

**Department of Legislative Services**  
 Maryland General Assembly  
 2011 Session

**FISCAL AND POLICY NOTE**  
**Revised**

House Bill 93

(Delegate Cardin, *et al.*)

Ways and Means

Education, Health, and Environmental Affairs

**Election Law - Independent Expenditures and Electioneering Communications - Reporting**

This bill establishes reporting requirements for specified independent expenditures for campaign material that is a public communication and disbursements for specified electioneering communications.

The bill takes effect December 1, 2011, and only applies to independent expenditures or disbursements for an electioneering communication made after December 1, 2011.

**Fiscal Summary**

**State Effect:** General fund expenditures increase by \$96,700 in FY 2012 for the cost to hire a full-time prosecutor and a full-time investigator. General/special fund expenditures to implement an online campaign finance system may increase in FY 2012 by an indeterminate amount. General fund revenues may increase due to the bill’s penalty provisions from cases heard in the District Court. Future years reflect ongoing personnel costs and potential penalty revenues.

(in dollars)	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
GF Revenue	-	-	-	-	-
GF Expenditure	\$96,700	\$164,600	\$172,900	\$181,600	\$190,800
GF/SF Exp.	-	\$0	\$0	\$0	\$0
Net Effect	(\$96,700)	(\$164,600)	(\$172,900)	(\$181,600)	(\$190,800)

*Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect*

**Local Effect:** Potential increase in revenues due to the bill’s penalty provisions from cases heard in the circuit courts.

**Small Business Effect:** Potential minimal.

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## Analysis

### **Bill Summary:**

#### *Reporting Dates and Reporting Periods*

A person who makes aggregate independent expenditures for campaign material that is a public communication, or disbursements for electioneering communications, relating to a candidate, of \$10,000 or more in an election cycle, must file an independent expenditure or electioneering communication report, respectively, with the State Board of Elections (SBE) on the next date a campaign finance entity of a candidate is required to file a campaign finance report. If the campaign material or electioneering communications instead relate to a ballot issue, the person must file an independent expenditure or electioneering communication report on the next date a ballot issue committee is required to file a campaign finance report. The report must cover the period from the beginning of the election cycle through the last day of the reporting period specified in statute for the campaign finance report filed by a campaign finance entity or ballot issue committee.

A person who subsequently makes aggregate independent expenditures for campaign material that is a public communication, or disbursements for electioneering communications, of \$10,000 or more following the end of the reporting period of the person's previous independent expenditure or electioneering communication report, respectively, must file an additional report in the same manner, but with the reporting period beginning with the closing date of the previous report.

A person is considered to have made an independent expenditure or a disbursement for an electioneering communication if a person has executed a contract to make an independent expenditure or a disbursement. The cost of creating and disseminating campaign material or electioneering communications, including any design and production costs, must be considered in determining the aggregate amount of independent expenditures for campaign material that is a public communication, or disbursements for electioneering communications, made by a person.

A contribution to a campaign finance entity is not considered to be a disbursement for electioneering communications.

### *Certain Definitions*

The existing definition of “independent expenditure” is modified by the bill to mean an expenditure by a person expressly advocating the success or defeat of a clearly identified candidate or ballot issue if the expenditure is not made in coordination with, or at the request or suggestion of, a candidate, a campaign finance entity of a candidate, an agent of a candidate, or a ballot issue committee. The bill specifies that “clearly identified” means the name of the candidate appears; a photograph or drawing of the candidate appears; or the identity of the candidate or ballot issue is apparent by unambiguous reference.

“Public communication” is defined as a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. The term does not include a news story, a commentary, or an editorial disseminated by a broadcasting station, including a cable television operator, programmer, or producer, satellite television or radio provider, website, newspaper, magazine, or other periodical publication, including any Internet or electronic publication, that is not controlled by a candidate or political party, nor does it include a candidate debate or forum.

“Electioneering communication” means a broadcast, cable, or satellite communication that (1) refers to a clearly identified candidate or ballot issue; (2) is made within 60 days of an election day on which the candidate or ballot issue is on the ballot; (3) is capable of being received by 50,000 or more individuals in the constituency where the candidate or ballot issue is on the ballot; and (4) is not made in coordination with, or at the request or suggestion of, a candidate, a campaign finance entity of a candidate, an agent of a candidate, or a ballot issue committee. “Electioneering communication” does not include (1) an independent expenditure; (2) a news story, commentary, or an editorial disseminated by a broadcasting station, including a cable television operator, programmer, or producer, or satellite television or radio provider that is not controlled by a candidate or political party; (3) a candidate debate or forum; or (4) a communication that proposes a commercial transaction.

