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FISCAL IMPACT REPORT

SPONSOR Wirth **ORIGINAL DATE** 03/02/11
LAST UPDATED 03/18/11 **HB** _____

SHORT TITLE Election Code Definitions **SB** 547/aSJC/aSfI#1

ANALYST Wilson

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total	\$12.0	\$1.0	\$1.0	\$14.0	\$1.0 Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB 155 & HB 491

SOURCES OF INFORMATION

LFC Files

Responses Received From

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

Other Response Received From

New Mexico Common Cause

SUMMARY

Synopsis of SFI#1 Amendment

Senate Floor Amendment #1 modifies the definitions of "coordinated expenditure" and "independent expenditure" with respect to political advertising. The amendment would change the period of time from 60 to 30 days for both primary and general elections in which certain advertising would be a permitted expense and specifies that the 30 day period begins before the first day that voters may vote on an absentee ballot in person at the county clerk's office.

Synopsis of SJC Amendment

The Senate Judiciary Committee amendment to Senate Bill 547 adds RECONCILING MULTIPLE AMENDMENTS TO THE SAME SECTION OF LAW IN LAWS in the short title and does the following:

The report required for independent expenditures shall include the amount and the name and address of the contributor of each contribution of \$100 or more that was made in

response to a solicitation that refers to the independent expenditure to be covered by the report and requests contributions to fund that independent expenditure;

If an advertisement is not authorized by any candidate or campaign committee, the report must contain the address and phone number of a responsible officer;

Advertisement does not include an internal political communication primarily limited to the contributors to a qualified political party, political committee, independent expenditure committee or similar enterprise; and

A qualified political party or an association of two or more persons the primary purpose of which is to make contributions to candidates, campaign committees or political committees or coordinated expenditures or any combination thereof.

Synopsis of Original Bill

Senate Bill 547 creates a new section of the Campaign Reporting Act.

It defines an independent expenditure as the payment or transfer or promise to pay or transfer money or other thing of value of \$300 or more that is

- 1) made by a person other than a candidate or campaign committee;
- 2) not a coordinated expenditure; and
- 3) made to pay for an advertisement that
 - a) expressly advocates the election or defeat of a clearly identified candidate or ballot measure;
 - b) is susceptible to no other reasonable interpretation than as an appeal to vote for or against a clearly identified candidate or ballot measure; or
 - c) refers to a clearly identified candidate or ballot measure and is published 60 days before the general election 30 days before the primary election and can reasonably be expected to be seen or heard by at least 500 people eligible to vote for the candidate or ballot measure.

The bill requires independent expenditures to be reported and filed electronically within 3 days of making such expenditure. The person making the expenditure is required to report:

- 1) the name and address of the person making the expenditure;
- 2) the name and address of the person to whom the expenditure was made and the amount, date and purpose of the expenditure. If no reasonable estimate of the amount is practicable, it is sufficient to report a description of the services, property or rights furnished through the expenditure.
- 3) the amount and name and address of the contributor for each contribution of \$100 or more that was earmarked by the contributor to be used to make the expenditure and made in response to a solicitation for contributions to be used to make the specific independent expenditure.

The bill provides that the reports must be filed electronically, and that exceptions may be made on a case- by-case basis for a person who lacks the technological ability to file electronically.

The bill also creates a definition of coordinated expenditure to mean a payment or transfer or promise to pay or transfer money or other thing that is:

- 1) made by a person other than a candidate or campaign committee;
- 2) made at the direction, suggestion or request of a candidate, campaign committee or political committee other than the person making the expenditure; or by any agent or representative of a candidate, campaign committee or political committee other than the person making the expenditure;
- 3) in order to pay for an advertisement that
 - a) expressly advocates the election or defeat of a clearly identified candidate;
 - b) is susceptible of no other reasonable interpretation than as an appeal to vote for or against a clearly identified candidate or
 - c) refers to a clearly identified candidate, is published or disseminated within 60 days before the general election or 30 days before the primary election at which the candidate is on the ballot and can reasonably be expected to be seen or heard by at least 500 persons eligible to vote for the candidate.

The bill creates a new section on disclaimers in advertisements which provides that a person who makes an expenditure of \$300 or more for an advertisement shall ensure that the ad contains:

- 1) the name of the candidate or campaign committee that authorized the advertisement'
- 2) if not authorized by a candidate or campaign committee, then it must contain the name, the phone number, email address or web address of the person who paid for the ad.

The disclaimers are required to be legible on visual media. If on audio media, the statement is required to be clearly spoken at the end of the communication. If both, it is required to be both legible and clearly spoken.

