

Elections

One act, S.L. 2008-150 (S 1263), contains all 2008 elections legislation, covering topics from oversight of elections to campaign finance regulation. It is referred to in this chapter as “the omnibus act.”

Oversight of Elections

The omnibus act creates the Joint Legislative Elections Oversight Committee, composed of nine members of the Senate who are appointed by the President Pro Tempore and nine members of the House of Representatives who are appointed by the Speaker of the House. The committee membership is to proportionally represent the partisan composition of each chamber.

The committee is to examine, on a continuing basis, election administration and campaign finance regulation in North Carolina and make recommendations to the General Assembly for improvement. The act charges the committee to study the budgets, programs, and policies of the State Board of Elections (SBE) and the county boards of elections; examine election statutes and court decisions; study other states’ practices; and study other election matters as determined by the committee.

Conduct of Elections

Instant Runoff Voting

In 2006 the General Assembly directed the SBE to conduct a pilot test of an innovative method of conducting elections. In the pilot, second primaries and “runoff” elections were eliminated in favor of “instant runoff voting.” Under the pilot, Hendersonville and Cary used instant runoff voting in municipal elections in 2007.

In traditional primaries, if no candidate receives at least 40 percent of the vote—the “substantial plurality”—the second-place candidate may call for a second primary. In instant-runoff voting, by contrast, voters cast their ballots only once, so they do not have to return to the polls for a second primary or runoff. When voters mark their ballots, they mark not only their choice for the winner—as they would in traditional voting—but they also mark their second and third choices. When the ballots are counted, only the first choices are tallied in the initial round of counting. If the race is a partisan primary and any candidate receives the 40 percent substantial plurality, then that candidate is declared the winner, and no further counting in that race is necessary. If, however, no candidate receives the substantial plurality, then the ballot counters conduct a second round of tallying, with only the two top finishers from the first round advancing to the second round. In the second round each ballot counts as a vote for whichever of the two finalists is ranked higher on the ballot. The candidate with the higher number of votes in the second round wins.

Instant runoff voting can be used in nonpartisan primaries, as well. If the race is a nonpartisan election and any candidate receives a majority of the votes, then that candidate is the winner, and no further counting in that race is necessary. If, however, no candidate receives a majority, then the counting continues to a second round as described in the paragraph above.

The 2008 omnibus act authorizes the SBE to use instant runoff voting in up to ten local jurisdictions in elections in 2009, 2010, and 2011. The governing board of each jurisdiction selected must approve participation in the pilot and agree to cooperate with the county board of elections. In the case of school board elections, the approval must come from the county board of elections itself, not the board of education. The SBE, in

consultation with the School of Government at the University of North Carolina, is to develop goals, standards, and criteria for implementation and evaluation.

Residence Period for Voting in a Primary

Article VI, section 2 of the North Carolina Constitution provides that a person who is otherwise qualified to vote may, after living in the state and the proper electoral district for thirty days, “vote at any election held in this State.” This constitutional requirement can be found in G.S. 163-55. In recent times the issue has arisen as to the proper interpretation of the state constitution and the statute with respect to primaries. Must a voter be a thirty-day resident before being eligible to vote in a primary, or should a primary be considered a part of the general election, so that a voter who has not resided for thirty days before the primary, but will have resided for thirty days by the time of the general election, be allowed to vote in the primary? The General Assembly answers this question in the omnibus act by amending G.S. 163-55 and a few related statutory provisions to make it clear that the thirty-day requirement applies to primaries as well as general elections. A voter must have resided for at least thirty days before a primary to be eligible to vote in the primary.

In addition voters must register to vote, under G.S. 163-82.6, at least twenty-five days before an election to be eligible to vote in the election. The omnibus act amends that statute to make clear that it applies to primaries as well as general elections.

Candidates on Ballot When New Election Ordered

By the general rule, when the SBE orders a new election because of irregularities in the original election, all candidates on the ballot in the original election are to appear on the ballot in the new election. G.S. 163-182.13(e) has provided, however, that when the SBE orders a new election in a multiseat race because of irregularities in the original election, and the irregularities could not have affected the election of one or more of the “leading vote getters,” then the SBE may order the election to be held among only “those remaining” candidates whose election could have been affected by the irregularities.

The omnibus act makes two wording changes. First, it substitutes “candidates” for “leading vote getters,” and, second, it deletes the word “remaining” from the statute. As thus rewritten, the statute says that when the irregularities could not have affected the election of one or more of the candidates, then the election may be limited to those candidates whose elections could have been affected.

This change was prompted by a situation that arose in a 2007 municipal election in Clayton. Five candidates ran for two seats. Only fourteen votes separated the top three vote getters. The fourth-place and

fifth-place finishers were separated from third place by fifty-six votes and 389 votes, respectively. Exactly twenty improper ballots were cast in the election. Because fewer than twenty votes separated the top three vote getters, the old wording of the statute required that in the new election all five candidates were to appear on the ballot. With the changed wording of the new statute, since the fourth- and fifth-place finishers were not within twenty votes of the second-place finisher, the irregularities could not have affected their outcomes, and the new election could have been limited to the top three finishers.

