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SUMMARY AND ANALYSIS OF H-7859 SUB A, THE CAMPAIGN FINANCE DISCLOSURE BILL

● The major difference between the Sub A and the original bill is that the Sub A exempts 501(c)(3) organizations from its reach. However, this legislation will still greatly affect – and affect in significantly adverse ways – numerous other non-profit, non-partisan organizations, large and small, that speak out on political issues.

● Though aimed at Super PACs and the corrosive effect of their large contributions, an organization need only spend $1,000 on broadly-defined "electioneering" activity to be subject to the bill's onerous and intrusive reporting and disclosure requirements.

● Although introduced in response to the *Citizens United* decision, this bill covers not only candidate elections, but also *referenda campaigns*, thus imposing numerous burdens on organizations engaged in completely non-partisan advocacy. Only six years ago, the General Assembly passed comprehensive legislation addressing reporting and disclosure requirements for ballot advocacy campaigns, but this bill renders that law obsolete for all but 501(c)(3) organizations. Even the lawful advocacy activities of 501(c)(3)'s could be affected, since their involvement in referenda campaigns often occurs in conjunction with other organizations that will not have the benefit of the exemption.

● With only a few modest exceptions, reporting and disclosure requirements are triggered any time a person or organization makes communications that, within 60 days of a general election or 30 days of a primary election, ***merely name*** a candidate in a manner that "can be received" by 2,000 or more people represented by the candidate. Even with two exemptions added to the Sub A, a group's dissemination, within the stated timeframe before an election, of a newsletter to the public that highlights General Assembly activities and names bill sponsors or includes the names of legislators serving on their Board of Directors, or the publication of a report card of votes by state officials on issues, or any similar communications that in the aggregate cost $1,000, will lead to mandatory reporting.

● In addition to being required to file a campaign finance report within 24 hours, ***the organization will be required to disclose the identity of all donors who have given $1,000 or more to the group in the past 12 months***, thus destroying their confidentiality and anonymity. This requirement will likely chill some individuals from donating to controversial organizations, or even non-controversial ones where donors seek anonymity for personal reasons. It doesn't matter how minuscule the "electioneering" is in terms of the organization's budget, and it doesn't matter that the donations were given totally unrelated to any such "electioneering."

● A process in the bill to allow organizations to classify individual donations as "non-campaign" donations so they do not have to be disclosed is extremely burdensome and unworkable for most small non-profit organizations.

● Any person who makes any written, typed or printed "electioneering communication" would have to list the organization's top five contributors.

● Any violation of this new statute constitutes a felony. Tellingly, reporting and disclosure violations committed under current election laws by candidates and their committees remain a misdemeanor.

ANALYSIS OF THE CAMPAIGN FINANCE DISCLOSURE BILL, SUB A

This legislation was introduced to deal with the well-publicized issue of so-called Super PACs. Although we question exactly how big a problem they are likely to be in Rhode Island, we recognize that legitimate concerns have been raised about these PACs. However, we believe that the bill will have its greatest impact on small organizations, not Super PACs, and an impact that could significantly affect the operation of those organizations.

Before addressing the specifics of the legislation, it is worth making a few general points:

● Campaign finance disclosure laws serve important interests in promoting an informed electorate and increasing transparency in the democratic process. But such laws also have the potential to impose significant burdens on, and chill, the exercise of First Amendment rights to speech and association, and therefore they must be crafted extremely carefully.

● Both nationally and in Rhode Island, experience over the last 40 years has taught that new laws intended to address campaign finance issues often have unintended consequences and fail to achieve their intended goals. In the past, they have often trapped and chilled unwary individuals and small organizations that were never the main target.

● Precisely because campaign finance legislation intersects with exercise of free speech and association rights, this is an extraordinarily complicated area of the law. Federal campaign finance laws include hundreds of pages of regulations designed to parse out some of those complexities. Even so, the dozens of lawsuits that continue to be filed over this issue show how difficult it can be.

