SUBJECT: Political contributions and expenditures, providing criminal penalties

COMMITTEE: Elections — committee substitute recommended

VOTE: 8 ayes — T. Smith, Peña, Allen, Anchia, Bohac, B. Brown, Harper-Brown, Heflin

0 nays

1 absent — Bonnen

WITNESSES: For — Jack Gullahorn, Professional Advocacy Association of Texas; Fred Lewis; (*Registered, but did not testify:* Ken Bailey, Common Cause of Texas; Andy Wilson, Public Citizen)

Against — None

On — Rene Lara, Texas AFL-CIO; Shanna Weisfeld, Texas State Teachers Association (TSTA); (*Registered, but did not testify:* Natalia Ashley, Texas Ethics Commission)

BACKGROUND: The Election Code defines a "contribution" as a direct or indirect transfer of money, goods, services, or any other thing of value and includes an agreement made, or obligation incurred, to make a transfer. The term includes a loan or extension of credit and a guarantee of a loan or extension of credit. The term does not include:

- a loan made in the due course of business by a lending corporation that has conducted business continually for more than one year before the loan is made; or
- an expenditure required to be reported under Government Code, sec. 305.006(b).

Government Code, sec. 305.006(b) requires lobbyists to report expenditures made to communicate directly with a member or the immediate family of a member of the legislative or executive branch to influence legislation or administrative action, including expenditures related to food, transportation, and lodging, entertainment, gifts, awards and mementos.

Elections Code, sec. 257.002 requires a political party accepting a contribution from a corporation or labor union to maintain the contribution in a separate account and allows use of the contribution only to defray normal overhead and administrative operating costs incurred by the party or to administer a primary election or convention held by the party.

"Direct campaign expenditure" is defined in the Elections Code as a campaign expenditure that does not constitute a campaign contribution by the person making the expenditure.

Elections Code, sec. 253.098 allows a corporation or labor organization to make one or more direct campaign expenditures from its own property for the purpose of communicating directly with its stockholders or members or with the families of its stockholders or members and does not require these expenditures to be reported.

Elections Code, secs. 253.061 and 253.062 provide that campaign contributions by individuals for $100 or less are not required to be reported, but contributions exceeding $100 must be reported.

DIGEST:

CSHB 2511 would amend the Elections Code by adding new sections and amending existing provisions on campaign financing in Texas, including provisions addressing administrative expenses and electioneering practices.

A political party accepting a contribution from a corporation or labor union could use the contribution only for its own administrative expenses or to administer a primary election or convention held by the party.

The bill would define an "administrative expense" as an expenditure for a separate segregated fund or political party incurred in the normal course of business by an organization, regardless of whether the organization engaged in political activity. These expenditures would include telephone and Internet services, office equipment, utilities, office supplies, legal and accounting fees, office space, salaries for administrative employees, and candidate forums. Not included as an administrative expense would be:

- issue advocacy or electioneering communications;
- political consulting to support or oppose a candidate;
- telephoning to communicate with the public;

- brochures and direct mail to persons, other than to a restricted class;
- political fund-raising;
- voter identification, voter lists, or voter databases, other than those related to a restricted class;
- polling of persons, other than those in a restricted class; or
- recruiting candidates.

CSHB 2511 would create a section in the Elections Code addressing expenditures for separate segregated funds (SSFs), or political action committees (PACs). Under the bill, a corporation, labor organization, or membership organization, other than a political committee, could make political expenditures from its own treasury funds and property to finance the establishment or administration expenses of its own PAC or separate segregated fund.

Money in a separate segregated fund from corporate, labor organization, or membership organization treasury funds would have to be kept in a separate account and could not be commingled with any other funds. An individual who knowingly violated this requirement would commit a class A misdemeanor (up to one year in jail and/or a maximum fine of $4,000). A separate segregated fund would be treated as a general-purpose committee.

Corporations, labor unions, and membership organizations, could make communications on any subject, including express advocacy or electioneering communications, to its restricted class or any part of that class. A restricted class would include stockholders and employees of a corporation and their families, as well as members and employees of a labor organization or membership organization and their families.

"Express advocacy" would be a communication that referred to a clearly identified candidate or ballot measure, using phrases such as "Vote for X," "Re-elect Y," "Support the Democratic Nominee," "Cast your Ballot Against (or for) the Republican Challenger," or "Defeat the Incumbent."

