LATE TESTIMONY

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2013

ON THE FOLLOWING MEASURE:
H.B. NO. 1147, H.D. 2, RELATING TO CAMPAIGN SPENDING.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Tuesday, March 19, 2013 **TIME:** 10:05 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): David M. Louie, Attorney General, or
Deirdre Marie-Iha, or Robyn B. Chun, Deputy Attorneys General

---

Chair Hee and Members of the Committee:

The Department of the Attorney General supports the intent of this measure, which adds several forms of disclosure and transparency provisions to Hawaii's campaign finance laws. Campaign finance disclosure provisions are the laws that allow the Hawaii electorate to "follow the money" and determine which individuals, organizations or businesses are seeking to influence their vote. Before this bill was heard by the House Committee on Judiciary, the Department had some significant practical and legal concerns about the bill. Fortunately, the majority of those concerns were addressed by the changes made in the H.D. 1. The House Committee on Finance made mostly nonsubstantive changes in the H.D. 2.[1] This testimony outlines the Department's current concerns about the H.D. 2.

The purpose of this bill, generally, is to increase the disclosure requirements in Hawaii's campaign finance laws. This bill (1) creates a new form of disclosure for "top contributors" to big money SuperPACs, where the top contributors would be identified in the advertisements themselves, (2) adds to the information required in noncandidate committee reports, (3) creates a new form of reporting for late *expenditures*, where current law requires disclosure only of late *contributions*, (4) adds to the information required in filings submitted to the Campaign Spending Commission about electioneering communications (that is, advertisements run during the last few weeks before an election), and (5) increases the disclosure required for corporations

[1] In the Department's view, most of the changes made in the H.D. 2 do not change the operation of the bill. There is one change, however, to subsection (b) of the top contributor provision (added by section 2 of the bill), that rendered the provision potentially less clear in application, and consequently should be amended. This is discussed below.

that engage in political spending by requiring all corporations to report as noncandidate committees and eliminating the separate "corporation" reporting status, which has a lesser level of disclosure.

In addition to suggested changes in the bill itself, the Department makes several important recommendations about the legislative history for this measure. *The Department strongly recommends that the legislative history (1) reflect that this bill is a re-introduced version of H.B. No. 2174, H.D. 1, S.D. ,1 from the 2012 session,*[2] *(2) explain that the repeal of section 11-332, Hawaii Revised Statutes (HRS), increases the disclosure requirements that apply to corporations, and (3) discuss the State's interest in increased campaign finance disclosure requirements.* Each of these is discussed in more detail below.

Need for Detailed Purpose Section and Legislative History.

One of the amendments the Department suggested before the House Committee on Judiciary was a detailed purpose section and legislative history. The House agreed with that suggestion, and the H.D. 2 now includes a detailed purpose section explaining many of the significant provisions of the bill. It is extremely important that this wording be kept intact. Under the federal campaign finance case law, if any of the amendments made in this bill were ever subject to a constitutional challenge, the purpose section and legislative history would become very important in the State's defense of these laws. When campaign finance disclosure provisions are challenged under the First Amendment, it is the *government* that bears the burden of demonstrating that the law survives constitutional scrutiny, under an intermediate form of review called "exacting scrutiny." *To help meet that burden, the Department strongly suggests that, should this Committee elect to pass the bill, the legislative history should also include a discussion similar to the detailed purpose section.* Ideally, the legislative history would also include some discussion of Hawaii's experience from the 2012 election to document why additional disclosure is necessary, especially for the new form of disclosure required by section 2 of the bill.

---

[2] H.B. No. 2174 was substantially amended and considered by both houses in 2012, but ultimately did not pass out of conference. Should this Committee pass this bill, the Department suggests that the legislative history reflect that H.B. No. 1147 is a continuation of the efforts made last session with (2012) H.B. No. 2174. Doing so will demonstrate that the legislative history of this measure, should it become law, actually spans two sessions.

Top Contributor Provision.

Section 2 of the bill would create a new form of campaign finance disclosure, called a "top contributor" provision. This provision is limited to so-called "SuperPACs." A SuperPAC is a political committee (called a noncandidate committee in Hawaii) that makes *only* independent expenditures. Independent expenditures are expenditures that are made by an individual or organization without coordinating with any candidate for office. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010), allowed unlimited corporate independent expenditures. Under the case law regarding independent expenditures that has developed since Citizens United, a SuperPAC may accept contributions of any size. Because a SuperPAC can accept contributions of any size, it offers a ready vehicle for wealthy individuals to pool their resources in support of, or in opposition to, a candidate in a manner not permitted before Citizens United. Under section 11-391, HRS, the advertisements purchased by these SuperPACs contain only the name of the SuperPAC in the advertisement itself. SuperPACs are often given innocuous or vague names, so our existing disclosure requirements are insufficient to identify the true source of the funds in the advertisement as it reaches the public. Under existing law, SuperPACs must disclose the sources of their funds as other noncandidate committees do. However, regular reports are filed relatively infrequently, and after the fact. This provision, if enacted, would require a big money SuperPAC to disclose the top sources of their funds *in the advertisement itself*. This would effect a substantial increase in disclosure for the advertisements undertaken by SuperPACs that receive sizable contributions.

