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STATE OF HAWAII
CAMPAIGN SPENDING COMMISSION
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February 12, 2009

TO: The Honorable Brian Taniguchi, Chair of the Senate Judiciary and Government Operations Committee
The Honorable Dwight Takamine, Vice-Chair of the Senate Judiciary and Government Operations Committee
Members of the Senate Judiciary and Government Operations Committee

FROM: Barbara U. Wong, Executive Director
Campaign Spending Commission

SUBJECT: Testimony on S.B. No. 93, Relating to Campaign Financing¹

February 12, 2009
9:30 p.m. in Conference Room 016

Chair Taniguchi, Vice-Chair Takamine, and Members of the Senate Judiciary on Government Operations Committee ("Committee"), thank you for hearing this bill and the opportunity to testify on this bill.

We strongly support S.B. No. 93, which was introduced at the request of the Campaign Spending Commission ("Commission").

This bill proposes to:

- Add a grace period to Hawaii Revised ("HRS") §11-204.5 which would allow a candidate that exceeds the 20% cap on nonresident contributions to return the excess contribution;
- Amend the definition of "electioneering communications" in HRS §11-207.5;
- Require the filing of one additional disclosure report for noncandidate committees in election years in order to provide greater transparency; and
- Repeal the law relating to the short form report for a candidate, party, or committee whose aggregate contributions and expenditures in a reporting period each total \$2,000 or less.

¹ This bill is a single referral to this Committee.

H.B. No. 217 is the companion bill and was referred to the House Judiciary Committee, which has not scheduled a hearing on that bill.

Section 5 provides that this bill would be effective upon approval, except section 3 (relating to the filing of an additional disclosure report and repeal of the short form report) would be applicable to reporting periods beginning on January 1, 2010.

We recommend that the Committee:

- Delete the proposed change to the electioneering communications law; and
- Include provisions of S.B. Nos. 94² and 95³ in this bill or that the Committee schedule a hearing on those two bills.

I. Nonresident contributions—seven day grace period after the reporting period (Section 1)

HRS §11-204.5 provides a 20% cap on contributions from nonresident individuals and persons (except for a member of the candidate's immediate family) to a candidate during each reporting period. This limitation was enacted to "ensure that elected officials are not disproportionately influenced by outside interests." H. Conf. Comm. Rept. No. 185, Haw. H.J. 1827, 1828 (2005).⁴

The Commission recognizes the administrative difficulties with this provision. For example, candidates must closely track contributions from nonresident persons and contributions from resident persons to ensure the cap is not exceeded. The difficulties are compounded because the cap is applicable to each reporting period and some reporting periods are only for a two-week period.

This bill proposes adding a seven-day grace period as follows:

- (b) If the candidate or candidate's committee returns or refunds a contribution or contributions that exceed twenty per cent of the total contributions received during a reporting period within seven days of the last day of the reporting period, the candidate and candidate committee shall not be in violation of this section.

² S.B. No. 94 reinstates language in HRS §11-209(a), that was deleted by Act 203, SLH 2005, to allow candidates for the office of prosecuting attorney to qualify for partial public financing; increases the expenditure limits and amounts available to candidates who apply for partial public financing; and removes the equalizing fund provisions in Act 244, SLH 2008 (Act 244) which established a pilot project for comprehensive public funding program for the county of Hawaii council elections beginning in 2010.

³ S.B. No. 95 updates, organizes, and clarifies the current campaign finance laws with minimal substantive changes.

⁴ The Committee's report stated as follows:

"Your Committee on Conference notes in particular the provisions of this measure establishing new limits on out-of-state contributions. Over the years, Hawaii has been influenced by out-of-state interests. Residents and outside interests have long fought over the development of our land, expansion of our economy, and other social policies. Unrestrained out-of-state contributions to candidates for elective office could continue to influence decisions that adversely affect the people of Hawaii. Restrictions on nonresident contributions will ensure that elected officials are not disproportionately influenced by outside interests."

II. Delete the amendment to the definition of “electioneering communications” (Section 2)

We request that the Committee consider deleting this change to HRS §11-207.6, relating to electioneering communications. This is based upon a narrower reading of the United State Supreme Court’s decision in Federal Election Commission v. Wisconsin Right to Life; 551 U.S. ----, ----, 127 S.Ct. 2652, 2685, 168 L.Ed.2d 329 (2007) (WRTL).