“Person” is defined to include an individual, a partnership, a committee, an association, a corporation, a labor organization, or any other organization or group of persons. The term does not include a campaign finance entity organized under State campaign finance law.

The terms “mass mailing” and “telephone bank” are also defined by the bill.

### *Content of a Report*

An independent expenditure or electioneering communication report must include:

- (1) the identity of the person making the independent expenditures or disbursements for electioneering communications and any person exercising direction or control over the activities of the person making the independent expenditures or disbursements;
- (2) the business address of the person making the independent expenditures or disbursements for electioneering communications;
- (3) the amount and date of each independent expenditure or disbursement for electioneering communications during the period covered by the report and the person to whom the expenditure or disbursement was made;
- (4) the candidate or ballot issue to which the independent expenditure or electioneering communication relates and, in the case of an independent expenditure, whether it supports or opposes the candidate or ballot issue; and
- (5) the identity of each person who made cumulative donations in excess of \$51 to the person making the independent expenditures or disbursements for electioneering communications during the period covered by the report.

“Donation” is defined as the gift or transfer, or promise of gift or transfer, of money or other thing of value to a person that is made for the purpose of furthering independent expenditures or electioneering communications.

### *Sanctions for Failure to File/Auditing of Reports*

An individual who fails to properly file an independent expenditure or electioneering communication report is subject to the sanctions that apply to the responsible officers of a campaign finance entity. Failure to provide all required information on a report is deemed a failure to file and renders the report overdue if SBE notifies the individual in writing of the deficiencies and a properly corrected report is not filed within 30 days after service of the notice.

The treasurer or other individual designated by an entity required to file an independent expenditure or electioneering communication report must sign each report and is responsible for filing reports in full and accurate detail.

As with campaign finance reports, SBE is given discretion to audit independent expenditure and electioneering communication reports.

### *Dissemination of Reported Information*

An entity required to file an independent expenditure or electioneering communication report must do at least one of the following, unless neither are applicable to the entity:

- if the entity submits regular, periodic reports to its shareholders, members, or donors, include in each report, in a clear and conspicuous manner, the information specified in numbers (3) through (5) in the above description of the required content of an independent expenditure or electioneering communication report for each independent expenditure or disbursement for electioneering communications made during the period covered by the report that must be included in an independent expenditure or electioneering communication report; or
- if the entity maintains an Internet site, post on the site a hyperlink from its homepage to the Internet site where the entity's independent expenditure or electioneering communication report information is publicly available (the hyperlink must be posted within 24 hours of the information being made publicly available on the Internet and remain posted until the end of the election cycle during which the entity filed an independent expenditure or electioneering communication report).

### *Recordkeeping*

A person required to file an independent expenditure or electioneering communication report must keep detailed and accurate records of all independent expenditures for campaign material that is a public communication, or disbursements for electioneering communications, made by the person and all donations received by the person that are for the purpose of furthering independent expenditures for campaign material that is a public communication or electioneering communications. The records must be preserved for two years after the end of the election cycle in which the person filed the report to which the records relate.

### **Current Law:**

#### *Independent Expenditures*

The Election Law Article does not require reporting of independent expenditures, but does define the term as “an expenditure by a person to aid or promote the success or defeat of a candidate if the expenditure is not made in coordination with, or at the request or suggestion of, the candidate, a campaign finance entity of the candidate, or an agent of the candidate.”

Maryland law did briefly require certain independent expenditures to be reported to SBE; specifically, those totaling more than \$10,000 to promote the success or defeat of the constitutional amendment authorizing video lottery terminals in the State, which was voted on at the 2008 general election. (See Chapter 620 of 2008.)

### *Campaign Material*

“Campaign material” is defined as any material that (1) contains text, graphics, or other images; (2) relates to a candidate, a prospective candidate, or the approval or rejection of a question; and (3) is published or distributed. Campaign material includes material transmitted by or appearing on the Internet or other electronic medium and an oral commercial campaign advertisement. Campaign material published or distributed by persons other than a campaign finance entity must include an authority line, set apart from any other message, that states the name and address of the person responsible for the campaign material.

