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FISCAL IMPACT REPORT

ORIGINAL DATE 2/6/17
 SPONSOR HLELC LAST UPDATED 3/6/17 HB 206/HLELCS
 SHORT TITLE Unaffiliated Voters in Primary Elections SB _____
 ANALYST Esquibel

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total			Minimal	Minimal	Recurring	General Fund, Local Government Funds

(Parenthesis () Indicate Expenditure Decreases)

House Bill 206/HLELCS relates to House Joint Resolution 6, Top Two Candidates Open Primary Elections, CA; and Senate Bill 205, Unaffiliated Voters in Primary Elections.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Secretary of State’s Office (SOS)

Attorney General’s Office (AGO)

SUMMARY

Synopsis of Bill

The House Local Government, Elections, Land Grants and Cultural Affairs Committee substitute for House Bill 206 (HB206/HLELCS) would amend the state’s closed primary election system to permit a registered voter who has not designated a political party preference, or a voter affiliated with an unqualified minor party, on their certificate of voter registration to choose to affiliate with a political party during a primary election by requesting any major political party ballot of their choice.

The substitute proposes amendments to Section 1-6-22.1 related to mail ballot precincts such that independent voters or those affiliated with an unqualified minor party must return a card mailed to them by the county clerk designating which party’s ballot they would like to receive in order to participate in the primary election.

House Bill 206/HLELCS would also amend various provisions of the election code including provisions regarding voter registration, the issuance of absentee ballots, voter lists, election challenges and presidential primaries.

FISCAL IMPLICATIONS

The bill does not include an appropriation.

The Secretary of State's Office (SOS) indicates to project the number of paper ballots that must be printed for each primary election, the SOS and county clerks calculate an expected voter turnout and print a certain percentage of each political party ballot based upon the number of registered democrats and republicans in each precinct. Under the provisions of the bill, ballot projections may be more difficult to determine as it will be difficult to anticipate which ballot style the unaffiliated voter may choose. This could result in ballot printing costs increasing in the primary election; however, this would not be an issue in precincts that use a ballot-on-demand printing system.

SIGNIFICANT ISSUES

The Attorney General's Office writes the semi-open primary established proposed in House Bill 206/HLELCS may be subject to constitutional challenge by major political parties that wish to keep their primaries closed. The republican party of New Mexico recently defended the current closed primary system in *Crum v. Duran*, No. S-1-SC-36030 (N.M. Feb. 6, 2017). Political parties would argue that opening their primary elections to independent and minor party voters interferes with their First Amendment right to association, which includes having the members of a political party choose that party's nominee.

However, whether the primary system proposed by HB206/HLELCS would violate major political parties' associational rights is a somewhat open question. In *California Democratic Party v. Jones*, the United States Supreme Court held that a blanket primary that permitted voters to choose any candidate, and then made the candidate of each party with the most votes that party's nominee, to be unconstitutional because it violated the party's First Amendment rights. [530 U.S. 567 (2000).] On the other hand, the Supreme Court has upheld the constitutionality of "top-two" blanket primaries where voters can select any candidate and the top two vote-getters advance to the general election, but are not named as the parties' nominees. [*Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008).] The Ninth Circuit recently upheld Hawaii's open primary system against a challenge by the state's democratic party, although the court noted that challenges to open primaries depend on the particular factual circumstances and the evidence presented by the parties of burdens on their associational rights. [*Democratic Party of Hawaii v. Nago*, 833 F.3d 1119 (9th Cir. 2016).]

ADMINISTRATIVE IMPLICATIONS

The Secretary of State's Office (SOS) notes if the proposed legislation is enacted, the roster of eligible voters generated in each county would be required to include voters who are registered with a major political party as well as those voters that do not have a political party affiliation. The current election management system is capable of generating this type of roster without any additional system enhancements.

Additionally, the SOS would be required to update the notice mailed out by county clerks related to all mail ballot precincts to comply with the new language added in Section 1-6-22.1.

OTHER SUBSTANTIVE ISSUES

The Attorney General’s Office (AGO) notes with respect to minor party members permitted to vote in major party primary elections, in the HLELC substitute bill there may be some confusion about which party such persons are “affiliating with.” By law, such persons are still affiliated with a minor party, but by the language of this bill are also choosing to affiliate with a major party.

The Secretary of State’s Office (SOS) indicates there is typically a much lower voter turnout in a primary election compared to a general election. An open primary may result in increased voter turnout.

RAE/sb/jle/al