When this section was first enacted in Act 140, SLH 1999, its purpose was stated as follows:

Your Committee finds that informational and educational advertising has become an unregulated and virtually unlimited aspect of political campaigns. A Federal law that was proposed but not enacted, the McCain-Feingold campaign spending reform bill, contained language designed to address this very issue. The bill before your Committee is modeled on the McCain-Feingold bill in its treatment of electioneering communications.⁵

Your Committee notes that informational and educational advertising has become an unregulated and virtually unlimited aspect of political campaigns, which may be used to target not only individual candidates but also ballot issues. Your Committee agrees that allowing these types of communications to go unregulated, while requiring registered candidates and committees to submit reports is a loophole in the current law that provides an unfair advantage to those who are unregistered yet expending funds to affect a particular election.⁶

The provisions of the “McCain-Feingold” bill referred to in the Committee Report were subsequently enacted in the Federal Bipartisan Campaign Reform Act of 2002 (BCRA). An advertisement was subject to campaign finance regulation only if it was “express advocacy” prior to BCRA (and Act 140), resulting in “sham issue ads.” BCRA closed this loophole by banning the use of corporate and union treasury funds for electioneering communications - broadcast ads aired during the pre-election period, referring to a candidate and targeting the candidate's constituents. The U.S. Supreme Court upheld the constitutionality of this provision in McConnell v. FEC, 540 U.S. 203 (2003).

The restrictions on electioneering communication, however, were scaled back in WRTL as the United State Supreme Court held that:

- BCRA’s electioneering provisions could not be applied to WRTL's ads, because they were not “the functional equivalent of express advocacy” for or against a candidate.

⁵ Senate Conf. Com. Rep. No. 27 (1999).

⁶ House Stand Comp. Rep. No. 1470 (1999).

- An ad is "the functional equivalent of express advocacy" only if it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."
- "Where the First Amendment is implicated, the tie goes to the speaker, not the censor."
- WRTL's ads were not the "functional equivalent of express advocacy" for two reasons: "First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter."
"Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office."⁷
- In applying the test, courts are generally barred from considering contextual evidence and may allow only "minimal if any discovery."
- The intent of the advertiser and the effect of an ad are irrelevant to whether it is "the functional equivalent of express advocacy."

Until WRTL's impact is determined, a more measured approach would be to read WRTL narrowly and leave Hawaii's definition of "electioneering communications" unchanged. The "electioneering communications" disclosure requirements would be applicable to all advertisements meeting the statutory definition.⁸

⁷ Wisconsin Right to Life Inc. challenged the application of BCRA to three advertisements, entitled "Wedding", "Waiting" and "Loan." The script for Loan follows:

LOAN OFFICER: Welcome Mr. and Mrs. Shulman. We've reviewed your loan application, along with your credit report, the appraisal on the house, the inspections, and well . . .

COUPLE: Yes, yes . . . we're listening.

OFFICER: Well, it all reminds me of a time I went fishing with my father. We were on the Wolf River Waupaca . . .

VOICE-OVER: Sometimes it's just not fair to delay an important decision.

But in Washington, it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates aren't getting a chance to serve.

It's politics at work, causing gridlock and backing up some of our courts to a state of emergency.

Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

Visit: BeFair.org

Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

⁸ This is the approach of the Federal Election Commission. Electioneering communications that qualify for the WRTL exemption may be funded with corporate and/or labor organization funds, but are subject to electioneering communications reporting and disclosure requirements. The comments that the FEC received were divided as to what guidance, if any, WRTL provided with respect to the "express advocacy" definition in the FEC's rules. The FEC decided to leave open this issue and address the question at a later time. See Explanation and Justification for Regulations on Electioneering Communications, Federal Register notice: 72 FR 72899 (Effective Date: December 26, 2007).

III. Provide greater transparency - require noncandidate committees to file a report in election years on July 31,⁹ which is the same filing date as candidate committees (Section 3)

Currently, noncandidate committees in an election year do not report until ten days before the primary election. The Commission proposes that the noncandidate committees file an earlier report on July 31 (the same time as candidate committees) in order to provide greater transparency and align the reporting between candidate committees and noncandidate committees. "Requiring for-profit corporations to report contributions and expenditures not only fosters public confidence in government through a more informed electorate . . . , but also serves as a critical crosscheck for ensuring the accuracy and completeness of reporting by candidates and other recipients of corporate contributions." Colorado Common Cause v. Meyer, 758 P.3d 153 (Colo. 1988).¹⁰

The table below, generally, lists the reporting requirements applicable to a candidate committees and noncandidate committees in 2009 through 2010. The changes proposed in this bill are shown in ramseyer format.

Candidate Committee's Report			Noncandidate Committee's Reports		
February 2, 2009	November 5 through December 31, 2008	Supplemental	February 2, 2009	November 5 through December 31, 2008	Supplemental
July 31, 2009	January 1 through June 30, 2009	Supplemental	July 31, 2009	January 1 through June 30, 2009	Supplemental
February 1, 2010	July 1 through December 31, 2009	Supplemental	February 1, 2010	July 1 through December 31, 2009	Supplemental
August 2, 2010	January 1 through June 30, 2010	1 st Preliminary Primary	<u>August 2, 2010</u>	<u>January 1 through June 30, 2010</u>	<u>1st Preliminary Primary</u>
September 8, 2010	July 1 through September 3, 2010	2 nd Preliminary Primary	<u>September 8, 2010</u>	<u>{January 1} July 1 though September 3,</u>	<u>2nd Preliminary Primary</u>

⁹ §11-195.5 Reporting deadline. When any reporting deadline falls on a Saturday, Sunday, or holiday designated in section 8-1, the reporting deadline shall be the next succeeding day that is not a Saturday, Sunday, or holiday.