Express advocacy would not include:

- a communication made by a corporation or labor organization communicating directly with its stockholders or members; or
- a communication that referred to a candidate or ballot measure appearing in a news story, commentary, editorial, or entertainment

medium published or broadcast by a bona fide broadcasting station, newspaper, magazine, or other publication entity, unless the entity was owned or controlled by a political party, political committee, or candidate.

"Electioneering communication" would be communication that could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates or ballot measures. "Clearly identified" candidates would be those identified by name, nickname, photograph, or picture, or an unambiguous reference that made the identity of the candidate apparent, such as a reference to the office held, incumbency, area represented, or the candidate's status as a candidate for a political party.

Membership organizations would be trade associations, cooperatives, or corporations without capital stock that stated requirements for membership in their articles, bylaws, constitution, or other documents and made those documents available to members upon request, solicited membership, expressly acknowledged acceptance of membership, and was not organized for the principal purpose of influencing an election.

CSHB 2511 would add an "in-kind contribution" to the definition of contribution. An "in-kind contribution" would be a contribution of goods, services, or any other thing of value, except money, including an agreement made or obligation incurred to make a contribution, or a third-party expenditure by a person that was:

- made with the prior consent or approval of the candidate, political committee, or political party, or their representative; or
- created, produced, or distributed at the request or suggestion of a candidate, committee, or party, or their representative, or a third party who was paying for the expenditure and the candidate, committee, or party, or their representative agreed to the request or suggestion.

The bill would redefine "direct campaign expenditure" to mean a campaign expenditure that was not an in-kind contribution, and would include expenditures for communications that were express advocacy or an electioneering communication.

Except as otherwise provided by law, an individual could make one or more direct campaign expenditures in an election

The bill would raise the threshold for reporting campaign contributions made by private individuals from $100 to $500.

The bill would state that the legislative history and text of the bill could not be construed or used to interpret the meaning of Election Code provisions as they existed before the bill and could not be construed or used in any manner, directly or indirectly, to interpret the prior law or its meaning in any pending civil or criminal case.

The bill would take effect September 1, 2009.

SUPPORTERS SAY:

CSHB 2511 would maintain the state's tradition of unlimited individual contributions, while prohibiting the use of corporate and union funds in elections and providing for full disclosure. By adopting federal standards and case law, the bill would provide modern, clear definitions of key terms in order to prevent the abuse of practices such as electioneering attack ads, the administrative expenses exception, and the use of "sham issue ads."

The U.S. Supreme Court has repeatedly held that a corporation or union PAC — established with corporate or union funds and donations by employees, shareholders or members — has a First Amendment right to use funds for "issue advocacy" to express opinions, bring attention to issues, and support or oppose certain legislation. These PACs may not, however, use funds for electioneering, or for the purpose of electing certain candidates or supporting a certain political party.

Texas law has been unclear and therefore, despite its original intent and tradition, has been abused in recent years to allow the use of sham issue ads. Sham issue ads involve a corporate or union PAC discussing a candidate or the issues surrounding a candidate, often just days before an election, and for the obvious purpose of rallying support or opposition, but never using the words "vote for." In the past, the presence of these words determined whether an ad was considered electioneering or issue-related, thus constituting the "magic word" test, which has led to abuse in recent years.

CSHB 2511 would expressly define an electioneering communication to avoid this abuse. However, the bill also would protect corporations and

unions by allowing ads to be used unless no reasonable interpretation existed that it could be anything other than an electioneering communication intended to advocate for the support or opposition of clearly identified candidates.

The lack of a definition of administrative expenses has resulted in the expenditure of these funds for items such as political consultants, electioneering communications, and political fund-raising. CSHB 251l would expressly define administrative expenses so that funds were spent only on true administrative expenses within the PAC, thereby ending current abuses occurring at the expense of shareholders and members.

Likewise, the bill either would define for the first time, or redefine for clarity, terms such as in-kind contributions, direct campaign expenditures, and express advocacy. In so doing, CSHB 2511 would give greater certainty to election law governing corporate contributions and expenditures in Texas. This would help ensure that administrative expenses could not be used for political activity and that sham issue ads could not be used for electioneering purposes, thus restoring the state's previously long-held and intended election practices prohibiting corporate and union money from entering into Texas elections.

OPPONENTS SAY:

No apparent opposition.

NOTES:

The committee substitute differs from the bill as introduced by adding provisions defining "administrative expense," "in-kind contribution," "membership organization," "member," and "restricted class," as well as redefining "direct campaign expenditure" and 'contribution."

The substitute also added a provision stating that the bill could not be construed or used to interpret the meaning of the provisions of the Election Code as they existed before the bill's effective date or to interpret the prior law in any pending civil or criminal case.