

Department of Legislative Services
Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 761
Ways and Means

(Delegate Kaiser)

Election Law – Contested Elections

This bill establishes and modifies specified thresholds relating to when a candidate or a registered voter (in the case of a ballot question) can petition for a recount and when a county, as opposed to a petitioner, must pay for the cost of a recount. The bill also establishes provisions governing “contested election committees” and prohibits a person from accepting a donation or making a disbursement relating to a contested election unless the person establishes a contested election committee and discloses donations received and disbursements made by the committee.

Fiscal Summary

State Effect: Sufficient information was not provided by the State Board of Elections (SBE) in time to include in this fiscal and policy note; however, based on estimates for other legislation, general fund expenditures may increase relatively minimally (potentially in the range of \$15,000) in FY 2022 only, to make changes to SBE’s campaign finance reporting system to incorporate contested election committee reporting. Revenues are not materially affected.

Local Effect: Local government expenditures may increase, as discussed below. **This bill may impose a mandate on a unit of local government.**

Small Business Effect: None.

Analysis

Bill Summary:

Recount Thresholds

The bill establishes that a candidate may not petition for a recount if the margin of difference between the number of votes received by an apparent winner and the losing candidate with the highest number of votes for the office is greater than 5% of the total votes cast for those candidates. In addition, a registered voter may not file a petition for a recount if the margin of difference between the number of votes cast for and against the question is greater than 5%.

The bill also changes a threshold defining when a county, and not the candidate who petitioned for the recount, must pay the costs of a recount. Under the bill, a county must pay the costs of the recount in that county if the margin of difference in the number of votes received by an apparent winner and the losing candidate with the highest number of votes for an office is 0.25% (replacing 0.1%) or less of the total votes cast for those candidates.

Contested Election Committees

The bill repeals a provision that establishes that State campaign finance law provisions relating to limits on contributions and transfers to campaign finance entities do not affect the right of an individual to pay reasonable legal expenses associated with maintaining or contesting the results of an election. In place of that provision, the bill establishes provisions governing “contested election committees” and prohibits a person from accepting a donation or making a disbursement relating to a contested election unless the person (1) establishes a contested election committee and (2) discloses the donations and disbursements in accordance with provisions (established under the bill) governing the committees.

“Contested election” means an election subject to a recount or a judicial challenge.

“Contested election committee” means an entity formed for the exclusive purpose of receiving donations and making disbursements relating to a contested election.

The bill establishes various provisions governing contested election committees, including:

- requirements that a statement of organization be filed with SBE, a treasurer of the committee be appointed, a designated bank account be used to receive donations and make disbursements, and detailed and accurate records of donations, disbursements, and outstanding obligations be maintained;

- a limit of \$2,000 on aggregate donations by a person (with the exception of specified donations from the candidate or candidate's spouse), or aggregate transfers by a campaign finance entity, to any one contested election committee (the limit does not apply to a contested election committee established to contest a ballot question election);
- a prohibition against a committee accepting a loan other than a loan from (1) a financial institution or other entity in the business of making loans or (2) the personal funds of a candidate or candidate's spouse if the committee was established to finance a recount of an election in which the candidate was on the ballot;
- a requirement that the treasurer of a committee file specified reports with SBE, electronically, of donations, disbursements, and outstanding obligations of the committee, which SBE must make publicly available on the Internet;
- provisions establishing late filing fees and other sanctions for a failure to file a report, with late filing fees and penalties deposited in the Fair Campaign Financing Fund; and
- a requirement that a committee, before filing a final report, pay all outstanding obligations and dispose of all its remaining assets by returning the remaining balance in the account of the committee to the donors on a pro rata basis.

Finally, under provisions that authorize the governing body of a county to establish a system of public campaign financing for elective offices in the executive or legislative branches of county government, the bill:

- requires that such a system allow a publicly financed candidate to establish a contested election committee under the provisions established by the bill; and
- authorizes such a system to (1) provide public funds to the contested election committee of a publicly financed candidate and (2) provide for more stringent regulation of campaign finance activity related to a contested election committee of a publicly financed candidate.

