



HOUSE BILL 1029: Bipartisan State Board Changes.

2017-2018 General Assembly

Committee:	Senate Rules and Operations of the Senate	Date:	December 12, 2018
Introduced by:	Reps. Torbett, Iler	Prepared by:	Erika Churchill, Jessica Sammons, and Brad Krehely
Analysis of:	Conference Committee Substitute (H1029-CCSBKf-6)		Staff Attorneys

OVERVIEW: *The Conference Committee Substitute for House Bill 1029 returns the law to the 2016 structure for elections, ethics, and lobbying and makes other modifications to the elections, ethics, and lobbying laws.*

BILL ANALYSIS:

Part I. Require Primary for New Election

Section 1 provides that for any new congressional general election ordered, a primary must be conducted for that election. The State Board must determine when the primary must be held and must take all other actions to conduct the primary.

Part II. Senate Bill 824, Implementation of Voter ID Const. Amendment

Section 2 provides that if the Senate Bill 824- Implementation of Voter ID Const. Amendment becomes law, then the provisions dealing with photo identification for voting do not apply to any new election ordered in a 2018 election contest.

Part III. Elections, Ethics, and Lobbying. Part III returns the law to the 2016 structure for elections, ethics, and lobbying, subject to modifications in the bill.

Section 3.1 gives the Revisor of Statutes authority to re-recodify Chapter 163A back into the former statutes governing the State Board of Elections, the State Ethics Commission, and the Secretary of State's authority over registrations and reporting by lobbyists and lobbyist principals. This section also repeals Sections 3-21 of S.L. 2017-6 and Part VIII of S.L. 2018-2 which were declared unconstitutional by the court.

Section 3.2 reestablishes the former State Board of Elections and deletes language providing that it is an independent regulatory and quasi-judicial agency.

Karen Cochrane-Brown
Director



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Section 3.3 reestablishes the former State Ethics Commission.

Sections 3.4-3.5 outline the transfer of authority, powers, duties and functions, records, personnel, property, and unexpended balances of appropriations, allocations, or other funds from the Bipartisan State Board of Ethics and Elections Enforcements to (1) the State Ethics Commission for ethics compliance and enforcement functions, (2) the Secretary of State for lobbying registration and enforcement functions, and (3) to the State Board of Elections for elections and campaign finance functions. The sections also transfer specific positions and ensure that the newly reenacted entities will have continuity with respect to pending actions, investigations, audits, and previously adopted rules.

This Part becomes effective January 31, 2019.

Part IV. Changes. Part IV makes changes to the elections, ethics, and lobbying laws.

Sections 4.1 eliminates the required registration and reporting for certain 'solicitors' under the lobbying laws.

Section 4.2 specifies that complaints before the State Ethics Commission and the Legislative Ethics Committee and complaints related to campaign finance matters, are signed and sworn under oath or affirmation to ensure that the filing of these complaints are subject to the penalty of perjury. Complaints before the State Ethics Commission and the Legislative Ethics Committee must be made by a registered voter. Investigations before the State Board of Elections must not be initiated more than four years from the earliest of the following dates: (1) the facts constituting the violation are known to the State Board or county board with jurisdiction, (2) the facts constituting the violation can be determined from the public record, and (3) the complainant knew or should have known of the conduct upon which the complaint is based.

Section 4.3 modifies the composition of county boards of elections to consist of five persons, with four members appointed by the State Board of Elections and one member appointed by the Governor. The Governor's appointee serves as chair.

Section 4.4 removes a requirement that the State Board of Elections, before assessing a civil penalty, notify and consult with the district attorney who would be responsible for bringing a criminal prosecution for the violation. Instead, it provides that after the assessment of a civil penalty, an appeal of the decision of the State Board is to be made to the Office of Administrative Hearings as a contested case under the Administrative Procedure Act.

Section 4.5 removes exemptions from rulemaking for rules adopted by the State Board of Elections, the State Ethics Commission, and rules related to lobbying so that new rules will have to go through the rulemaking process.

Section 4.6 modifies the definition for "electioneering communications," to provide that the window of applicability is 30 days prior to the general election in even-numbered years, rather than after September 7 through the General Election in even-numbered years and 60 days prior to the time set for absentee balloting for all other elections.

Section 4.7 amends the statute which requires the court to allow the General Assembly to remedy districts in the redistricting of legislative or Congressional districts before the court imposes substitute plans. This section provides that the period of time for the General Assembly to remedy those defects must not be less than two weeks. However, if the General Assembly is scheduled to convene legislative session within 45

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days of the date of the court order that period of time must not be less than two weeks from the convening of that legislative session.

Section 4.8 amends the procedure for voting an absentee ballot in the presence of two persons. It requires the voter to do one of the following: (1) have the application notarized or (2) have the two persons in whose presence the voter marked that voter's ballot to certify that the voter is the registered voter submitting the marked ballot.

Section 4.9 provides that the State Board must require that the information from the register of absentee ballot requests and the certified list of executed absentee ballots be transmitted to the State Board. The State Board must adopt rules to implement this provision, including rules addressing the frequency of transmittal.

