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

SPONSOR Wirth **ORIGINAL DATE** 01/28/14 **LAST UPDATED** 01/28/14 **HB**

SHORT TITLE Campaign Finance Reporting **SB** 18

ANALYST Cerny

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY14	FY15	FY16		
	Indeterminate but minimal	Indeterminate but minimal	Recurring	General Fund

(Parenthesis ( ) Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY14	FY15	FY16	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		$ 60.0		$ 60.0	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION
LFC Files

Responses Received From
Office of the Attorney General (AGO)
Secretary of State (SOS)

SUMMARY

Synopsis of Bill

Senate Bill 18 amends the Campaign Reporting Act (CRA), 1-19-25 to 1-19-36 NMSA 1978 by:

- Requiring disclosures of independent expenditures;
- Replacing current law on disclaimers with an expansion of the amount of information that must be disclosed on campaign advertising;
- Prohibiting independent expenditure committees from contributing to candidates;
- Allowing the AGO to bring a civil action without a referral by the Secretary of State (SOS); and
- Increasing civil penalties

Specifically:
Section 1 of the bill, all new material, addresses disclosure and reporting of independent expenditures over eight hundred dollars within a twelve month period. Section 1 does not address "independent expenditure committees," but instead addresses independent expenditures where the entity is "not otherwise required to be reported under the Campaign Reporting Act." It outlines required reports and their timing.

Section 2 of the bill, all new material, addresses disclaimers in advertising. Under this provision, disclaimers must be added to advertising when the advertising exceeds three thousand dollars over a twelve-month period.

Section 3 revises the existing definitions under the Act. It adopts a new definition of advertisement, anonymous contribution, bank account, campaign committee, contribution, expenditure, political committee and reporting individual. It creates definitions for ballot measure, campaign expenditure, coordinated expenditure, and independent expenditure.

Section 4 addresses the registration and disclosure requirements for both political committees and independent expenditure committees. It contains provisions that apply only to independent expenditure committees.

Section 5 addresses the reporting requirements for candidates, political committees and independent expenditure committees and cleans up extraneous language in the existing Act.

Section 6 addresses the time and place of reporting for all reporting individuals including candidates, political committees and independent expenditure committees. Primarily, that section changes the time that reports are due from 5:00 p.m. to midnight. It adds reports that are only applicable to independent expenditure committees.

Section 7 addresses the contents of the report for political committees and independent expenditure committees. It contains provisions that are applicable only to independent expenditure committees.

Section 8 addresses candidates, campaign committees, political committees and independent expenditure committees regarding bank accounts, anonymous contributions, and special events. It contains a provision that explicitly prohibits independent expenditure committees from making contributions to candidates, campaign committees or political committees or to make coordinated expenditures. It also increases the allowable amount that may be raised at a single special event fundraiser to five thousand dollars before such an event is subject to anonymous contribution limits, providing no one person contributes more than twenty-five dollars in cash at the event.

Section 9 contains clean up language required by LCS drafters.

Section 10 adds a provision allowing the AGO to institute a civil action without a referral from the SOS and increases the amount of the civil penalties, from two-hundred-fifty dollars per violation to one thousand dollars, not to exceed a total of twenty-thousand dollars.

Section 11 changes the term "the" to "a" in significant places within the campaign contribution limitation provisions. The effect of that change is to make the primary and general election cycles consistent for both two year and four year office holders. Currently, four year office holders (State Senate, Governor, Lt. Governor, State Treasurer, State Auditor, Secretary of State, Public Regulation Commission, magistrates, county offices) have a longer primary election cycle than two year office holders.

Section 12 adds "independent expenditure committee" as subject to the proscribed civil penalties.

Section 13 repeals Sections 1-19-16 and 1-19-17, determined by the AGO to be unconstitutional.

Section 14 states that the effective date of the provisions of the bill will be November 5, 2014.

FISCAL IMPLICATIONS

According to analysis by the SOS, implementation of this legislation will require some programming changes to the existing Campaign Finance Information System (CFIS), which is the electronic reporting system referred to in the bill.

The current system requires that the report filers register with the SOS and obtain a user name and password, and begin filing reports according to a pre-determined calendar. This bill proposes to require some individuals to file reports either within three days or 24 hours of making certain independent expenditures, which are not "otherwise required to be reported." This provision will require the development of a module within the CFIS system that does not operate according to the business rules already established for the system.

The SOS anticipates the costs of the programming changes to be approximately $60 thousand, adding that "the cost of adding significant new programming changes to the system can be difficult to estimate."

Indeterminate and likely minimal revenue may result from the increase in civil penalties associated with this bill.

SIGNIFICANT ISSUES

SB 18 attempts to bring the CRA into compliance with the relevant federal court decisions and Attorney General's opinion by setting specific provisions for independent expenditures and coordinated expenditures, in particular.

According to analysis from the AGO, the bill appears designed "to respond to recent important campaign finance case law – primarily the U.S. Supreme Court's controversial holding in the *Citizens United* case, as well as the more recent 10th Circuit decision in *NM Republican Party v. King* – by providing for reasonable public disclosures of relevant information concerning independent expenditures that can affect NM election campaigns."

