

Department of Legislative Services
Maryland General Assembly
2017 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 898

(Delegate Ebersole, *et al.*)

Ways and Means

Education, Health, and Environmental Affairs

Election Law - Campaign Finance - Coordinated Expenditures

This bill establishes standards regarding when a disbursement, or an action to cause a disbursement, to promote the success or defeat of a candidate or a political party at an election is a “coordinated expenditure” subject to existing campaign contribution limits. The bill prohibits a person from making a coordinated expenditure in excess of the contribution limits or a donation to a person for the purpose of furthering a coordinated expenditure in excess of the contribution limits. A candidate or political party is also prohibited from being the beneficiary of a coordinated expenditure in excess of the contribution limits. Penalties are established for violations of the bill, and the State Board of Elections (SBE) is authorized to investigate potential violations.

Fiscal Summary

State Effect: General fund expenditures may increase in certain fiscal years to hire an investigator, depending on the number of potential violations. The cost of a contractual investigator is approximately \$50,000 on an annual basis. Special fund revenues increase, potentially significantly, to the extent penalties are imposed and collected.

Local Effect: None.

Small Business Effect: None.

Analysis

Bill Summary:

Coordinated Expenditures

“Coordinated expenditure” means a disbursement, or an action to cause a disbursement, that promotes the success or defeat of a candidate or a political party at an election and is made in cooperation, consultation, understanding, agreement, or concert with, or at the request or suggestion of, the candidate or political party that is the beneficiary of the disbursement. The bill specifically includes in the definition of “coordinated expenditure” a disbursement for any communication that republishes or disseminates campaign material prepared by the candidate or political party that is the beneficiary of the disbursement.

The bill also establishes circumstances under which a person that makes a disbursement to promote the success or defeat of a candidate or political party at an election is presumed to have made a coordinated expenditure, generally based on the interaction/relationship, or overlap of personnel or professional services vendors, between the person and the candidate or political party. A person may rebut the presumption by presenting sufficient contrary evidence and obtaining a declaratory ruling from SBE before making a disbursement to promote the success or defeat of a candidate or political party at an election.

A person may not be considered to have made a coordinated expenditure solely because the person or the person’s agent engaged in discussions or communications with a candidate regarding a position on a legislative or policy matter, provided there is no communication regarding other specified campaign matters.

“Coordinated expenditure” does not include a disbursement for communications that are not included under the definition of a “public communication,” including news stories, commentary, or editorials disseminated by specified means, internal membership communications by businesses or other entities, and candidate debates or forums.

“Candidate” and “political party” are defined to include associated political committees and agents.

“Person” includes an individual, a partnership, a political committee, an association, a corporation, a labor organization, or any other organization or group of persons. “Person,” however, does not include a political committee that exclusively accepts contributions that are subject to campaign contribution limits.

Investigation and Penalties

SBE is authorized to investigate a potential violation of the bill and must provide specified notice and ample opportunity to be heard at a public meeting of the board to a person, candidate, or political party that is subject to an investigation. At the conclusion of the investigation and following the hearing, SBE must issue a public report of its findings and may impose a civil penalty for an unintentional violation or refer the matter for further investigation by the State prosecutor if SBE has reasonable cause to believe the violation was willful and knowing.

A civil penalty must be assessed according to specified existing procedures for assessment of civil penalties by SBE. The civil penalty may be up to 100% of the amount by which the coordinated expenditure exceeded the contribution limit or, if applicable, up to 100% of the amount of the donation made to a person for the purpose of furthering a coordinated expenditure in excess of the contribution limits.

A willful and knowing violation of the bill's provisions is a misdemeanor and subject to a fine of up to 300% of the amount by which the coordinated expenditure exceeded the contribution limit or, if applicable, up to 300% of the amount of the donation made to a person for the purpose of furthering a coordinated expenditure in excess of the contribution limits.