In the initial version of the bill, if the noncandidate committee could not identify the top contributors who contributed *for the purpose of funding the advertisement*, then the committee was obliged to identify the greatest aggregate top contributors to the noncandidate committee generally (i.e., those who contributed without designating that their funds were to be used for a particular advertising campaign). H.B. No. 1147, at page 1, line 19, to page 13, line 20. Under the bill as initially introduced, the noncandidate committee would identify the *same number* of top contributors (initially five, but changed to three in the H.D. 1 at the Department's suggestion) either way. The amendments made by the H.D. 1 (and repeated in the H.D. 2) ***decrease*** the number of top contributors disclosed, by only requiring the disclosure of the noncandidate committee's ***one*** top contributor who contributed for the purpose of funding the advertisement.

The disclosure of this one top contributor will satisfy the provision as it is currently drafted. H.B. No. 1147, H.D. 1, at page 4, line 12, to page 5, line 2; H.B. No. 1147, H.D. 2, at same pages and lines. ***Under the H.D. 2, the noncandidate committee need not further identify other contributors who contributed to the committee generally, even if those contributors are a far greater source of the committee's funds***.

The decrease in disclosure created by the amendments made in H.D. 1 is best illustrated by an example. Say a SuperPAC had three contributors total, each of them meeting the definition of "top contributor" ($10,000 or more in aggregate contributions in the year prior to the purchase of the advertisement). The SuperPAC has one $15,000 contributor, one $1,000,000 contributor, and one $2,000,000 contributor. Under the H.D. 1 (and the H.D. 2), if the $15,000 contributor contributed *for the purpose of funding the advertisement*, but the other contributors did not, ***only the $15,000 contributor would be disclosed in the advertisement***. H.B. No. 1147, H.D. 1, at page 14, line 18 to page 5, line 2; H.B. No. 1147, H.D. 2, at same pages and lines. Under the bill as initially introduced, *all three* of these contributors would be disclosed in the advertisement. H.B. No. 1147 at page 2, line 19, to page 3, line 4.

The difference between these two approaches for the top contributor provision is significant, so the Department thought it prudent to explain it in some detail. If enacted in its current form, the provision may offer an incentive for SuperPACs to structure their fundraising in a manner that may undercut the effectiveness of the provision. The extent of disclosure required by law is a policy decision, and in the Department's view, both approaches are constitutionally sound. Therefore, if this Committee agrees with the approach adopted by the House, then no amendments are necessary. If this Committee desires to return to the approach from the initial version of the bill, then the H.D. 2 should be amended to reflect the structure of the initial bill, particularly the language at H.B. No. 1147, page 2, line 14, to page 3, line 20.

Regardless of this Committee's approach to this policy question, the Department suggests two drafting changes to the top contributor provision, for clarity and internal consistency. First, the definition of "top contributor" would be more consistent with the rest of the provision if the phrase "prior to the purchase of an advertisement" (H.D. 2, page 7, line 4) instead read "prior to the purchase of the advertisement." Because the top contributor provision applies to particular advertisements (see subsection (a)), this relatively minor change makes the provision clearer.

Second, the Department suggests that the first portion of subsection (b) be returned to the text used in the H.D. 1. As noted above, the House Committee on Finance made technical, non-substantive changes. One of these changes was to *remove* the requirement that subsection (b) only apply when a noncandidate committee has more than three top contributors who contributed in *equal* amounts. H.D. 1, page 5, lines 16-19. This provision was amended in the H.D. 2, in a manner that apparently was not intended to be substantive in scope. H.D. 2, page 5, lines 17-21. In the Department's view, however, this amendment renders the provision unclear, because the predicate requirement (equal contributions to the committee) has been removed. The Department therefore strongly suggests that this portion of subsection (b) be amended to instead use the text from the H.D. 1.[3]

Other Amendments Made by the Bill.

