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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/16/15

SPONSOR Wirth LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Campaign Finance Disclosure SB 384

ANALYST Cerny

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		≥\$ 250.0			Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates House Bill 278, Campaign Finance Disclosure

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
Office of the Attorney General (AGO)  
Secretary of State (SOS)

### SUMMARY

#### Synopsis of Bill

Senate Bill 384 amends, adds new material, and repeals sections of the Campaign Reporting Act (CRA) Sections 1-19-25 to 36, NMSA 1978. It brings the CRA into compliance with the relevant federal court decisions and Attorney Generals’ opinions by repealing unconstitutional provisions of the Act. It also establishes constitutionally permissible provisions for independent expenditures and coordinated expenditures, and creates new categories of report filers for independent expenditures and covered transfers.

**Section 1--Reports by persons who are not political committees or candidates:** The first section requires a person who makes an “independent expenditure” or “covered transfer” “not otherwise required to be reported” under the CRA, in an amount that exceeds \$1000 in a calendar year to file a report with the SOS within 3 days of making the expenditure or transfer. This section creates a reporting requirement for persons or entities who are not candidates, campaign committees or political committees when they make political expenditures that meet the definitions of “covered transfer” or “independent expenditure”

If the independent expenditure or covered transfer is for \$3000 or more, and is made within 14 days of a statewide election, it must be reported within 24 hours. The report shall identify the person making the expenditure, the recipient, and the amount or a reasonable estimate of the amount. If the person making the transfer received contributions that were “earmarked” for the expenditure, the identity of the contributor who earmarked the funds must be disclosed.

**Section 2--Disclaimers in Ads:** The bill repeals unconstitutional sections of the CRA regarding disclaimers, and enacts new provisions. Campaign expenditures, coordinated expenditures or independent expenditures for advertisements that exceeds \$3,000 in a calendar year must contain the (1) name of the authorizing candidate or campaign committee, or if neither of those apply, the name and phone number or web address of the person who authorized and paid for the advertisement. If the advertisement is an independent expenditure, then the advertisement must list the top three funders. If the advertisement is transmitted by audio media, the disclaimer must be clearly spoken. The bill exempts certain types of advertising from such reporting and also requires disclaimers to be included in the types of advertising that are covered.

**Section 3--Coordination of Expenditures:** This section provides that an expenditure for an advertisement that is (1) express advocacy or electioneering and (2) that is made is “cooperation, consultation or concert” with a candidate, campaign committee or political party is a “coordinated expenditure”, and is considered a contribution to the candidate or political party.

Section 3 also gives examples of behavior that meet the level of conduct required to be considered coordination. If a person meets that standard of conduct, then paying for an advertisement that meets certain conditions will be considered a “coordinated expenditure.”

The advertisement must either: promote, support, attack or oppose a clearly identified candidate; or refer to a clearly identified candidate (usually referred to as “express advocacy); can reasonably be seen by at least 500 persons eligible to vote for the candidate and is published or disseminated within 30 days before the primary or within 60 days before the general election (generally referred to as “electioneering”).

#### **Section 4--Definitions**

Section 4 deletes the definition of “advertising campaign” and establishes new definitions of “advertisement,” “ballot measure,” “campaign expenditure,” “coordinated expenditure,” “covered transfer,” “independent expenditure” and “political party.” It amends the definitions of “bank account,” “campaign committee,” “candidate,” “contribution,” “expenditure,” “political committee” and “proper filing officer.” The definition of a “political committee” has significant amendments and includes committees whose primary purpose is to make independent expenditures, contributions to candidates or coordinated expenditures.

**Section 5--Registration of Political Committees:** Section 5 subsection B requires political committees to register within 3 days of receiving, contributing or spending \$1,000 (instead of the previous threshold of \$500) for a political purpose. It deletes the existing provision that exempts political committees from registering who are located in another state and who are registered with the Federal Election Commission.

Section 6 contains clean up language. Section 7 requires reports to be filed by midnight rather than the existing deadline of 5:00 pm. The supplemental report contribution minimum is changed to \$1,000 (up from \$500) for non-statewide races, and \$3,000 (up from \$2,500) for

statewide races. The bill adds a provision for reporting of independent expenditures during the last week of the election cycle.