The definition of advertisement is changed to mean a communication referring to a candidate, ballot measure or election that is published, disseminated, distributed, or displayed to the public by print, broadcast, satellite, cable or electronic media, including recorded phone messages, mailers, handbills, signs and billboards and that can reasonably be expected to be seen or heard by at least one thousand persons.

The term advertisement does not include an internal political communication primarily limited to the contributors of a qualified political party, political committee, independent expenditure committee, officers, management, staff or stockholders of a corporation or similar enterprise, or the members of a labor organization or other membership organization. It also does not include communications appearing in a news story, commentary or editorial distributed through print, broadcast, satellite, cable or electronic media unless such media are owned or controlled by a candidate, political party, political committee or independent expenditure committee.

The bill creates a definition of ballot measure to mean a constitutional amendment or other question submitted to the voters in an election. It also creates a definition of "campaign expenditure" to mean payment or transfer or promise to pay or transfer money or other thing of value that is made by a campaign committee or by a candidate in furtherance of the candidate's campaign in an election.

It redefines political committee to mean a qualified political party or an association of two or persons the primary purpose of which is to make coordinated expenditures.

FISCAL IMPLICATIONS

Establishing a new electronic reporting module on the SOS's website is estimated to cost a minimum of \$12,000, plus approximately \$1000 per year for maintenance, based on the most recent estimates received by the SOS from the vendor. The SOS does not currently have sufficient funds budgeted to implement the module in the current fiscal year before the effective date of July 1, 2011.

SIGNIFICANT ISSUES

The SOS provided the following:

Both the definition of “coordinated expenditure” and “independent expenditure” use the terms “reasonable interpretation”, “reasonably be expected” and “is deemed to constitute” It appears that both of these definitions contain subjective terms, and do not create a bright-line definition of these types of expenditures that the SOS could look to in order to establish whether an expenditure is clearly under the purview of the Campaign Reporting Act.

The provision regarding earmarking of an independent expenditure may be in conflict with 1-19-34.3 NMSA 1978, which provides “It is unlawful for a person to make a contribution in the name of another person and not person shall knowingly accept a contribution made by one person in the name of another person.”

The definition of advertisement to only include one that can “reasonably be expected to be seen or heard by at least one thousand persons” again would involve subjective analysis as to the reasonableness of an expectation and does not appear to provide a bright-line definition of an advertisement.

If a political party sends material to registered members of the party who are not necessarily “contributors”, it is not clear whether or not the material would be excluded from the definition of “advertisement”. The term “contributor” is not defined.

Under the new definition of “political committee”, it does not include an independent expenditure committee. It appears that an independent expenditure committee would be subject to different campaign contributions limits under 1-19-34.7 NMSA than a committee making coordinated expenditures or a political committee.

Under the definition of “advertisement”, paragraph (2), it discusses “media owned or controlled by a candidate, political party, political committee or independent expenditure committee.” Since the definition of political committee means a qualified political party, the use of both terms in the definition of “advertisement” may create ambiguity. Additionally, it is not clear what the term “controlled by” would mean. The term “controlled by” might be subject to different interpretations.

Common Cause believes New Mexico desperately needs “a sensible, sustainable overhaul of the state’s Campaign Reporting Act”. Over the last 40 years, based on a complex and ever-evolving interpretation of the First Amendment to the U.S. Constitution, federal courts have severely

restricted what governments can do when attempting to regulate money in politics. Yet in the aftermath of last year’s U.S. Supreme Court decision, *Citizens United v. FEC*, new opportunities have opened up for strong disclosure laws. SB 547 is designed to push right up to the line of what’s constitutionally permissible without stepping over the boundaries drawn by the federal courts. In doing so, the bill creates a strong disclosure system for independent expenditures while at the same time paying careful attention to judicial precedent to ensure that this system will be legally enforceable

RELATIONSHIP

SB 547 relates to HB 155, Disclosure of Funds for Election Advocacy and
HB 491, Electioneering Communications Contributions

Common Cause notes of the three political advocacy disclosure bills being considered this legislative session, SB 547 is the only one that would implement robust yet sustainable disclosure requirements. They claim that it does no good to pass ‘tough’ campaign finance laws that are going to be immediately invalidated in federal court. Competing bills either go too far to be legally enforceable such as HB 491 or don’t go far enough in disclosing this kind of campaign-related spending such as HB 155.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

According to the AGO, 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*. 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. Whether or not this bill adequately ensures disclosure is a question.

DW/mew:svb