Section 4.10 does the following: S.L. 2018-121 reduced the number of judicial divisions from eight to five, effective January 1, 2019. G.S. 1-267.1, providing for a three-judge panel to hear certain constitutional challenges, specifically references the judicial divisions by number. This subsection updates that statute to reflect the reduction in the number of judicial divisions. This section becomes effective January 1, 2019.

Section 4.11 provides that the State Board of Elections must refer apparent criminal campaign finance violations to the State Ethics Commission. The State Ethics Commission must offer confidential recommendations regarding the appropriateness of a criminal referral. The investigation and vote of the State Ethics Commission on the recommendation must be completed within 90 days of receipt of the request from the State Board of Elections. After receiving and considering the confidential recommendation of the State Ethics Commission, the State Board of Elections must report to prosecuting authorities if it has knowledge of or reason to believe that there has been a violation. This section is effective January 31, 2019, and applies to referrals of violations made on or after that date by the State Board of Elections to prosecuting authorities.

Part V. Report on Absentee Ballot Fraud Investigations

Section 5 provides that the State Board of Elections must report and make recommendations on absentee ballot fraud to the Joint Legislative Elections and Ethics Oversight Committee by April 1, 2019. The report must identify instances of potential mail-in ballot harvesting and data on for mail-in absentee ballots for the past five election cycles.

Part VI. Effective date.

Section 6.1 authorizes the Revisor of Statutes to make nomenclature changes and modifications of citations to effectuate this act.

Section 6.2(a) provides that appointments to the State Board of Elections, county boards of elections, and the State Ethics Commission must be made as soon as possible and that no further appointments are required in 2019 except to fill vacancies that arise. Serving as a State employee does not prohibit service for the initial appointments to the new State Board of Elections. It also provides that in making appointments to the State Board of Elections and State Ethics Commission, any service on the Bipartisan

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State Board of Elections and Ethics Enforcement is considered "service" for purposes of consecutive terms.

Section 6.2(b) provides that the term of office for the Executive Director of the State Board of Elections begins upon appointment and must be made as soon as possible after the State Board's initial meeting. This term of office expires in May 2021.

Section 6.3 provides that except as otherwise provided, the act is effective when it becomes law.

CURRENT LAW:

Status of the Ethics and Election Administration Prior to 2016

Prior to 2016, the State Ethics Commission (SEC) administered the State Government Ethics Act and Lobbying Laws, including providing ethics and lobbying guidance, through formal written advisory opinions and informal advice, and education to legislators, public servants, and legislative employees, and all persons affected by the lobbying laws.

The SEC:

- Consisted of eight members, four appointed by the Governor and four appointed by the General Assembly.
- Had to be registered voters in this State.
- No more than one half of the membership could be associated with the same political party.
- The Governor appointed the chair of the SEC annually.
- Served four year terms.
- Could be reappointed.

Prior to 2016, the State Board of Elections (SBE) administered elections and campaign finance and provided guidance, advice, and training for elections and campaign finance to the county boards of elections.

The SBE:

- Consisted of five members, all of whom were appointed by the Governor from a list of nominees submitted to the Governor by the State party chairman of each of the two political parties having the highest number of registered affiliates as reflected by the latest registration statistics published by the SBE.
- Had to be registered voters in this State.
- No more than three members could be of the same political party.
- Elected its chair from its membership.
- Served four year terms.
- Could serve no more than two consecutive terms.

County boards of elections consisted of three registered voters of each county. No more than two members of the county board of elections could belong to the same political party.

The Secretary of State was responsible for registrations, reporting, and audits with respect to lobbyists and lobbyist principals in North Carolina.

Consolidation of the functions of elections, ethics, and lobbying

S.L. 2017-6 reorganized the State Board of Elections and the State Ethics Commission into the Bipartisan State Board of Ethics and Elections Enforcement (State Board). Under the 2017 law, the State Board was to consist of eight members appointed by the Governor, four from each of the two largest political parties.

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The members were to be selected from lists provided by the two largest State political parties. The Governor could remove members only for misfeasance, malfeasance, or nonfeasance.¹ The North Carolina Supreme Court found that this merger was a constitutional exercise of authority, but that the provisions relating to membership and appointment were unconstitutional. *Cooper v. Berger*, 370 N.C. 392, 809 S.E.2d 98 (2017).

S.L. 2018-2 amended the establishment of the State Board to provide that the State Board would consist of nine members, with the Governor appointing four members from each of the State's largest two political parties from lists provided by the two largest State political parties. The ninth member was not to be affiliated with either of the two largest State political parties, and was appointed by the Governor from a list of two nominees submitted by the other eight members of the State Board. The Governor had discretion to remove any member of the State Board. When challenged in court, a three-judge superior court permanently enjoined Sections 3-22 of S.L. 2017-6 and Part VII of S.L. 2018-2 in their entirety.

The Court suspended its injunction over portions of the law to allow the current State Board, composed of nine members, to continue its service during the November 2018 elections. The suspension of the injunction was to remain in place until the November 2018 elections are certified by the State Board. The Court has extended the stay until December 28, 2018 at noon, or until the November 2018 Statewide elections are certified, whichever occurs first.

¹ S.L. 2017-6 also repealed Part I of S.L. 2016-125, an earlier effort to merge the Board of Elections and the State Ethics Commission. A three judge panel found that structure to be unconstitutional. An appeal was dismissed as moot upon the passage of S.L. 2017-6.