The bill amends 1-19-31 to add a 12-month provision to the reporting requirement by limiting the “not previously reported” provision to those transactions that were not previously reported in the last 12 months. The bill prohibits expenditures that are payable to cash or bearer. It amends 1-19-34 to all for multiple bank accounts.

The bill increases the aggregate anonymous contributions to \$3,000 for statewide offices per election and \$1,000 for all other races per election. With regard to contribution limits, the bill changes the contribution limits so that all offices are on a two-year cycle.

It provides that contribution limits do not apply to political committees that make only independent expenditures, or to any contribution made to a bank account for only independent expenditures.

The bill extends until midnight the time for filing reports of all expenditures made, contributions made or received on certain dates, including independent expenditures made after 5:00 pm on the Friday before a primary or general election; expenditures made and contributions made or received on or before the 30th day after a primary election; and expenditures made and contributions made or received on or before the 25th day after the general election and not previously reported.

The bill would increase the civil penalty that may be imposed for each violation that involves unlawful solicitation or the making or acceptance of an unlawful contribution from \$250 to \$1,000 and for each violation of any provision of the CRA from \$50 to \$1,000, and for a total not to exceed \$20,000 (up from \$5,000) under each provision, as well as provides for imprisonment of not more than one year.

Effective date of the bill will be July 1, 2015.

## **FISCAL IMPLICATIONS**

SB 384 carries no appropriation.

This bill will require significant enhancements to the Campaign Finance Information System (CFIS) or the construction of a new system to accommodate the reporting. SOS analysis states that the cost of such a system is estimated at \$250,000. However, the SOS may be able to partner with a non-profit entity to obtain source code and develop a new system for less than \$100,000. The SOS recommends an appropriation to accommodate all necessary CFIS enhancements.

According to AGO analysis, SB 384 may result in indeterminate expenditures to the AGO, as the AGO is authorized, with or without a referral from the Secretary of State, to institute a civil action for violations or to prevent violations of the CRA.

Enforcement of the existing provisions of the act represents a significant risk of litigation 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 \$160,000 per lawsuit.

## SIGNIFICANT ISSUES

SB 384 will address recent court decisions that have invalidated key parts of NM’s campaign reporting laws and does so with disclosure requirements that appear to be in conformity with applicable and relevant court rulings in the 10<sup>th</sup> Circuit and other jurisdictions around the country, according to the AGO.

The disclosure requirements in the bill seem designed specifically to address the controversial *Citizens United* decision of the U.S. Supreme Court, which allowed corporations and other entities to make election-related expenditures but also indicated that the best available safeguard to address such expenditures was to require full disclosure of their sources of funds.

The bill will require third-party independent groups, such as PACs, that make expenditures affecting election campaigns to disclose contributions and expenditure in a manner consistent with the disclosures required of candidates and political parties. The bill will require political committees to appoint and maintain a treasurer and file a statement of organization within 3 days of receiving, contributing or expending \$1,000. Political committees located in other states and registered with the Federal Election Commission would no longer be exempt from this filing requirement.

SB 384 addresses the issue of “covered transfers”, where nonprofit or other groups may seek to avoid disclosures by transferring funds for expenditures intended to affect elections from one group to another. The bill will require relevant disclosures involving such “covered transfers”.

SOS analysis states:

**Repeal of Sections 1-19-16 and 1-19-17.** The New Mexico Attorney General has opined these sections are unconstitutional and has declined to enforce those provisions for a number of years. The bill adds new disclaimer provisions for all political advertising, whether run by a candidate, political committee or person making independent expenditures. The provisions for verbal disclaimers may require too long of a disclaimer on 30 second ads, based on a recent ruling from Wisconsin.

**Independent Expenditures and Coordinated Expenditures:** Spending by entities who are independent from candidates has grown significantly since 2010, and under federal law, is not subject to contribution limits. In 2012, the SOS was enjoined from enforcing certain provisions of the CRA with regard to independent expenditures. The same injunctive order in *Republican Party v. King* determined that the CRA's contribution limits would apply to coordinated expenditures. In the absence of definitions of independent expenditures and coordinated expenditures within the existing CRA, the SOS does not have clear guidance regarding enforcement under either the CRA or the case law. This bill removes unconstitutional provisions from the CRA, replaces them with provisions based on the limitations established by the federal courts.