A fine or penalty is paid by the person that committed the violation or a political committee of the candidate or political party that committed the violation. If the fine or penalty is not paid within one year of the later of the date the fine or penalty was imposed or the date of the final judgment following any judicial review of the imposition of the fine or penalty, the fine or penalty is the joint and several liability of the candidate or those exercising direction or control over the activities of the person, authorized candidate campaign committee, or political party. A candidate may not be jointly and severally liable for a fine or penalty under the bill unless a court or SBE finds that the candidate engaged in conduct that constitutes coordination with a person under the bill.

The fines and penalties are distributed to the Fair Campaign Financing Fund (FCFF).

SBE is authorized to adopt regulations as necessary to implement the bill.

Current Law/Background: Independent expenditures – political spending by individuals or organizations without coordination with a candidate – have received a significant amount of attention since the 2010 Supreme Court decision in *Citizens United v. FEC* and the subsequent decision of the D.C. Circuit Court of Appeals in *SpeechNow.org v. FEC* (also in 2010). The Supreme Court and D.C. Circuit held, respectively, that corporate independent expenditures could not be limited or prohibited and that contributions to

political committees that make only independent expenditures (super political action committees, or super PACs) could not be limited. Limits on independent expenditures were differentiated from limits on contributions to candidates (which “have been an accepted means to prevent *quid pro quo* corruption”) based on the conclusion that, in the case of independent expenditures, “[t]he absence of prearrangement and coordination of an expenditure with the candidate ... alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”

Maryland’s campaign finance law establishes limits on contributions to candidates and political committees and requires reporting of independent expenditures. Following the *Citizens United* and *SpeechNow.org* decisions, SBE guidance indicates that the board does not interpret the statutory contribution limits to apply to super PACs. As previously stated in other SBE guidance, however, and as explicitly stated in statute beginning January 1, 2015 (pursuant to Chapter 419 of 2013), if coordination exists between a candidate and a person making an expenditure benefitting the candidate, then the expenditure is not an independent expenditure and is instead a contribution subject to the statutory contribution limits. The statute does not define what constitutes coordination. In the absence of a statutory definition, SBE has issued guidance that lists factors it would consider in determining whether coordination has occurred. The list of eight factors includes “sharing of campaign material, strategies, or information that is not generally available to the public” and “the extent to which a candidate shares operations, responsible officers, staff, consultants and other third party vendors with another candidate or person.”

Currently, a person is limited to contributing an aggregate amount of \$6,000 to any one campaign finance entity (a political committee through which a candidate’s campaign finance activity must be conducted) during a four-year election cycle. A State central committee of a political party and a legislative party caucus committee may make aggregate in-kind contributions to a single candidate during an election cycle of up to \$1 for every two registered voters in the State. For a local central committee, the limit is \$1 for every two registered voters in the county.

FCFF holds funding for public campaign financing of gubernatorial tickets under the Public Financing Act.

State Expenditures: General fund expenditures may increase for SBE to hire an investigator, potentially only on a contractual basis during election seasons and/or part time, to the extent investigation of potential violations under the bill cannot be handled with existing SBE resources. The cost of an additional contractual investigator, working full time, is approximately \$50,000 annually.

State Revenues: Special fund revenues increase to the extent penalties are imposed and collected for violations of the bill. The extent of any special fund revenue increase cannot

be reliably estimated, but based on the penalties specified in the bill (up to 300% of a prohibited expenditure or donation, for a willful and knowing violation), significant penalties may be collected if there are violations.

Additional Information

Prior Introductions: HB 1201 of 2016, a similar bill, received a hearing in the House Ways and Means Committee, but no further action was taken. HB 1088 of 2015, another similar bill, received a hearing in the House Ways and Means Committee, but no further action was taken.

Cross File: None.

Information Source(s): Judiciary (Administrative Office of the Courts); State Board of Elections; Office of the State Prosecutor; Department of Legislative Services

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