Recent court decisions also inform analysis by the SOS: "In recent years, federal U.S. Supreme Court cases and several 10th Circuit Court of Appeals cases have rendered portions of the existing Campaign Reporting Act as unconstitutional. Two cases have specifically addressed New Mexico's Campaign Reporting Act, *New Mexico Youth Organized v. Herrera* and *Republican Party of New Mexico v. King.* In *Youth Organized,* the 10th Circuit federal court determined that the Campaign Reporting Act's disclosure provisions cannot be applied to certain organizations. Further, on an as-applied challenge, it found that the Act's definition of "political purpose" was unconstitutional. In *Republican Party*, the federal court held that New Mexico's contribution limits cannot be applied to entities making independent expenditures, but can be applied to coordinated expenditures and candidate contributions."

According to the SOS analysis, in recent public comments received by the SOS, there is wide disagreement as to the meaning of "coordinated expenditures" under the current Act and the existing case law. SOS analysis further states, "As set forth above, the SOS was enjoined from enforcing certain provisions of the Campaign Reporting Act with regard to independent expenditures. The same injunctive order in *Republican Party v. King* determined that the Act's contribution limits would apply to coordinated expenditures. In the absence of definitions of independent expenditures and coordinated expenditures within the existing Act, the SOS does not have clear guidance regarding enforcement under either the Act or the case law. 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."

ADMINISTRATIVE IMPLICATIONS

This bill allows 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.

OTHER SUBSTANTIVE ISSUES

Analysis from the AGO addresses another substantive legal issue with regard to ballot measures:

> Section 3 of the bill defines "independent expenditure" to include expressly advocating for "the passage or defeat of a clearly identified ballot measure." Thus the bill imposes disclosure requirements on ballot measure expenditures. However, the U.S. 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) where, in a ballot-issue election, a person has a First Amendment right to hand out anonymous handbills; see also Sampson v. Buescher, 625 F.3d 1247 (10th Cir. 2010), where 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; see also First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) where, in a ballot-issue election, the First Amendment prohibits the State from banning corporate campaign expenditures); see also Citizens Against Rent Control/Coalition for Fair Hous. v. Berkeley, 454 U.S. 290 (1981) wherein a ballot-issue election, the First Amendment prohibits the State from limiting campaign contributions.
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> It is unknown how far the courts will extend the holdings in Mcintyre and Sampson. For example, the 10th Circuit in Sampson held that the First Amendment prohibits the State from requiring disclosure of contributions and expenditures by a ballot measure committee that raises less than $1,000. Would the 10th Circuit similarly strike down the provisions in Section 1 of this bill that regulate ballot measure expenditures of more than $800 (Subsection A) or $3,000 (Subsection C)?
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> Might this bill be better served by taking a more cautious approach and not impose the same disclosure requirements for *ballot* elections as for *candidate* elections? Or would the Bill be more defensible in court if it only required disclosures about ballot measure expenditures that exceed a certain threshold dollar amount that is in excess of $1,000?

According to analysis by the SOS "It should also be noted that campaign finance and other Election Code provisions and legislation have been challenged in court in recent years and

therefore improperly crafted legislation represents a financial risk to the state. In lawsuits arising from those circumstances, the Secretary of State becomes the nominal defendant who is required to respond. When courts rule that legislative acts are unconstitutional or when they impose other remedies pursuant to such cases, cost to New Mexico taxpayers may reach as high as $140,000."

A widely-reported January 2014 survey commissioned by Common Cause New Mexico reported that "Voters were informed that a bill was also proposed earlier this year that would have required more public disclosure and reporting from groups who spend money on political campaigns. This would have redefined certain types of campaign expenditures so that independent political groups who are spending money on campaigns would have to report who their donors are and how the money is being spent…the vast majority of voters (86%) are supportive of this measure, with 63% saying they *strongly support* [italics theirs] the proposal compared to just 9% who say they are opposed. Support for a bill requiring more disclosure of campaign donations and expenditures cuts across demographic and party lines with over four-fifths of Democrats (89%), independents (87%) and Republicans (82%) offering their support for bringing up the bill again in 2014." The survey was conducted by Research & Polling with a sample size of four hundred sixty-seven randomly selected registered voters. The report states that "A sample size of 467 at a 95% confidence level provides a maximum margin of error of approximately 4.5%." (A complete copy of the survey may be found here: http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=4847593 .)

AMENDMENTS

SOS analysis notes that several sections of the bill contain numerous provisions, some of which apply only to certain committees, and some of which apply to all report filers, and states "that the history of this legislation indicates that there is some confusion as to the application of the various provisions to different entities. The SOS is charged with administration of the Act. As such the SOS recommends that the provisions of the bill that address independent expenditure committees be set out in separate sections of the Act, rather than including the various provisions applicable to different entities in the same sections of law."

AGO analysis recommends that the bill could be amended in Section 1 to apply one uniform cut-off point for independent expenditure disclosures, e.g., $2,000 or $2,500, rather than creating what appears to be a confusing three-tier system of (a) no disclosures below $800 in total expenditures; (b) certain disclosures for expenditures between $800 and $3,000; and (c) additional disclosures for expenditures greater than $3,000.

AGO analysis states "the bill could be amended to modify or even not require the disclosures that should apply to expenditures affecting ballot questions."

To avoid evasion of the disclosure requirements by laundering contributions through multiple organizations, AGO analysis recommends that the bill could be amended to include the following provision: "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."

To create a deterrent against deliberate evasion of the disclosure requirements, AGO analysis recommends that the bill could be amended to include the following provision: "It is unlawful to willfully evade disclosure or the contribution limits of the Campaign Reporting Act by setting up conduits to conceal the real source of funds for an independent expenditure."

CAC/jl