**Covered Transfers:** The bill creates a new type of reporting entity for those persons making a “covered transfer.” A covered transfer is essentially an earmarked contribution to someone who will transfer that contribution to a candidate or political committee. The

SOS has not had any reporting of these types of transfers in the past.

Covered transfers are not, by virtue of their definition in the bill, subject to contribution limits. However they appear to be subject to the “earmarking” provisions of 1-19-34.7 in Section 12 of the bill and the contribution limits outlined in that section.

A table showing the treatment of each type of entity under this bill is attached.

The bill provides that with or without a referral of the SOS, the AGO or district attorney may institute a civil action in district court if a violation has occurred or to prevent a violation from occurring. Relief could include a permanent or temporary injunction, a restraining order or other appropriate order including a civil penalty of up to \$1000 for each violation not to exceed \$20,000. Allowing the AGO to bring a civil action without referral by the SOS, thus avoids 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.

### **PERFORMANCE IMPLICATIONS**

The bill may result in increase to the civil caseload of the AGO if cases are referred by the Secretary of State or the AG determines that violations of the CRA have occurred or may occur.

### **ADMINISTRATIVE IMPLICATIONS**

The SOS would need to enhance its CFIS in order to accommodate the reporting requirements detailed in the bill.

The CFIS does not have the capability to accept reports with a negative balance; therefore, an enhancement will be required to accommodate the reporting of only expenditures.

Subsection A (1) requires reporting of expenditure within 24 hours of certain independent expenditures. Subsection A (2), requires the same report to be completed within 3 days of certain independent expenditures or covered transfers. CFIS does not currently have the capability to enable reporting at differing and staggering report due dates. The new requirements would require a significant enhancement to CFIS to enable online registration by such persons as well as the additional report availability.

Section 1, subsection B (2) provides that if no monetary value can be assigned to a particular independent expenditure or covered transfer, it is sufficient to report instead a description of the services, property or rights furnished through the expenditure. CFIS does not have the capability to accept a “description” in lieu of a monetary value. This will require a significant adjustment to the business rules that developed CFIS to “balance” reports financially.

The political committee statement of organization has additional requirements; it requires the identification of any bank account to be used by the committee be disclosed. CFIS does not have the capability to list more than one bank account per committee, an enhancement will be required to allow for multiple account listings.

The supplemental reporting requirements are not clear; the SOS recommends clarification as there is currently a timing issue. The report currently does not require that contributions received

on Friday before 5:00 pm be reported.

The contents of the report include the opening and closing cash balance for the bank account that is maintained by the reporting individual during the reporting period. This provision need to be clarified to indicate that either the report balances must match exactly what the bank account balance is, or should there be a separate place in CFIS for this entry to be made. If a separate entry is required, an enhancement to CFIS will be required.

CFIS does not have the capability to track and monitor aggregate contributions from all contributors. The SOS recommends an appropriation to allow for this enhancement to provide an enforcement mechanism for contribution limits.

## **DUPLICATION**

HB 278 is a duplicate of this bill.

## **TECHNICAL ISSUES**

SOS analysis states that Section 1 discusses different reporting triggers that make the bill difficult to follow, further, the bill requires that the independent expenditures and covered transfers be reported, but it does not require a registration.

The aggregate limit for anonymous contributions for political committees also may need to be included.

The political committee statement of organization requires the identification of any bank account to be used by the committee be disclosed. The SOS suggests clarification on this requirement. The information contained in CFIS is public and no account number should be included.

AGO analysis points out these technical issues:

1. Given the amendments in Section 1 regarding civil penalties, would it not be best to combine subsections B and C since the new penalties (\$1,000 per violation to a maximum of \$20,000) will now apply to all violations of the of the Act, whereas in the current law the penalties differ for (i) unlawful solicitation and the making or acceptance of an unlawful contribution (current subsection B), and (ii) all other violations of the Act (current subsection C)?
2. The definition of “political purpose” in proposed amendment to Section 1-19-26, Definitions, uses the word “purpose” in the definition itself. Should that be revised so that definition reads “political purpose” means an attempt to support or oppose the nomination or election. . . .”?