Candidates of New Political Parties

The General Statutes provide for the formation of new political parties. G.S. 163-98 provides that when a new party has met the statutory requirements and been recognized by the SBE, its candidates for the first general election are to be nominated by convention (rather than by primary); those nominees will then appear on the general election ballot. The president of the convention is to certify the names of those nominees to the SBE. The omnibus act adds a provision to the statute specifying that the nominees must be affiliated with the new party at the time of the certification. They may meet this requirement by submitting an application to change party affiliation at the time the certification is submitted.

Delivery of Notice of Final SBE Decision

G.S. 163-182.14 has provided that a final decision by the SBE on an election protest is to be delivered to the parties personally or by certified mail. The omnibus act amends the statute to provide that delivery may also be made by regular U.S. mail or by delivery services that provide a record of the date and time of delivery.

Campaign Finance Adjustments to Court Decision

North Carolina’s campaign finance statutes have been the subject of nearly constant litigation since 1996. The most recent major court ruling came in May 2008. In *North Carolina Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008), the federal court of appeals held several portions of the statutes unconstitutional.

First, the court overturned a portion of the statutory provisions for determining whether a contribution is the kind of contribution that can be regulated. For a contribution to be the kind that is subject to regulation, it must be made “to support or oppose the nomination or election of one or more clearly identified candidates.” G.S. 163-278.14A has provided the

basis for making the determination of whether a contribution met this requirement: either the communications funded by the contribution contained words like “vote for Smith” or “Smith for commissioner,” or, in the absence of such words, “contextual factors” such as the language, timing, and distribution of the communication revealed that the nature of the communication was “electoral advocacy.” The court held that this second prong—the contextual factors prong—was unconstitutional, because it could include many kinds of speech other than speech that is “the functional equivalent of express advocacy” of a candidate.

Second, the court overturned a portion of the statutory provisions for determining whether an entity that spends money for election-related speech is a “political committee.” Only if the entity meets the definition of political committee is it subject to the full range of campaign finance regulation. G.S. 163-278.6(14) set out several ways in which an entity would meet the definition. For instance, an entity “controlled by a candidate” would be a political committee. The statute has provided further that an entity is a political committee subject to regulation if it had “as a major purpose” the support or opposition of the nomination or election of a candidate. The court held that this last provision—“a major purpose”—was unconstitutional. It would be constitutional, the court decided, only if its coverage was limited to entities with “the major purpose” of supporting or opposing candidates. The difference between “a major purpose” and “the major purpose” is crucial, the court ruled. Allowing regulation of entities with “a major purpose” that is electoral sweeps in too many entities that have many major purposes and amounts to unconstitutional regulation of protected speech.

Third, the court overturned a portion of the statutory provision, G.S. 163-278.13, that places a limitation of \$4,000 as the most that a contributor may give during any one election to any one candidate or political committee. The court held that enforcing this limitation against committees that make only independent expenditures—that is, expenditures that are not coordinated with any candidate—is an unconstitutional limitation on free speech.

In response to these rulings, the 2008 omnibus act contains a number of revisions to the campaign finance regulation statutes.

“Support or Oppose” Limitation

To meet the first of the court’s rulings, the omnibus act amends G.S. 163-278.14A to provide that a contribution or expenditure is made “to support or oppose the nomination or election of one or more clearly identified candidates” only if it contains words such as “vote for Smith” or “Smith for commissioner.” The act deletes the provision for “contextual factors” discussed above.

“The” Major Purpose

To meet the second of the court’s rulings, the omnibus act amends G.S. 163-278.6(14) to provide that an entity not controlled by a candidate meets the definition of “political committee,” and is thus subject to the full range of campaign finance regulation, only if it has “the major purpose” of supporting or opposing a candidate. Before the change, the statute referred to “a major purpose.”

Limits Not Applicable to Independent Expenditure Committees

To meet the third of the court’s rulings, the omnibus act amends G.S. 163-278.13 to add a new subsection providing that the contribution limitation of \$4,000 per election does not apply to contributions made to an independent expenditure political committee. The treasurer of such a committee must make a certification to the SBE that the committee does not and will not make contributions, directly or indirectly, to candidates or to committees that make contributions to candidates.

Other Campaign Finance Adjustments

Candidate Serving as Own Treasurer

G.S. 163-278.6 contains definitions of terms that apply throughout the campaign finance statutes. One such defined term is “political committee,” and the campaign finance statutes then spell out many responsibilities of political committees. The omnibus act amends the statute to make clear that the term includes the campaign of a candidate who serves as his or her own treasurer.