On the following pages, we briefly summarize some of the more problematic portions of the legislation itself:

The proposed Sub A makes a number of changes to the original bill, but many are relatively minor, and a few – such as a revision of the definition of "independent expenditure" and a new definition designed to address what are called "covered transfers" – actually expand the bill. The most significant change that narrows the scope of the original bill is the exclusion of 501(c)(3) organizations. In most other respects, however, the bill's original flaws remain. They will continue to have a significant impact on 501(c)(4)'s and other organizations engaged in non-partisan advocacy, and even on 501(c)(3)'s when they engage in advocacy activity in conjunction with these other organizations.

Despite the bill's intended focus on Super PACs, it is worth noting that the onerous disclosure requirements in the bill apply to groups that need spend no more than $1,000 on broadly-defined "electioneering communications."

Further, although the bill was introduced in response to the Citizens United decision, the Sub A continues to cover not only candidate elections, but also *referenda campaigns*. Only six years ago, in response to an ACLU lawsuit, the General Assembly passed comprehensive legislation addressing reporting and disclosure requirements for ballot advocacy campaigns. That law recognized, as the U.S. Supreme Court has, that referenda and candidate campaigns are fundamentally different and should not be treated the same. (Different constitutional standards are at stake since referenda campaigns do not raise the same concerns about corruption that motivate regulation of campaign finance in candidate elections.) The 2006 statute enacted by the legislature was the result of a compromise hammered out by numerous individuals, organizations and legislators that balanced the various speech, privacy and transparency issues involved. However, the Sub A creates an entirely new and more burdensome scheme to cover 501(c)(4) participation in referenda campaigns.

Indeed, by having the Sub A limit the reach of the 2006 law to only 501(c)(3) organizations, this bill essentially reinstates the pre-2006 scheme that led to a federal law suit and prompted the changes in the law that are now being swept away. This may require small non-profits to set up political action committees in order to participate in referenda campaigns and otherwise unduly limit their activities. Even in the referendum context, the help provided 501(c)(3)'s may be largely illusory. Many referenda campaigns are coalition-oriented, and (c)(3)'s often team up with 501(c)(4) organizations on such campaigns. Yet those organizations, as well as the coalition itself, will be subject to the new bill's requirements, effectively stifling the ability of the (c)(3)'s to work on coordinated campaigns.

Another significant problem that remains is the bill's definition of "electioneering communication," which triggers reporting and disclosure requirements in the same manner that "independent expenditures" do. An independent expenditure is defined as an uncoordinated expenditure that expressly advocates the election or defeat of a clearly identified candidate or is "the functional equivalency" of such advocacy. However, the relatively narrow scope of this definition is swallowed up by the definition of "electioneering communication," which is a communication in any medium that, within 60 days of a general election or 30 days of a primary election, ***merely names*** a candidate (or referendum) and "can be received" by 2,000 or more people in the candidate's district.

The Sub A adds two new exceptions to this broad definition: communications made to one's "members, owners, stockholders or employees," and certain communications over the Internet. However, the latter exemption does not apply to websites whose primary purpose is to advocate for the passage or defeat of a referendum, and the former exemption does not apply if an organization's communication, such as a newsletter, goes out to interested people beyond the

group's own members. In short, the potential reach of this definition remains extremely large. As a result, it will still require reporting and disclosure of activities by purely non-partisan organizations like the ACLU that speak out on political issues.

Examples of the effects of this expansive definition are innumerable. A 501(c)(4) non-profit that, within the stated timeframe before an election, prepares a summary of General Assembly activities that names bill sponsors, or releases a report card to the public of votes by state officials on issues, or publishes a newsletter that thanks the sponsor of a bill or includes the name of a legislator serving on their Board of Directors, has issued an "electioneering communication."

This will likely trigger detailed reporting requirements, if the communication "can be received" by 2,000 constituents and the aggregate costs of those communications exceed $1,000. Specifically, if the printing and mailing of these communications in total cost more than $1,000, the organization will be required to file a campaign finance report within 24 hours. ***In this report, the organization will also be required to disclose the identity of all donors who have given $1,000 or more to the group in the past 12 months.***

Many people contribute to non-profit organizations, especially controversial ones, not wanting or expecting their donations to be made public. Large donors in particular may legitimately fear retaliation, consequences at their workplace or other adverse effects if their donation were publicized. Whether it's the ACLU, a gay rights group, or the Rifle and Revolver Association, imposition of this reporting requirement could have a significant chilling impact on donations to non-profits. It is important to keep in mind that these are donations that have not been made for campaign purposes, that may have been made to agencies whose mission remains

strictly non-partisan, and that are in response to so-called "electioneering" activities that are a miniscule portions of the organization's budget.