### *Campaign Finance Reporting*

For each election in which a campaign finance entity (including a ballot issue committee) participates, it generally must file campaign finance reports at various times prior to and after the primary and general elections. The reports must contain information required by SBE with respect to all contributions received and all expenditures made by or on behalf of the campaign finance entity during a reporting period. Annual reports generally must also be filed on the third Wednesday in January.

The responsible officers (chairman and treasurer) of a campaign finance entity are subject to late fees for failure to file a campaign finance report. Fees relating to campaign finance reports are paid to SBE and applied to pay the expenses of collection and of audits of campaign finance reports. In addition, a responsible officer of a campaign finance entity who, without cause, does not file a report and pay the late fee within 30 days of being served with a notice of a failure to file by SBE is guilty of a misdemeanor and subject to a fine of up to \$25,000 and/or imprisonment of up to one year.

**Background:** The U.S. Supreme Court, in *Citizens United v. Federal Election Commission* (2010), invalidated federal restrictions on corporate independent expenditures in connection with certain qualified federal elections, causing many states with similar restrictions to consider legislation in 2010 to amend their laws. In addition to legislation introduced to repeal such restrictions, various states with and without restrictions (including Maryland) considered legislation in 2010 that would increase disclosure of independent expenditures. Since the *Citizens United* decision, at least

15 states have enacted laws or adopted regulations addressing independent expenditures, almost all of which focus, at least in part, on increased disclosure.

Disclosure of independent expenditures was also one of the subjects addressed by the Maryland Attorney General’s Advisory Committee on Campaign Finance formed in the fall of 2010. The committee recommended in its January 4, 2011 report that the General Assembly enact legislation requiring individuals or groups not registered with SBE as a political committee (a term used interchangeably with “campaign finance entity” in the Election Law Article) that make an “independent expenditure” or an “electioneering communication” to file a disclosure report with SBE.

**State Fiscal Effect:**

*Office of the State Prosecutor*

General fund expenditures increase by \$96,700 in fiscal 2012, which accounts for the bill’s December 1, 2011 effective date. On an annualized basis, general fund expenditures increase by \$164,600 in fiscal 2013 and by \$190,800 in fiscal 2016. This estimate reflects the cost of hiring one full-time prosecutor and one full-time investigator in the Office of the State Prosecutor (OSP) to investigate and prosecute campaign finance violations associated with the bill’s changes. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses.

According to OSP, the bill creates an entirely new class of expenditures and persons who would be subject to reporting requirements and would probably more than double the volume of election law complaints. OSP indicates that adequate investigation and enforcement will require additional personnel as current staff is working at maximum capacity and will not be able to absorb the additional caseload the bill will produce. OSP currently has one prosecutor who devotes a portion of their time to election law complaints and a part-time investigator position devoted entirely to election law complaints.

Positions	2
Salaries and Fringe Benefits	\$93,138
Computer Workstations	3,000
Supplies	<u>580</u>
<b>Total Fiscal 2012 State Expenditures</b>	<b>\$96,718</b>

Future year expenditures reflect a full salary with 4.4% annual increases and 3% employee turnover as well as 1% annual increases in ongoing operating expenses.

*State Board of Elections*

SBE has issued a request for proposals (RFP) for the development of an online campaign finance reporting system to replace the current software-based system. The 2010 Budget Reconciliation and Financing Act (Chapter 484) authorized the transfer in fiscal 2011 of \$500,000 of the balance in the Fair Campaign Financing Fund (FCFF) to SBE for the purpose of implementing the system. An amount of \$500,000 has been transferred out of the fund and a budget amendment has been processed for that purpose. The 2010 BRFA requires that any of the funds not used for the system revert back to the fund.

The new online campaign finance reporting system is expected to be implemented subsequent to the 2011 Baltimore City elections and the ability for independent expenditures and disbursements for electioneering communications to be reported would be incorporated in the development of the new system. This may increase special fund and/or general fund expenditures for the development of the system. General fund expenditures would potentially increase only if the cost of the system exceeds the \$500,000 in special funds transferred from FCFF.

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**Additional Information**

**Prior Introductions:** SB 543/HB 1029 of 2010, similar bills, received hearings in the Senate Education, Health, and Environmental Affairs Committee and the House Ways and Means Committee, respectively, but no further action was taken on either bill.

**Cross File:** SB 592 (Senator Raskin, *et al.*) – Education, Health, and Environmental Affairs.

**Information Source(s):** State Board of Elections, State Prosecutor’s Office, Maryland Attorney General’s Advisory Committee on Campaign Finance, Department of Legislative Services

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