

STORAGE NAME: h0559s2.go

DATE: April 15, 1999

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
GOVERNMENTAL OPERATIONS
ANALYSIS**

BILL #: CS/CS/HBs 559, 171, & 565

RELATING TO: Campaign Financing

SPONSOR(S): Committees on Governmental Operations and Election Reform, Representatives Detert, Turnbull, Logan and others

COMPANION BILL(S): CS/SB 314, 2nd Engrossed (similar), HB 171 (compare), HB 565 (compare), and SB 92 (compare)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) ELECTION REFORM (PRC) YEAS 12 NAYS 0
 - (2) GOVERNMENTAL OPERATIONS YEAS 3 NAYS 1
 - (3) GOVERNMENTAL RULES & REGULATIONS
 - (4)
 - (5)
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I. SUMMARY:

CS/CS/HBs 559, 171, & 565 is an act relating to campaign financing. Specifically, the bill makes the following changes to Ch. 106, F.S.:

- ▶ Prohibits any public officer, agency employee, or local government attorney from using or authorizing the use of any of the facilities of a public office or agency for the purpose of promoting or opposing a candidate, or for testimonials, thank you promotions, or other forms of paid media advertising on behalf of a public official.
- ▶ Expands the definition of "political committee" to include any group which anticipates making expenditures in excess of \$500 in a calendar year on political advertising in support of or opposition to an elected public official. Committees of continuous existence (CCEs) will now be required to register as political committees if any expenditure is made to support or oppose an elected public official. These changes will effectively require these groups to register and file campaign finance reports as currently required of political committees. The definition of contribution and expenditure are amended to conform.
- ▶ Expands the definition of "political advertisement" to target "issue ads," by requiring any paid expression in a communications media which mentions or shows a clearly-identifiable candidate for election or reelection and is distributed at any point during the election cycle to be reported and disclosed. Provides limited exemptions.
- ▶ Requires more stringent reporting requirements for political committees and CCEs with respect to groups organizing the committees. Provides time-frame for committees to comply. Provides penalties.

The bill has a minimal fiscal impact.

CS/CS/HBs 559, 171, & 565 provides an effective date of July 1, 1999.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Political Advertisements

Elected Public Officials

In general, groups who wish to support or oppose a **candidate, issue, or political party** must first register with the Department of State as a political committee and file periodic financial reports detailing names and addresses of those giving or receiving funds from the committee and corresponding amounts. Political committees are also required to file statements of organization which state the names and positions of its principal officers. Section 106.011 (1), F.S., defines a "political committee," in relevant part, as follows:

[A] combination of two or more individuals, or a person other than an individual, the primary or incidental purpose of which is to support or oppose any **candidate, issue, or political party**, which accepts contributions or makes expenditures during a calendar year in an aggregate amount in excess of \$500 [emphasis added].

With few exceptions, "political advertisements" must include a "paid for by" disclaimer identifying who is responsible for the particular advertisement. [See *generally*, ss. 106.071 and 106.143, F.S.; Doe v. Mortham, 708 So.2d 929 (Fla. 1998)]. "Political advertisement" is defined in pertinent part as meaning:

... a paid expression in any communications media ... whether radio, television, newspaper, magazine, periodical, campaign literature, direct mail, or display or by means other than the spoken word in direct conversation, which shall **support or oppose any candidate, elected public official, or issue** [emphasis added].

[s. 106.011(17), F.S.]. Absent any filing requirements for these organizations, the name placed on the disclaimer alone may not adequately identify the persons responsible for the advertisement.

Although the Florida Election Code captures groups supporting or opposing **candidates, issues, or political parties** by requiring registration as a political committee and defines "political advertisement" to include **elected public officials**, the Code fails to encompass groups who make expenditures for political advertising which support or oppose an **elected public official**. Therefore, although such groups have to identify their name on the advertisement's disclaimer, they do not have to file any documentation with the Division of Elections detailing the names and addresses of the principal officers of the group, the source of contributions made to the group, or expenditures made. Where groups use generic names (i.e. the "Florida Committee for Better Government" or the "Coalition for Citizens Rights") the disclaimer information alone may not be sufficient to identify the affiliations or motivations of the sponsors or principal officers.

