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

SPONSOR Cervantes **ORIGINAL DATE** 02/21/11 **LAST UPDATED** **HB** 491

SHORT TITLE Electioneering Communications Contributions **SB**

ANALYST Aledo

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY11	**FY12**		
	*See Fiscal Implications		

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From
Secretary of State (SOS)
Attorney General's Office (AGO)
Administrative Office of the Courts (AOC)
Administrative Office of the District Attorneys (AODA)

SUMMARY

Synopsis of Bill

House Bill 491 amends the Campaign Reporting Act to incorporate the following:

- Electioneering communications reporting requirements – HB 591 requires the disclosure of contributions and expenditures for "electioneering communications" defined as any means of communication conveyed by radio, television, cable, satellite or electronic broadcast; any print advertisement, including direct or bulk mailings; or any other means of mass communications that (a) refers to a candidate; (b) is made during an election year for the office sought by the candidate; and (c) is targeted to the voters residing in the district of the candidate. The bill requires any person who makes a payment or promise to pay for any electioneering communication exceeding $2,300 to meet the requirements as a reporting individual under the Campaign Reporting Act, if the expenditure is not otherwise subject to reporting by a candidate, campaign committee or political committee. It provides that only contributions deposited into the account required by this

section are subject to reporting requirements, but if an organization uses general treasury funds for the electioneering communication, the entity shall report the name and address of any person who has donated $1,000 or more to the organization; and for individuals, report the occupation and employer of the donor.

- Prohibiting the concealment of contribution sources – HB 491 makes it unlawful to intentionally conduct, structure, engage in or participate in a financial transaction if the person knows the transaction is designed to avoid or evade the contribution limitations of Campaign Reporting Act, or conceal or disguise the source of the contribution to avoid reporting requirements. It also provides that it is unlawful to create, establish or organize more than one organization with the intent to avoid or evade the contribution limits, or conceal or disguise the source to avoid reporting.
    - The amount of the contribution determines the level of the crime:
        1) 2nd degree felony: contributions total more than $100,000;
        2) 3rd degree felony: contributions total more than $50,000 but not more than 100,000;
        3) 4th degree felony: contributions total more than $10,000 but not more than 50,000;
        4) Misdemeanor: contributions total $10,000 or less.
    - In addition to the criminal penalty, violations of these crimes are also subject to a civil penalty of three times the value of the contribution

The bill also amends the definitions of "political committee", "contribution" and "expenditure".

HB 491 increases the contribution limit for political committees from $500 to $2,300. In other words, a political committee may now receive or expend $2,300 before being required to register with the Secretary of State. Lastly, the bill makes it a 4th degree felony to make or receive contributions made by one person in the name of another person.

FISCAL IMPLICATIONS

The Secretary of State's office notes that there would be some fiscal impact due to additional registration and reporting requirements. It is difficult to estimate the number of entities who would come under the electioneering reporting requirements.

HB 491 creates three new crimes. According to the Administrative Office of the District Attorneys and the Administrative Office of the Courts, amendments to existing laws and the creation of new crimes have the potential to affect the entire criminal justice system by increasing caseloads, thus requiring additional resources to handle the increase.

SIGNIFICANT ISSUES

The SOS is concerned that the definition of electioneering includes communications made during an election year for the office sought by the candidate. This time frame appears to exceed the

time frames considered to be electioneering in federal law or case law. The SOS also finds that there needs to be clarification as to which entities would fall under the definition of "campaign committee" and which entities would fall under the definition of "political committee" under this bill, as well as which entities would be excluded from both definitions. The definition of "political committee" speaks in terms of the "nomination, election or defeat of a candidate". It is not clear whether an entity that worked for the nomination, election or defeat of multiple candidates would be considered to be a "political committee".

The Attorney General's Office provided the following background information:

