

Department of Legislative Services
Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

Senate Bill 632

(Senator Kagan)

Education, Health, and Environmental Affairs

Ways and Means

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 modifies the definitions of “contribution” and “expenditure” under State campaign finance law to include funding associated with contesting an election (a recount or judicial challenge). Under provisions that apply only to publicly-financed candidates, 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 establishes a contested election committee and discloses donations received and disbursements made by the committee.

Fiscal Summary

State Effect: General fund expenditures increase by \$15,000 in FY 2022 only. 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.

Contributions and Expenditures Associated with Contesting an Election

The bill includes, under State campaign finance law, under the definitions of “contribution” and “expenditure,” respectively, (1) the gift or transfer, or promise of gift or transfer, of money or other thing of value to a campaign finance entity to assist in the payment of expenses associated with contesting an election under provisions governing recounts and judicial challenges and (2) a gift, transfer, disbursement, or promise of money or a thing of value by or on behalf of a campaign finance entity to pay expenses associated with contesting an election under provisions governing recounts and judicial challenges. The bill also, correspondingly, 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.

Contested Election Committees for Publicly Financed Candidates

Under provisions that apply only to a person that accepts public campaign financing under the Public Financing Act (PFA) (gubernatorial tickets) or a county public campaign financing system, 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, including an election that may be subject to a recount but for which a recount does not occur because neither candidate files a formal recount petition or initiates a judicial action.

“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 the State Board of Elections (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 prohibition against soliciting or accepting a donation on behalf of a contested election committee in excess of the contribution limits under PFA or the applicable county public campaign financing system;
- 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
- requirements that (1) any part of a public contribution made to a committee that is not spent be repaid to the appropriate government entity and (2) a committee, after repaying remaining public contributions and 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 existing 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:

- allows for such a system to include public financing of a contested election committee; and

- authorizes such a system to allow a publicly financed candidate to transfer any amount of funds from the candidate's campaign finance entity to the candidate's contested election committee.

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.”

Campaign Finance Entities and Reporting

Unless otherwise expressly authorized by law, all campaign finance activity for an election under the Election Law Article of the Annotated Code must be conducted through a campaign finance entity (defined as a political committee established under Title 13 of the Election Law Article). An individual may not file a certificate of candidacy or a declaration of intent until the individual establishes, or causes to be established, an authorized candidate campaign committee (a campaign finance entity authorized by the candidate to promote the candidate’s candidacy). For each election in which a campaign finance entity participates, it generally must file campaign finance reports at various times prior to and after the primary and general elections, as well as an annual report. 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.

“Contribution” and “Expenditure” under State Campaign Finance Law

Under State campaign finance law, “contribution” means the gift or transfer, or promise of gift or transfer, of money or other thing of value to a campaign finance entity to promote or assist in the promotion of the success or defeat of a candidate, political party, question, or prospective question. “Expenditure” means a gift, transfer, disbursement, or promise of money or a thing of value by or on behalf of a campaign finance entity to (1) promote or assist in the promotion of the success or defeat of a candidate, political party, question, or prospective question at an election or (2) pay for the publication expense of a legislative newsletter.

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: General fund expenditures increase by \$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: HB 761 (Delegate Kaiser) - Ways and Means.

Information Source(s): State Board of Elections; 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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