Issue Advocacy

"Issue ads," ads which discuss non-referendum issues of interest to the electorate, which include references to or likenesses of candidates or elected public officials are not regulated under Florida law. Such an ad does not have to include the phrase "paid political advertisement," or similar expression. The ad does not have to identify the sponsoring individual or group. Nor is such an ad considered a contribution or expenditure under the Florida Election Code; thus there is no limit to the amount which can be spent in coordination with, or independent of, any candidate.

Reporting Requirements of Political Parties and CCEs

Political committees and committees of continuous existence (CCEs) are required to register with the Division of Elections and file a statement of organization which include in part:

- Name and address of the committee;
- Names, addresses, and relationship of affiliated organizations;
- Area, scope, and jurisdiction of the committee;
- Name, address, and position of the custodian of accounts and other principal officers; and
- Name and address of candidates being supported or issues being opposed or supported by the committee.

[ss. 106.03 and 106.04, F.S.]

Political committees and CCEs are also required to file periodic reports with the Division of Elections outlining all contributions and expenditures received and expended. [s. 106.07, F.S.] Further, CCEs must file an annual report outlining essentially the same organizational information required of the committee's initial report. [s. 106.04, F.S.]

B. EFFECT OF PROPOSED CHANGES:

Political Advertisements

Elected Public Officials

CS/CS/HBs 559, 171, & 565 requires groups that anticipate making expenditures in excess of \$500 in a calendar year for political advertising which supports or opposes an **elected public official** to register as a political committee and file the requisite reports. Also, CCEs making such expenditures will be required to register as a political committee irrespective of the amount expended on such advocacy. The definitions of "contribution" and "expenditure" are amended to conform.

Issue Advocacy

The bill modifies the definition of "political advertisement" to include any paid expression in a communications media (other than the spoken word in direct conversation) which:

- Mentions or shows a clearly-identifiable candidate for election or reelection; **and**
- Is distributed at any point during the period following the last day of qualifying for that candidacy through the ensuing general election ("the election cycle").

However, the bill excludes from this definition an advertisement which:

- Advertises a business rather than the candidate, is paid out of funds of that business, and is similar to other advertisements for that business which have mentioned or shown the candidate and have been distributed regularly over a period of at least 1 year before the qualifying period for that candidacy; **or**
- Is distributed or broadcast only to areas other than the geographical area of the electorate for that candidacy.

Under this definition, "issue ads" will be subject to regulation if the advertisement mentions or shows a clearly identifiable candidate for election or reelection, regardless of whether the advertisement contains express words of advocacy (i.e. "vote for," "re-elect," "vote against," "defeat," or any similar words or statements). Sponsors will have to identify the advertisement as "paid political advertisements" and, in most cases, include a sponsorship disclaimer identifying who they are. [s. 106.143(1), F.S. (1997); See, *Doe v. Mortham*, 708 So.2d 929 (Fla. 1998) (sponsorship identification disclaimer requirement unconstitutional as applied to individuals acting independently and using only their own modest resources)].

Any political advertisement which meets the conditions of the definition as set forth under this bill, would fall within the scope of the terms "contribution" and/or "expenditure" for campaign finance reporting and contribution limit purposes. If the modification has the effect of bringing "issue ads" within the scope of the terms "contribution" and/or "expenditure", the effects would be significant. Issue ads by a political party which are coordinated with a candidate would be allocable to the party contribution limit of \$50,000. Political committees coordinating an issue ad with a candidate would be limited to spending a maximum of \$500 per election. Uncoordinated expenditures by political parties and political committees for issue ads would need to be reported on campaign finance treasurers' reports.

The ability of a state to regulate issue advocacy ads raises significant constitutional free speech issues (See, **Comments**, below).

Reporting Requirements of Political Parties and CCEs

Registration and reporting requirements for political committees and CCEs are modified. The bill requires that the committee's name include the corporation, labor union, professional association, political committee, CCE, or other business entity whose representatives are responsible for setting up the committee, if any. For those committees whose name does not include the group which organized it, the bill requires that the name include the common special or economic interest of the organization. Additionally, the bill requires the committee's treasurer report to include a description of the special or economic interest, if any, of a majority of the committee's contributors. The bill also requires the committee's treasurer and other principal officers to identify their principal employer on the committee's statement of organization. The bill requires that this information be updated, where necessary.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

Yes. The Division of Elections and the Florida Elections Commission will be responsible for enforcing the changes to the campaign finance laws implemented under this bill.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes. Groups who wish to support or oppose an elected public official will be required to become a registered political committee and submit periodic campaign finance reports.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

An agency or program is not eliminated or reduced.