Other provisions of the bill make smaller, but still substantive, changes to Hawaii's existing campaign finance disclosure provisions. Sections 3 and 4 of the H.D. 2 make small changes to section 11-314, HRS, which governs the duties of the Campaign Spending Commission, and section 11-331, HRS, which governs the filing of reports. Among these amendments is a statutory requirement that the Commission maintain its records in a searchable database. Page 10, lines 3-4. Section 5 of the bill amends section 11-335, HRS, which governs the contents of the noncandidate committee reports, and adds several requirements to those regular reports. Section 6 of the bill amends section 11-337, HRS, to specify that expenditures that are arranged in advance, by contract, to be rendered during the last three days before an election must be included in a late expenditure report. Section 7 of the bill amends section 11-338, HRS, which governs late *contribution* reports. These amendments create a new form of reporting for late *expenditures*. Section 8 of the bill makes a small amendment to section 11-340, HRS, to clarify that the Commission may fine any person that is required to file a report, not just the noncandidate or candidate committees themselves. Section 9 of the bill adds to the information required in filings about electioneering communications (that is, advertisements run during the last few weeks before an election). Section 10 of the bill makes clarifying

[3] To accomplish this, the first part of subsection (b) in the H.D. 2 through the semi-colon (H.D. 2, page 5, lines 17-21) should be replaced with the text in same location of subsection (b) in the H.D. 1 (H.D. 1, page 5, lines 16-19). There were other changes made to subsection (b) in the H.D. 2, but they do not change the operation of the provision.

amendments to the advertisement provision, section 11-391, HRS, and also explicitly extends the existing disclosure requirements to advertisements published "by electronic means." Together, these amendments represent an incremental, measured expansion of Hawaii's campaign finance disclosure requirements.

Legislative History Needed for Repeal of Section 11-332.

Section 11 of the H.D. 2 eliminates section 11-332, HRS, as redundant. Section 11-332 is specific to corporations that make only contributions to candidates (that is, they do not make independent expenditures or contributions to noncandidate committees) and for that reason partially overlaps with noncandidate committee status (which already covers both contributions and expenditures). ***Eliminating this provision will not decrease disclosure because a corporation, like any organization, is subject to noncandidate committee reporting requirements if it meets the requirements*** (over $1,000 in contributions or expenditures under sections 11-302 and 11-321(g), HRS). In fact, reporting as a noncandidate committee has a lower threshold, because *any* contributions or expenditures over $1,000 in the aggregate will trigger noncandidate committee status. Under section 11-332, HRS, in contrast, reporting is triggered only by contributions *to a single candidate* over $1,000. In addition, under section 11-335, HRS, corporations reporting as noncandidate committees will be required to disclose all contributions over $100, rather than just those that are over $1,000 to a single candidate. Repealing the corporate reporting status in favor of using noncandidate committee status for all corporations will therefore cause an *increase* in the disclosure requirements for corporations. Providing for a single reporting status for corporations (reporting as noncandidate committees) would also serve the interests of disclosure because it would be uniform for all corporations.

The repeal of this provision may cause confusion, because independent expenditures by corporations are of great public concern since the United States Supreme Court's decision in Citizens United. For that reason, *the Department strongly suggests that, should this Committee elect to repeal section 11-332, HRS, as proposed in this measure, the standing committee report should reiterate this Committee's understanding that corporations are already required to file disclosure reports under our current campaign finance laws* if their contributions or expenditures exceed $1,000, under sections 11-302 and 11-321(g), HRS. The corporation

provision would be eliminated to enhance consistency in disclosure, and to increase the disclosure requirements applied to corporations.

Importance of Delayed Effective Date.

The H.D. 2 added a defective effective date of November 5, 2030. H.D. 2, section 15. In the H.D. 1, the bill's effective date was November 5, 2014, which is the day after the 2014 general election. H.D. 1, section 15. Should this Committee elect to pass this bill with a true effective date, this delayed effective date (November 5, 2014) is very important because (1) it is generally preferable not to amend campaign finance laws part-way through any election period and (2) the Campaign Spending Commission will require substantial lead time to amend its regulations and prepare to implement the changes made by the bill.

LATE TESTIMONY

KRISTIN E. IZUMI-NITAO
EXECUTIVE DIRECTOR

PHONE: (808) 586-0285
FAX: (808) 586-0288
WWW.HAWAII.GOV/CAMPAIGN

STATE OF HAWAI'I
CAMPAIGN SPENDING COMMISSION
235 SOUTH BERETANIA STREET, ROOM 300
HONOLULU, HAWAII 96813

March 18, 2013

TO: The Honorable Clayton Hee, Chair
Senate Committee on Judiciary and Labor

The Honorable Maile S.L. Shimabukuro, Vice Chair
Senate Committee on Judiciary and Labor

Members of the Senate Committee on Judiciary and Labor

FROM: for KK Kristin Izumi-Nitao, Executive Director
Campaign Spending Commission

SUBJECT: **Testimony on H.B. No. 1147, HD 2, Relating to Campaign Spending**

Tuesday, March 19, 2013
10:05 a.m., Conference Room 016

Thank you for the opportunity to testify on this bill. The Campaign Spending Commission ("Commission") supports the intent of this bill. The measure does not require an appropriation from the Legislature.