¹⁰ "[I]nformed public opinion is the most potent of all restraints upon misgovernment." Buckley v. Valeo, 424 U.S. 1, 67, 96 S. Ct. 612, 658 (1976) (quoting Grosjean v. American Press Co., 297 U.S. 233, 250, 56 S. Ct. 444, 449 (1936)). "[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." Id. at 67, 96 S. Ct. at 657 (1976). "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Id. (quoting L. Brandeis, Other People's Money 62 (National Home Library Foundation ed. 1933)).

				2010	
September 15, 2010	September 4 through September 14, 2010	Late Contributions Report ¹¹	September 15, 2010	September 4 through September 14, 2010	Late Contributions Report
October 8, 2010	September 4 through 18, 2010	Final Primary Report	October 8, 2010	September 4 through 18, 2010	Final Primary Report
October 25, 2010	September 19 through October 18, 2010	Preliminary General Report ¹²	October 25, 2010	September 19 through October 18, 2010	Preliminary General Report
October 25, 2010	January 1 through October 18, 2010	Preliminary General Report ¹³			
November 1, 2010	October 19 through October 29, 2010	Late Contributions Report ¹⁴	November 1, 2010	October 19 through October 29, 2010	Late Contributions Report
December 2, 2010	October 19 through November 2, 2010	Final Election Period Report ¹⁵	December 2, 2010	October 19 through November 2, 2010	Final Election Period Report

IV. Repeal the law relating to the short form report (Section 3)

HRS §11-212(d) allows a “candidate, party, or committee whose aggregate contributions and aggregate expenditures for the reporting period each total \$2,000 or less” short form, in lieu of the reports and schedules normally filed pursuant to HRS §§11-212 and 11-213.

¹¹ This form is for reporting contributions from any person or entity that aggregates more than \$500 and made to a candidate during the period of fourteen calendar days through four calendar days prior to the Primary Election. Late contributions must also be reported on the Final Primary Report. The report is not required if there are no late contributions.

¹² This form is for candidates that were successful in the Primary Election and have advanced to the General Election. This report is not required for candidates that won outright or were unsuccessful in the Primary Election. See the Final Election Period Report

¹³ This is the first report for candidates for the Office of Hawaiian Affairs.

¹⁴ This form is for reporting contributions from any person or entity that aggregates more than \$500 and made to a candidate during the period of fifteen calendar days through four calendar days prior to the General Election. Late Contributions must also be reported on the Final Election Period Report. The report is not required if there are no Late Contributions or if a candidate won outright or was unsuccessful in the Primary Election.

¹⁵ For candidates that filed the Preliminary General Report.

The Honorable Brian Taniguchi
Testimony regarding S.B. No. 93
February 12, 2009
Page 7 of 7

All candidate committees and noncandidate committees must electronically file with the Commission. This "short form" report, apparently, was enacted to minimize the paper work required when reports were not filed electronically. In view of the requirement for all candidates to input data into Schedule A (Contributions) and Schedule B (Expenditures), the reason for this "short form" report has disappeared and this provision should be repealed.

Section 5 of the bill specifies that the changes to section 3 (July 31 filing of a noncandidate committee report in election years and repeal of the short form report) would be effective for reporting periods beginning on January 1, 2010 to allow sufficient time for changes to be made to the electronic filing system.



THE LEAGUE OF WOMEN VOTERS OF HAWAII

TESTIMONY ON SB 93 RELATING TO CAMPAIGN FINANCING

Committee on Judiciary and Government Operations
Thursday, February 12, 2009
9:30 a.m.
Conference Room 016

Testifier: Jean Aoki, LWV Legislative Liaison

Chair Taniguchi, Vice Chair Takamine, members of the JGO Committee,

The League of Women Voters supports SB 93 in general. The grace period of 7 days after the last day of the reporting period given to return refunds of contributions that exceed the twenty percent cap on contributions from non-Hawaii residents except for certain exceptions sounds reasonable. We can understand the stresses of a campaign especially those who do not have the funds to hire enough staff to monitor everything as carefully as they should.

We see no problems with the rest of the amendments.

There is one section in this bill, not one being amended, that is so confusing that I would like to call it your attention. It seems to me that some amendment is in order.

Under "Electioneering communications shall not include communications:" beginning on line 8 on page 3, (1), (3) and (4) are very clear. But (2), "That constitute expenditures by the disbursing organization" puzzles us as to whom the "disbursing organization" is referring to.

Thank you for this opportunity to testify on SB 93.