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(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:

Duplicates/Relates to Appropriation in the General Appropriation Act: none at this time.

SECTION III: NARRATIVE

This analysis is neither a formal Attorney General’s Opinion nor an Attorney General’s Advisory Letter. This is a staff analysis in response to an agency’s, committee’s, or legislator’s request.

BILL SUMMARY

Synopsis:

Senate Bill 675 creates a system whereby an advertisement for a statewide election or the state legislature must be submitted to two review agencies contracted with the Attorney General’s Office for review of “truthfulness” before it may be published. The Act creates a score based on the “truth or falsity” of an advertisement and “whether the advertisement is misleading.” The Act requires that these political advertisements include that score. Senate Bill 675 explains that if the two reviewing agencies “disagree on the truthfulness of the advertisement by more than one step,” the sponsor of the advertisement must submit the advertisement to a third agency.

If an advertisement is not submitted to the reviewing agencies, the sponsor of the advertisement is “punished with a fine of two times the cost of producing and distributing the advertisement” and include a disclaimer that the advertisement has not been rated. If this disclaimer is not included, the sponsor “shall be punished with a fine of twenty times the cost of producing and distributing the advertisement.”

Senate Bill 675 requires that the Attorney General contract with three nonpartisan public or private agencies to be the review agencies. The Attorney General’s office is also charged with establishing rules to administer the provisions of the Act.

FISCAL IMPLICATIONS As drafted, Senate Bill 675 requires the Attorney General to contract with nonpartisan public or private entities. The Bill requires the Attorney General to establish rules for administering the provisions of the Act.

SIGNIFICANT ISSUES

Senate Bill 675 may violate the First Amendment. The bill creates a rating system based on how truthful an advertisement is or how misleading it is, and “[u]ntruthful speech, commercial or

otherwise, has never been protected for its own sake.” Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)(citations omitted). Despite this, as the Supreme Court has found, there is a high value in political speech and “the primary importance of speech itself to the integrity of the election process. As additional rules are created for regulating political speech, any speech arguably within their reach is chilled.” Citizens United v. Fed. Election Comm’n, 558 U.S. 310 (2010)(citation omitted). Creating a system where political advertisements must be vetted by review agencies contracted to a governmental entity may create a chilling effect on speech and thus violate the First Amendment.

Senate Bill 675 creates two categories to rate a political advertisement, with no guidelines for how to determine the truthfulness of an advertisement or what constitutes “misleading.”

Senate Bill 675 requires that an advertisement score be “represented graphically” but gives no indication as to what would satisfy this requirement. Page 3, lines 7-14.

Senate Bill 675 requires that if two review agencies disagree on the truthfulness score by “more than one step for either of the subcategories.” It is unclear what “one step” consists of in this context.

Senate Bill 675 creates penalties for those who do not comply with the rules of this Act, but does not explain how these penalties will be enforced or who will be responsible for compliance with ensuring compliance with the Act. Additionally, the Act creates a heavy fine for those who do not submit their political advertisements to the review agencies, and an even heavier fine to those who do not print the required disclaimer. In Citizens United, the Court wrestled with the difficulty of criminal liability, determining, and finding issue with, the fact that in that case, “a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak.” Citizens United v. Fed. Election Comm’n, 558 U.S. at 335 (citation omitted). Although the penalties in Senate Bill 675 are not criminal, there may be an issue with creating a system where a political entity must rely on a governmental review of its political speech before permitting that speech to be given to the public.

PERFORMANCE IMPLICATIONS: As drafted, Senate Bill 675 requires the Attorney General to establish rules to administer the Act, as well as contract with the review agencies to score the political advertisements.

ADMINISTRATIVE IMPLICATIONS: As drafted, Senate Bill 675 requires the Attorney General to establish rules and contract with the review agencies. This may result in staff time dedicated to creating these rules and in reviewing agencies and contracts with them.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP: None

TECHNICAL ISSUES: N/A

OTHER SUBSTANTIVE ISSUES: N/A

ALTERNATIVES: N/A

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL: Status quo

AMENDMENTS: N/A

