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

		ORIGINAL DATE	02/25/11		
SPONSOR	HVEC	**LAST UPDATED**	03/05/11	**HB**	604/HVECS
SHORT TITLE	Election Contributions & Express Advocacy			**SB**	
				ANALYST	Aledo

APPROPRIATION (dollars in thousands)

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

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HB155, HB 491, SB181 and SB 547

SOURCES OF INFORMATION
LFC Files

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

No Response From
General Services Department (GSD)

SUMMARY

Synopsis of HVEC Substitute

House Voters & Elections Committee Substitute for House Bill 604 attempts to prevent "pay-to-play" and other forms of government corruption by limiting direct contributions from lobbyist, principals of state contractors and principals of prospective state contractors. This bill also incorporates measures to increase transparency in the electoral process. HB 604 adds four new sections to the Campaign Reporting Act.

Section 1 prohibits lobbyists from making campaign contributions to a candidate for nomination or election to a state public office, a campaign committee of a candidate for state public office or a state-level or county-level political party committee. This Section does not prohibit a lobbyist's employer from making contributions or expenditures on behalf of a candidate, nor does it prohibit a lobbyist from contributing to his/her own campaign.

Section 2 prohibits principals of state contractors and prospective state contractors from making

campaign contributions to a candidate for nomination or election to a state public office, a campaign committee of a candidate for state public office or a state-level or county-level political party committee. Like the lobbyist provision above, this section, does not prohibit a principal of state contractors or prospective state contractors from making contributions to his/her own campaign. Furthermore, this section specifically states that the provisions in this section do not limit the provisions of other statutes or agency rules that may further limit contributions from a principal of a state contractor or prospective state contractor.

Section 3 requires a person, other than a candidate to disclose contributions and expenditures to the Secretary of State for "express advocacy" and the "functional equivalent of express advocacy". The disclosure is required if the price of the communication exceeds $2,000 and the communication occurs within thirty days before a primary election or sixty days before a general election. The disclosure report is required to include:

1) the name and address of the person making the communication and the responsible officer who authorized the communication;
2) a digital or print copy of the communication;
3) the source of the funds for the communication including:
    a. general treasury funds; and
    b. special solicitations

The report must be filed within two business days of the date the communication is first distributed. Section 3, Subsection D also specifies that the provisions in this section do not apply to voter guides allowed by the IRS Code to be distributed by 501(c)(3), communications appearing in a news story, commentary or editorial distributed through print or electronic media or any broadcasting station, unless the facilities or media are owned by any political party, political committee or candidate, or communications from an organization to its own members or to persons who have requested that the organization send them information, including information conveyed on an organization's website.

Section 4 requires a person, other than a candidate, who expends more than $2,000 on a communication or a series of communications within thirty days before a primary election or sixty days before a general election that constitutes express advocacy or functional equivalent of express advocacy to include a disclaimer on the communication. The communication disclaimer must include the words "authorized by" and identify the responsible officer as well as the words "paid for by" and the name of any person who paid for the communication. There is also a requirement to include a statement that the communication is not authorized by any candidate or candidate's campaign committee. The disclosure is required to be printed clearly and legibly on print media, and spoken at the end of a broadcast communication.

Lastly, HB 604 adds the following definitions to the Campaign Reporting Act:

- express advocacy
- functional equivalent of express advocacy
- lobbyist
- political committee
- principal of a state contractor or prospective state contractor
- prospective state contractor

- state agency
- state contract
- state contractor
- state public office

FISCAL IMPLICATIONS

The SOS stated that Section 3 would require the SOS to develop reporting process for express advocacy or the functional equivalent communications. According to the SOS, materials for the process of reporting or upgrades to the current Campaign Finance Information System (CFIS) would be necessary if the reports were filed electronically. A new module of this type would cost an estimated twelve thousand dollars ($12,000) based on the most recent information obtained from the contractor for that program, as well as an additional annual maintenance cost of one thousand dollars ($1,000).

Although the bill does not require electronic submission of the reports, the SOS states that manual processing of the reports would be time consuming and may require additional staff. HB 604 does not contain an appropriation. The SOS states that implementation would not be possible within its existing budget prior to the effective date of July 1, 2011.

By prohibiting lobbyists and principals of state contractors and prospective state contractors from making political contributions, HB 604 has the potential to considerably reduce the number of lobbyist reports the SOS must process yearly, potentially leading to cost savings for the SOS.