But regardless of their desire for anonymity, donors of more than $1,000 to organizations will indirectly be tagged as somehow contributing to a political campaign. We fully understand the concerns about Super PACs, but individuals making a $1,000 donation to the ACLU or dozens of other 501(c)(4) non-profits in the state are not the problem.

Proponents note that the bill contains a process to allow organizations to specifically classify individual donations as "non-campaign" donations so they do not have to be disclosed, but this would be an extremely burdensome and unrealistic process for many organizations. First, of course, is the problem that many non-profits, no matter how removed from the political sphere they are, will have to consider in advance whether they will be engaging in "electioneering communications" – i.e., naming a candidate or a referendum – in an election cycle, even though a referendum of interest might not be approved by the General Assembly until a few months before the election. The bill would nonetheless require that both the agency and donor mutually agree at the time of the donation that it will not be used for such activity. The agency's "highest ranking financial officer" must then certify this in writing to the donor. In light of the extremely broad definition of "electioneering" and the fungibility of funds in small organizations, this seems to us to be completely unworkable.

Another section of the bill, §17-25.3-3, goes even further. As written, any person who makes an "electioneering communication" for any written, typed or other printed communication must include their name on the publication. The reach of this provision is in direct conflict with the U.S. Supreme Court decision in *McIntyre v. Ohio Elections Commission*, which recognized the constitutional protections adhering to the distribution of some anonymous political literature.

In addition, any such communication from an entity that has incurred or expended $1,000 on "electronic communications" would have to list its top five contributors. This is the case whether the entity spent $1,000 on printed materials that merely "unambiguously identified" a candidate or referendum, or spent only $1,000 to express its views on a referendum question. The effect would likely be to prevent some organizations involved in controversial issues – whether the ACLU, Planned Parenthood, or the Right to Life Committee – from participating in any referenda campaigns whatsoever if any of its top five donors gave with an expectation of anonymity.

The Sub A also creates a new type of reportable expenditure known as "covered transfers." Though perhaps not intended, we read this new section of the bill to severely limit the ability of hybrid 501(c)(4)/(c)(3) organizations to transfer money from the former to the latter. In fact, if the 501(c)(4) sets up a segregated account for "electioneering communications," it may be barred from providing any money to its (c)(3) arm.

Finally, the severity of the penalties associated with violations of this new statute only adds to the bill's chilling effect. Any violation constitutes a felony, and includes the imposition of up to a $10,000 fine, or 2% of the organization's "total expenditures" (although it is unclear to us what figure that term refers to). Compare that to the penalties in the section of the election laws dealing with reporting requirements for candidates and office-holders themselves and their campaigns. There, violations of the law, including reporting requirements, constitute a misdemeanor with a maximum $1,000 fine. There is no legitimate basis for such a distinction.

When one considers the wide swath of this bill as to what constitutes engaging in an "electioneering communication" regarding a candidate, the problems are multiplied exponentially when applied to referenda campaigns.

As we previously stated, we recognize proponents' concerns about the need for better transparency in the way so-called Super PACs may skirt disclosure laws. But this proposal will likely have little effect on such a problem in Rhode Island, to the extent it exists here, while adversely affecting many individuals and organizations that are far removed from the world of Super PACs and their donors.

We therefore urge amendments to the bill that would eliminate the troubling scenarios described here, and that would instead focus much more tightly on the issue of true Super PACs. At a minimum, we believe that (1) referenda should be excluded from the bill, as a law already in place and carefully crafted only six years ago appropriately addresses that issue; (2) the definition of "electioneering communication" should be narrowed to mirror the scope of the definition of "independent expenditure"; (3) consideration should be given to increasing the threshold amount triggering disclosure requirements; and (4) the penalties should be revised to mirror those in place for candidate violations of reporting laws.