independent expenditures committees from the requirements of non-activity that could trigger a request for cancellation of registration.

31. On page 26, line 2, after "for", insert "political committees,".

Amendment 32 would clarify that subsection 7 G also applies to political committees.

32. On page 28, line 4, after "official", insert ", political committee".

Amendment 32 adds language to be consistent with the title of Section 8, to indicate that political committees are subject to the requirements of this section.

Synopsis of Senate Floor Amendment #1

The Senate Floor #1 amendment to the Senate Judiciary Committee substitute for the Senate Rules Committee substitute for Senate Bill 15 makes changes to the content of the expenditures and contributions reports required under the bill to clarify that they shall include the occupation, name, and type of business as applicable of any person or entity making contributions of $250 or more in the aggregate per election.

Synopsis of Original Bill

The Senate Judiciary Committee substitute for the Senate Rules Committee substitute for Senate Bill 15 (SB 15) relates to campaign financing and amends the Campaign Reporting Act (CRA), 1-19-25 to 1-19-36, NMSA 1978, to specifically include the reporting of independent expenditures. It redefines advertisement, bank account, campaign committee, contribution, expenditure, political committee, election and reporting individual. It creates definitions for ballot measure, campaign expenditure, coordinated expenditure and independent expenditure.
The bill excludes federal, municipal, school board and special district elections from the definition of “election” thereby exempting candidates in those races from the reporting requirements.

Adding two new sections to the CRA, it requires a person who spends more than $800 on an independent expenditure (or an aggregate of $800 in a 12 month period) to report those expenditures to the Secretary of State (SOS), even though they may not be required to register with the SOS as an independent expenditure committee or a political committee under the CRA. It requires stricter reporting for those who made independent expenditures of $3 thousand dollars or more.

SB 15 also requires, where independent or coordinated expenditures for campaign advertisements exceed $3 thousand in aggregate in the preceding twelve months, disclaimers in such advertisements. These include the name of the candidate who authorized the advertisement or whose committee authorized it, or if not authorized, the name and phone number or the web address of the person who authorized and paid for the advertisement. SB 15 also details how such disclaimers will be disseminated and displayed on advertisements.

SB 15 provides that a political committee must appoint and maintain a treasurer and file a statement of organization with the SOS within 3 days of making contributions or a coordinated or independent expenditure, or within twenty-four hours of making such contributions or expenditures totaling $5 thousand or more.

An independent expenditure committee must do the same organizationally, however it must do so within 3 days of making independent expenditures of more than $3 thousand within a 12-month period or within twenty-four hours of making an expenditure of more than $5 thousand within a 12-month period, whichever is earlier.

SB 15 prohibits an independent expenditure committee from making contributions to candidates, campaign committees, or political committees, or to make coordinated expenditures.

The bill provides for reporting of contributions and expenditures by independent expenditure committees, but also provides that they are not required to file a report in a non-election year if they have had no contributions or expenditures during a reporting period. Such a committee may also cancel its registration but will retain its obligation to submit a new statement of organization in the event it future activities should require it to do so.

Report required of independent expenditure committees must indicate, in addition to the requirements of other committees: the name of each identifiable candidate or ballot measure referred to in an advertisement sponsored by the committee, whether the candidate or ballot measure if supported or opposed in the advertisement, or whether the advertisement does or does not take a position on the candidate or ballot measure.

The bill also allows the Attorney General's Office (AGO) to bring a civil action without a referral by the SOS. It also increases civil penalties for violation of the CRA up to one thousand dollars per violation, not to exceed a total of twenty thousand dollars.

Lastly, SB 15 carries an emergency clause.

FISCAL IMPLICATIONS

The SOS in previous analysis notes that implementation of this legislation will require some programming changes to the Campaign Finance Information System to accommodate the reporting requirements for independent expenditure committees as set out in the bill, as well as to accommodate the filing of reports by individuals or entities who are not required to register with the SOS or file reports according to the reporting schedule. "The SOS anticipates the costs of the programming changes to be approximately $60 thousand."

The Administrative Office of the Courts (AOC) in previous analysis stated: "There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Additional fiscal impact on the judiciary would be proportional to the increased arrests or civil cases filed due to enforcement of this law and commenced prosecutions. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase. Efforts to quantify specific fiscal impact by case are underway, but specific information is not available at this time."

SIGNIFICANT ISSUES

Both the SOS and AGO in previous analysis point out that the SOS was enjoined from enforcing certain provisions of the Campaign Reporting Act with regard to independent expenditures. This bill appears to resolve the legal issues raised in that regard. It also adds definitions for types of expenditures which are currently not contained in the statute, but which appear in the court's injunction.

In Section 10, this bill amends Section 1-19-34.6 of the CRA, enabling the AGO to bring a civil action without referral by the SOS, thus avoiding problems similar to the criminal case, State v. Block, 150 N.M. 598 (Ct. App. 2011), where the defendant claimed that the AGO needed a referral by the SOS to file a criminal case.

The bill seeks to require more disclosure about the sources of funds for independent expenditures that can affect election campaign outcomes in New Mexico. The AGO states that "While some may argue that such additional disclosures run counter to the First Amendment guarantee of freedom of speech, and the freedom to speak anonymously, the additional disclosures in this bill appear consistent with the U. S. Supreme Court's recent decision in the controversial Citizens United case, where the Justices actually ruled 8-1 in favor of laws requiring fair disclosure of the sources of funds used that affect election campaigns."