> This bill addresses N.M. Youth Organized v. Herrera, 611 F.3d 669 (10th Cir. N.M. 2010) which struck down parts of New Mexico's Campaign Reporting Act as unconstitutional. The bill also addresses Citizens United v. FEC, 130 S. Ct. 876 (2010), which, for the first time, allowed corporate entities to spend unlimited amounts of money for independent expenditures in political elections. In response to Citizens United, eight states immediately enacted laws to require disclosure of either independent expenditures (three states) or electioneering communications (five states).
>
> This bill adopts the definition of "electioneering communications" from the Federal Election Campaign Act, 2 USCS § 434**.** The US Supreme Court has repeatedly upheld the constitutionality of this definition. McConnell v. FEC, 540 U.S. 93 (2003); FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007) and Citizens United. As a result, thirteen states have adopted this definition from federal law and currently require disclosure of "electioneering communications" (Alaska, Colorado, Iowa, Maine, Massachusetts, North Carolina, Ohio, Oklahoma, South Carolina, South Dakota, Utah, Washington, and West Virginia).
>
> Since Buckley v. Valeo, 424 U.S. 1 (1976), it had been widely accepted that government could only regulate speech that "expressly advocate[ed] the election or defeat of a clearly identified candidate." (In fact, most states have adopted the "express advocacy" definition in their campaign laws,) Not only has the Court soundly criticized this standard in McConnell v. FEC, but in Citizens United the Court rejected this requirement altogether when government chooses to regulate "electioneering communications":
>
> > "As a final point, Citizens United claims that, in any event, the disclosure requirements in § 201 **must be confined to speech that is the functional equivalent of express advocacy.** The principal opinion in WRTL [Wisconsin Right to Life] limited 2 U.S.C. § 441b's restrictions [i.e. ban] on independent expenditures to express advocacy and its functional equivalent. Citizens United seeks to import a similar distinction into BCRA's [Bipartisan Campaign Reform Act] disclosure requirements. **We reject this contention**.
> >
> > The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech. In Buckley, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. In McConnell, three Justices who would have found §

> 441b to be unconstitutional nonetheless voted to uphold BCRA's disclosure and disclaimer requirements. 540 U.S., at 321, (opinion of Kennedy, J., joined by Rehnquist, C. J., and Scalia, J.). And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself. United States v. Harriss, (1954) (Congress "has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose"). **For these reasons, we reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.**

Citizens United at 915 (citations omitted) (emphasis added).

And in response to the US Supreme Court's heightened scrutiny and criticism of campaign laws that impose criminal penalties on First Amendment speech, this bill abolishes the criminal penalties and only includes a criminal penalty for the serious crime of unlawful circumvention of contribution limits and disclosure requirements.

Finally, this bill cleans up the definition of "political committee" which has been struck down by both the US Supreme Court in Buckley v. Valeo and the 10th Circuit Court of Appeals in N.M. Youth Organized v. Herrera.

TECHNICAL ISSUES

The SOS also points out that the term "political purpose" is removed from 1-19-26.1 NMSA 1978 under this bill regarding registration for political committees, but remains in Section 1-19-34, which appears to create a contradiction regarding political committees.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The AGO cautions that New Mexico has already experienced campaign "donations" being funneled through non-profit corporations for use in campaign communications. As a result of the ensuing litigation, New Mexico's Campaign Reporting act was struck down by N.M. Youth Organized v. Herrera, 611 F.3d 669 (10th Cir. N.M. 2010). Without a change to New Mexico's laws, anonymous entities will continue to act as secret conduits for large campaign contributions, especially given that New Mexico just enacted the first ever limits on campaign contributions that go into effect this next election cycle.

AMENDMENTS

The AOC recommends that the judicial performance evaluation commission's evaluations be listed as not included in electioneering communication. The Supreme Court's Orders of 2/12/97 and 8/25/99 established the judicial performance evaluation program to improve the performance of New Mexico's judges and to provide credible information to New Mexico voters on all judges standing for retention. The program does not apply to judges running in partisan elections. The commission completes a written narrative profile for each judge standing for retention. The commission must provide one of the following recommendations: "Retain" or "Do Not Retain." The narrative is an overall assessment of a judge, as well as specific strengths (if any) and

specific weaknesses (if any). Narrative profiles are released to the public at least 45 days before the retention election as required by the Supreme Courts' Orders and Rules Governing the Judicial Performance Evaluation Commission, SCRA 1986, 28-201 to 28-206. The judicial performance evaluation commission is not a political committee but is mandated by the Supreme Court to provide judicial performance evaluation information to the voters of New Mexico. The commission currently operates off its non-reverting general funds or state general funds. Section 34-9-18 NMSA 1978 allows the judicial performance evaluation fund to consist of appropriations, gifts, grants, donations and bequests made to the fund.

AOC suggests adding to page 8, line 2, "(b) the judicial performance evaluation commission's evaluations on the appellate, district and metropolitan court judges standing for retention conveyed either in print, website, radio, television broadcast or other electronic means." Then (b) becomes (c), (c) becomes (d), and (d) becomes (e).

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