Matching Funds

Article 22D of G.S. Chapter 163 governs the North Carolina Public Campaign Fund, under which candidates for justice of the state’s Supreme Court or judge of the Court of Appeals may choose to forego the opportunity to raise funds for their campaign and instead, in return for a promise to limit campaign spending, receive public funds to support their campaigns. G.S. 163-278.67 provides for a participating candidate to receive public funds in addition to the regular amount when a nonparticipating opponent has spent more than a certain amount in the campaign. These additional funds are called “matching funds.” The omnibus act amends the statute to add a requirement that when a candidate becomes eligible for any amount of matching funds, the SBE is to authorize the transfer of the matching funds as soon as practicable; the Department of Administration is to transfer the funds to the candidate no later than twelve hours after receiving the notice from the SBE.

G.S. 163-278.13(e2) has provided that no nonparticipating candidate who is opposed by a participating candidate may accept a contribution in the final twenty-one days of the election, if the contribution would trigger the participating candidate's right to matching funds. The omnibus act repeals that provision.

The North Carolina Public Campaign Fund, as noted above, offers public funding to candidates for Supreme Court and Court of Appeals. Similarly, Article 22J of G.S. Chapter 163, the Voter-Owned Elections Act, offers public funding to candidates for commissioner of insurance, superintendent of public instruction, and auditor. In both instances, nonparticipating candidates who have participating opponents are required to report when they reach 80 percent of the trigger amount that would entitle the participating opponent to matching funds. The two statutory provisions requiring this report—G.S. 163-278.66(a) and G.S. 163-278.99A(a)—have required the report when the nonparticipating candidate's expenditures or obligations reach that 80 percent level. The omnibus act amends both statutes to require the report when contributions reach the 80 percent level. It also deletes from the statute particulars about triggers for further reports and instead directs the SBE to set out the schedule for further reports.

Separate Accounts for Funds

The omnibus act enacts new G.S. 163-278.8(h), which requires that committee treasurers maintain all moneys of the committee in a bank account or accounts used exclusively by the political committee and may not commingle those funds with any other funds.

Purchases of Campaign Merchandise Not “Contributions”

The omnibus act enacts new G.S. 163-278.8A, which provides that a political party executive committee may sell goods or services and that the purchase price of the goods or services will not count as a “contribution” for purposes of the contributions limits contained in the campaign finance statutes, for purposes of reporting contributions, or for purposes of account-keeping. For this exemption to apply, the executive committee must have filed a plan with the SBE, and the SBE Executive Director must have approved it. Under the plan the price of the goods and services must be reasonably close to the market price, total sales must not exceed \$10,000 in an election cycle, no single purchaser may make total purchases of more than \$50, and the treasurer of the executive committee is to report the amount raised and the number of purchases.

Clarifying Quarterly Reports

G.S. 163-278.9 sets out the reporting schedule for candidates and committees. One of the required reports is the quarterly report, required during even-numbered years when “there is an election for that candidate or in which the campaign committee is supporting a candidate.” The omnibus act adds the words “or opposing” so that the reporting is required when there is an election for that candidate or “the campaign committee is supporting or opposing a candidate.”

Nonmunicipal Committees Reporting for Municipal Contributions and Vice Versa

The campaign reporting statutes contain a distinct set of provisions for municipal elections, separate from the provisions for county and state elections, with distinct provisions for political committee organization and reporting. The omnibus act enacts new G.S. 163-278.40J, making it clear that political committees that are organized under the general provisions must, if they make contributions or expenditures in municipal elections, make reports according to the municipal reporting schedule for those contributions or expenditures.

An amendment to G.S. 163-278.9(d) applies the other way around. It provides that a committee organized under the municipal provisions that makes contributions in nonmunicipal elections must meet the general reporting requirements.

Electioneering Communications

Two different articles in G.S. Chapter 163 regulate certain kinds of election-related communications in the sixty days before a general election and thirty days before a primary. Article 22E regulates broadcast, cable, and satellite communications; Article 22F regulates mass mailings and telephone bank communications. In both cases if the communication refers to a clearly identified candidate for statewide office or for the General Assembly and reaches a large audience, it is referred to as an “electioneering communication,” and the sponsor must report certain information regarding expenditures for the communication. Further, the statutes prohibit corporations, insurance companies, labor unions, and professional associations from making any expenditure for an electioneering communication.

The omnibus act amends both G.S. 163-278.82 and G.S. 163-278.92 to provide that the prohibition on expenditures by corporations, insurance companies, labor unions, and professional associations does not apply unless the electioneering communication at issue is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.

Reporting Late Contributions

The statutes calling for reports of contributions and expenditures by political committees and referendum committees—G.S. 163-278.9 and G.S. 163-278.9A—have required that contributions of \$1,000 or more from political committees be reported within forty-eight hours of receipt. The omnibus act amends the statutes to require that any contributions of that size, whether from political committees or other sources, must be so reported and to specify that in-kind contributions must be reported.

Robert P. Joyce