Current Law:

Election Recounts

A candidate for public or party office who has been defeated based on the certified results of any election conducted under State election law may petition for a recount of the votes cast for the office sought. In addition, a petition for a recount based on the certified results of a question on the ballot in an election may be filed by a registered voter eligible to vote for the question.

The petition must specify that the recount be conducted (1) in all precincts in which the office or question was on the ballot or (2) only in the precincts designated in the petition. A counterpetition may also be filed if the initial petition did not specify all of the precincts in which the office or question was on the ballot and the outcome of the election is changed on completion of the recount.

Each petitioner must pay the cost of a requested recount; however, the petitioner is not liable for the costs of the recount if:

- the outcome of the election is changed;
- the petitioner has gained a number of votes, for the petitioner's candidacy or for or against the question that is the subject of the petition, equal to 2% or more of the total votes cast for the office or on the question, in all precincts being recounted; or
- (1) the margin of difference in the number of votes received by an apparent winner and the losing candidate with the highest number of votes for an office is 0.1% or less of the total votes cast for those candidates or (2) in the case of a question, the margin of difference between the number of votes cast for, and the number against, the question is 0.1% or less.

If the petitioner is not liable for the costs of the recount, a county must pay the costs of the recount in that county.

Judicial Challenges

Title 12, Subtitle 2 of the Election Law Article, authorizes a registered voter, if no other timely and adequate remedy is provided, to seek judicial relief from any act or omission relating to an election, whether or not the election has been held, on the grounds that the act or omission (1) is inconsistent with the Election Law Article or other law applicable to the elections process and (2) may change or has changed the outcome of the election.

A registered voter may seek judicial relief in the appropriate circuit court within the earlier of (1) 10 days after the act or omission or the date the act or omission became known to the petitioner or (2) 7 days after the election results are certified, unless the election was a gubernatorial primary or special primary election, in which case 3 days after the election results are certified.

The Maryland Court of Appeals, in *Suessmann v. Lamone*, 383 Md. 697 (2004), has indicated that, in order to meet the requirement under Title 12, Subtitle 2 that an act or omission may change or has changed the outcome of an election, a litigant must prove, by clear and convincing evidence, a substantial probability that the illegal action may change or has changed the outcome of the election. The court indicated that a substantial probability, while less than 100%, is significantly more than "more likely than not."

Legal Expenses Associated with a Contested Election

Under State campaign finance law, provisions relating to limits on contributions and transfers to campaign finance entities do not affect the right of an individual to pay reasonable legal expenses associated with maintaining or contesting the results of an election.

State Fiscal Effect: Based on estimates provided by SBE for other legislation, general fund expenditures may increase relatively minimally (potentially in the range of \$15,000) in fiscal 2022 only, to make changes to SBE's campaign finance reporting system to incorporate contested election committee reporting.

Local Fiscal Effect: Local government expenditures increase to the extent counties are responsible for the cost of any additional recounts under the bill as a result of the increase in the margin of difference threshold (0.25% instead of 0.1%) defining when a county, and not a candidate who petitions for a recount, must pay the costs of a recount. For illustrative purposes, Montgomery County indicates that it incurred costs of \$737 per precinct and just over \$38,000 total (consisting largely of personnel costs) for a 2018 recount in a district consisting of 52 precincts.

Local government expenditures also increase to the extent counties with public campaign financing systems provide public funds to any contested election committees of publicly financed candidates, as authorized by the bill.

Additional Information

Prior Introductions: None.

Designated Cross File: SB 632 (Senator Kagan) - Education, Health, and Environmental Affairs.

Information Source(s): Office of the State Prosecutor; Judiciary (Administrative Office of the Courts); Carroll, Harford, Montgomery, and St. Mary's counties; Department of Legislative Services

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