SIGNIFICANT ISSUES

The Secretary of State notes that the intent of the bill is unclear regarding prohibiting lobbyists and contractors from making contributions to any political committee. The SOS points out that the use of the terms "state- or county-level political party committee" on page 2, lines 3-4, and lines 20-21, create ambiguity in the law. Under existing law, a "political committee" includes "political parties". It is unclear to the SOS if the bill also intends to limit contributions to corporations, labor organizations, trade or professional associations that operate for a political purpose; or is the intent only to restrict contributions to political party committees, which are not separately defined in the Act. The SOS contends that the definition of "political committee" in the bill does not resolve the ambiguity.

The AGO provided the following information:

> Ban on lobbyist contributions:
>
> This bill imposes a far sweeping ban on all lobbyists, regardless of how narrow their lobbying activities are. For example, a legislative lobbyist would be banned under this bill from contributing to the state auditor. The California Supreme Court struck down as unconstitutional a similar ban in Fair Political Practices Commission v. Superior Court of Los Angeles County, 25 Cal. 3d 33, 45 (1979) ("While either apparent or actual corruption might warrant some restriction of lobbyist associational freedom, it does not warrant total prohibition of all contributions by all lobbyists to all candidates.") And more recently, the 2nd Circuit Court of Appeals struck down a similar ban. Green Party of Conn. v. Garfield, 616 F.3d 189 (2d Cir. 2010).

Ban on contractor contributions

The ban on contractors suffers from the same constitutional infirmity as the ban on lobbyists—the ban is overly broad. The ban is not "branch specific"; for example, a contractor is banned from donating to a legislator even though the contractor only has a contract with the Auditor's office. See Green Party of Conn. v. Garfield, 616 F.3d 189 (2d Cir. 2010) (Upholding only a "branch specific" ban on contractor contributions.)

Furthermore, the bill may present First Amendment speech problems when it comes to prohibitions on contributions by spouses and dependent children of contractors. The US Supreme Court struck down a wholesale ban on contributions by minors as unconstitutional McConnell v. FEC, 540 U.S. 93, 232 (2003).

Campaign Disclosure

This bill follows what two other states have done by requiring disclosure of "express advocacy" and "functional equivalent of express advocacy" campaign communications. "Express advocacy" is a term of art developed by the US Supreme Court in Buckley and "functional equivalent of express advocacy" is another term of art first mentioned by the US Supreme Court in McConnell v. FEC, 540 U.S. 93 (2003) and then expanded in Wisconsin Right to Life, Inc.

After the Buckley case the Court approved of this "express advocacy" language for campaign disclosure laws in, twenty states amended their statues to regulate "express advocacy". And since McConnell and Wisconsin Right to Life were decided, two states have likewise amended their statutes to add the "functional equivalent of express advocacy".

However, five of the Supreme Court Justices have recently criticized both the "express advocacy" and the "functional equivalent of express advocacy" tests as being either ineffectual or unconstitutionally vague. For example, both Ginsburg and Breyer joined the majority opinion in McConnell criticizing the use of "express advocacy" as essentially useless:

> Buckley's express advocacy line, in short, has not aided the legislative effort to combat real or apparent corruption, and Congress enacted [the McCain-Feingold bill, aka "Bipartisan Campaign Reform Act"] to correct the flaws it found in the existing system.

In McConnell at 193-94 and then later in Wisconsin Right to Life, three additional judges (Scalia, Kennedy, and Thomas) criticized "express advocacy", as well as the "functional equivalent of express advocacy" test, as being unconstitutionally vague:

> There is a fundamental and inescapable problem with all of these various tests. Each of them (and every other test that is tied to the public perception, or a court's perception, of the import, the intent, or the effect of the ad) is impermissibly vague…
>
> The "functional equivalent" test does nothing more than restate the

> question (and make clear that the electoral advocacy need not be express). The test which asks how the ad's audience "would reasonably understand the ad" provides ample room for debate and uncertainty.

Wisconsin Right to Life at 492-93

The AGO asserts the use of "express advocacy" and the "functional equivalent of express advocacy" is unenforceable because of its inherent ambiguity. In fact, the AGO has already litigated this definition in N.M. Youth Organized v. Herrera, 611 F.3d 669 (10th Cir. N.M. 2010) and found its use to be functionally meaningless.

AMENDMENTS

The AGO recommends adopting the definition of "electioneering communications" from the McCain-Feingold bill (aka "Bipartisan Campaign Reform Act"), 2 USCA § 434**.** The US Supreme Court has repeatedly upheld the constitutionality of this definition as "easily understood and objectively determinable". McConnell v. FEC, 540 U.S. 93, 194 (2003); FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007) and Citizens United, 130 S. Ct. 876 (2010).

MCA/mew