## **OTHER SUBSTANTIVE ISSUES**

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 percent) are supportive of this measure, with 63 percent saying they *strongly support* [italics theirs] the proposal compared to just 9 percent 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 percent), independents (87 percent) and Republicans (82 percent) 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 percent confidence level provides a maximum margin of error of approximately 4.5 percent.” A complete copy of the survey may be found here:

[http://www.commoncause.org/states/new-mexico/research-and-reports/NM\\_010114\\_Survey\\_MiP\\_polling.pdf](http://www.commoncause.org/states/new-mexico/research-and-reports/NM_010114_Survey_MiP_polling.pdf)

CAC/bb/aml

ENTITY	Registration Required	REPORTING REQUIREMENTS	TIME TO FILE	Disclaimer Required on Advertising <sup>i</sup>	Subject to Contribution Limits on contributions received
Not a political committee- but makes independent expenditures "IEs" or covered transfers (CT) \$1000 or more in 12 months	No	1. Name and Address of Entity 2. Name and Address of Person to whom IE or CT made 3.Amount or Estimate of Amount 4.Date 5.Purpose 6 *Contributor of any earmarked funds	3 Days after making the expenditure or transfer	No	No – IEs  Covered transfers- no, but may constitute an "earmarked" contribution under 1-19-34.7
Not a political committee but makes IEs or covered transfers \$3000 or more in 12 months	No	All of the above, plus (1) if IE or CT made from a segregated bank acct set up for making IEs or CTs -name and address of each contributor over \$200 to acct; or (2) Not a segregated account- name and address of each contributor over 5K in 12 months, unless contributor requested funds not be used for IEs, CTs, campaigns, political committees or IE committees	Three days after making an expenditure unless it is within 14 days of a primary or general, and then within 24 hours.	Yes- the name and phone number or web address of the person who authorized and paid for the Ad ; plus the top three funders identified in any report to SOS; <b>at any time?</b>  or if fewer than 3 reported, then those reported on any report in last 12 months	IEs – No  Covered transfers- no, but may constitute an "earmarked" contribution under 1-19-34.7
Candidate/Campaign Committee	No- begin reporting upon receiving 1k nonstatewide office/3k statewide office	All contributions and expenditures	Begin reporting upon meeting the definition of a Candidate - 10 reports per cycle (2 in odd years; 8 in even years)	Yes, but only after hitting 3K in 12 month period; disclose the name of the candidate who authorized	Yes

Political Party-qualified under 1-7-2 (meets definition of political committee)	Yes within 3 days of receiving contributing or expending over \$1K	All contributions and expenditures	Begin reporting upon registration – 10 reports per cycle(2 in odd years; 8 in even years)	Yes, but only upon reaching 3K in expenditures in 12 month period; disclose name, phone number or web address of person who authorized and paid for ad;  For an independent expenditure, must disclose top 3 funders of the IE	Yes
Political Committee- primary purpose is to make contributions to candidates, campaign committees, political committees or make coordinated expenditures	Yes within 3 days of receiving contributing or expending over \$1K Yes	All contributions and expenditures	Begin reporting upon registration 10 reports per cycle (2 in odd years; 8 in even years)	Yes, but only upon reaching 3K in expenditures in 12 month period; disclose name, phone number or web address of person who authorized and paid for ad;  For an independent expenditure, must disclose top 3 funders of the IE	Yes
Independent Expenditure – primary purpose is to make independent expenditures; and has received over 3k in past 12 months. Committee (meets the definition of a political committee)	Yes within 3 days of receiving contributing or expending over \$1K Yes	All contributions and expenditures	Begin reporting upon registration 10 reports per cycle (2 in odd years; 8 in even years)	Yes; disclose name, phone number or web address of person who authorized and paid for ad;  must disclose top 3 funders of the IE	No- does not apply to a committee that makes “only IEs” (versus primary purpose) or to an account segregated for IEs.

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