The AGO states that the intent of Section 1 is unclear, but that it appears to create a default mechanism to require disclosure of independent expenditures that would not otherwise be required to be reported under the Campaign Reporting Act. The AGO states: "This section may be directed towards non-profit corporations who, but for Section 1, would not be required to file a disclosure statement because their primary purpose is not campaigning."

AMENDMENTS

The AGO recommends that to avoid evasion of the disclosure requirements this bill would be strengthened if it included the following language:

- "It is unlawful for an independent expenditure committee to accept a contribution from a tax-exempt organization that does not publicly disclose the sources of its contributions."

In addition, to create a deterrent against deliberate evasion of the disclosure requirements, this bill should include the following provision:

- "It is unlawful to willfully evade disclosure or the contribution limits of NM law by setting up improper conduits to conceal the real source of funds for an independent expenditure."

The AGO recommends that both provisions include a civil penalty calculated by multiplying the amount of the unlawful contribution by a set factor (e.g. multiply the contribution by a factor of four).

OTHER SUBSTANTIVE ISSUES

SB 15 could result in legal challenges for three reasons outlined below, 1) pertaining to the constitutionality of contribution limits not based on an election cycle for that particular office; 2)

the inability of challengers to raise campaign funds early during a redistricting year; and 3) the inclusion of ballot measures in the portion of the bill that references advertising.

More in-depth legal analysis from the AGO suggests:

1) One consequence of this bill is to double the amount of contributions that Senators and statewide elected officials can raise who run for office every four years. Under this bill they will be able to raise the campaign limit amounts every two years instead of once every four years.

For instance, under SB 15, the primary election cycle for state senators would be the 2012 general election until the 2016 primary. For candidates with staggered offices, such as those for the Public Regulation Commission (where one set of candidates is in one election cycle and the other set is in a different election cycle), SB 15 would enable them to raise funds on a 2-year rather than a 4-year cycle.

SB 15 would have no impact on House Representatives who run for office every two years. It would also have no effect on Political Action Committees (PACS) as they currently can receive the contribution limits during any primary or general election cycle.

The AGO notes in previous analysis: "There is a split of authority over the constitutionality of contribution limits that are not based on an election cycle for that particular office. The Ninth Circuit struck down a similar—though not identical--provision as unconstitutional. The court struck down as unconstitutional California's campaign contribution limits because they were limited by year instead of by election cycle. The Ninth Circuit held that this discriminated against challengers because most challengers normally do not start raising money until either the year of the election, or the year before the election. Therefore, incumbents would have the advantage of raising the limit amounts every year. (Service Employees Int'l Union, etc. v. Fair Political Practices Comm. 955 F.2d 1312, 1320, 9th Cir. Cal. 1992). Under this bill, incumbents would have the advantage of raising the limit amounts twice."

However, the AGO also notes that "the Eighth Circuit disagreed with the Ninth Circuit's interpretation of the standard of review required by Buckley and instead determined that there must be evidence of invidious discrimination. Minn. Citizens Concerned for Life, Inc. v. Kelley, 427 F.3d 1106, 1113-14 (8th Cir. 2005). Accordingly, the Eighth Circuit found that there was no evidence of invidious discrimination against challengers. In addition, the court concluded that 'challengers may form campaign committees and raise money years in advance of an election.'" Consequently, this issue remains unresolved by the courts. Should SB 15 be passed, it is potentially open to legal challenge.

2) The AGO states "Another important note of caution is that every ten years during an election in a redistricting year, challengers will normally be precluded from raising contributions early because they will not know the boundaries of the district they want to run in. This factor could also lead a court to strike down this bill as unconstitutional."-

3) The AGO also states that the US Supreme Court has carved out special disclosure exemptions for campaign advertising in ballot measure elections. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) finding that in a ballot-issue election a person has a First Amendment right to hand out anonymous handbills. "While it is unknown how far the courts will extend the holdings in McIntyre and Sampson, this bill may want to take a more cautious approach by not imposing

the same disclosure requirements for *ballot* elections as for *candidate* elections. Accordingly, it may be appropriate in this bill to consider creating separate disclosure requirements for ballot measures."

Other relevant case law:

- Sampson v. Buescher, 625 F.3d 1247 (10th Cir. 2010)--In a ballot-issue election, the First Amendment prohibits the state from requiring disclosure of contributions and expenditures by a committee that raises less than $1,000.

- First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978)--In a ballot-issue election, the First Amendment prohibits the state from banning corporate campaign expenditures

- Citizens Against Rent Control/Coalition for Fair Hous. v. Berkeley, 454 U.S. 290 (1981)--In a ballot-issue election, the First Amendment prohibits the state from limiting campaign contributions.

However, the AGO states that "On the other hand, given the 8-1 ruling in favor of disclosure in Citizens United, it may be that upon further review the Supreme Court will decide to reconsider and rule that ballot measure disclosure requirements should be found to be lawful. Even if they do not, and ballot measure disclosures are not approved so that they can be done anonymously, the courts may well rule that those provisions are severable so that the rest of the law on disclosures remains lawful and intact."

CAC/blm:svb