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

Not applicable.

(2) what is the cost of such responsibility at the new level/agency?

Not applicable.

(3) how is the new agency accountable to the people governed?

Not applicable.

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

Not applicable.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Yes. This bill will require those who can lawfully run advertisements which support or oppose an elected public official without disclosing their membership or their financing to register as a political committee and to file periodic reports as required.

Additionally, political committees and CCEs will be under more stringent requirements to disclose the contributors and organizers of their committees.

Also, to the extent that issue ads are regulated under the provisions of this bill, sponsors of such ads will have to adhere to disclosure requirements and other provisions of the Florida Election Code that they are currently not subject to.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

The bill does not purport to provide services to families or children.

- (1) Who evaluates the family's needs?

Not applicable.

- (2) Who makes the decisions?

Not applicable.

- (3) Are private alternatives permitted?

Not applicable.

- (4) Are families required to participate in a program?

Not applicable.

- (5) Are families penalized for not participating in a program?

Not applicable.

- b. Does the bill directly affect the legal rights and obligations between family members?

No.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

The bill does not create or change a program providing services to families or children.

- (1) parents and guardians?

Not applicable.

- (2) service providers?

Not applicable.

- (3) government employees/agencies?

Not applicable.

D. STATUTE(S) AFFECTED:

This bill amends ss. 104.31, 106.011, 106.03, 106.04, and 106.07, F.S.

E. SECTION-BY-SECTION ANALYSIS:

- Section 1. Creates s. 104.31(2), relating to political activities of state, county, and municipal officers and employees. This subsection prohibits any public officer, agency employee, or local government attorney from using or authorizing the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of promoting or opposing a candidate, or for testimonials, thank you promotions, or other forms of paid media advertising on behalf of a public official. It also clarifies what is included and what is excluded by the term "facilities of a public office or agency".
- Section 2. Amends the definitions of "political committee," "contribution," "expenditure," and "political advertisement" as follows:
- ▶ Modifies "political committees" to include groups that anticipate making expenditures in excess of \$500 in a calendar year for political advertising supporting or opposing an elected public official.
 - ▶ Includes as a "contribution" any funds received by a political committee which are to be used for political advertising for or against an elected public official. Amends definition of "expenditure" to conform.
 - ▶ Modifies the definition of "political advertisement" to include any paid expression in a communications media (other than the spoken word in direct conversation) which:
 1. Mentions or shows a clearly-identifiable candidate for election or reelection;
and
 2. Is distributed at any point during the period following the last day of qualifying for that candidacy through the ensuing general election ("the election cycle").
- However, two exemptions are granted if the advertisement:
1. Advertises a business rather than the candidate, is paid out of funds of that business, and is similar to other advertisements for that business which have mentioned or shown the candidate and have been distributed regularly over a period of at least 1 year before the qualifying period for that candidacy; **or**
 2. Is distributed or broadcast only to areas other than the geographical area of the electorate for that candidacy.
- Section 3. Amends registration requirements for political committees to include the name of the corporation, labor union, or professional association whose officials, employees, or members established the committee, if any. However, if the name of the aforementioned groups is not included, the name must include the common special or economic interest of the committee. Provides time-frame for committees to comply. Provides penalties.
- Section 4. Conforms the requirements for political committees in "Section 3" above to committees of continuous existence. However, if the name of these business, economic, or special interest groups is not included, the CCE must provide as clear a description as practicable of the economic or special interest of a **majority** of the contributors of the political committee if they share a common interest. Majority is defined as those contributions over \$100 which make up more than 50 percent of aggregate contributions. Requires a CCE to register as a political committee if expenditures are to be made to support or oppose an elected public official.
- Section 5. Requires the treasurer's report for political committees and CCEs whose name does not include a corporation, labor union, professional association, or other business entity or special or economic interest, to provide as clear a description as practicable of the economic or special interest of a **majority** of the contributors of the political committee if they share a common interest. Majority is defined as those contributions over \$100 which make up more than 50 percent of aggregate contributions.

Section 6. Provides an effective date of July 1, 1999.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

Minimal. The Division of Elections has indicated that any changes can be handled with current staff.

2. Recurring Effects:

See above.

3. Long Run Effects Other Than Normal Growth:

Not applicable.

4. Total Revenues and Expenditures:

Not applicable.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

Not applicable.

2. Recurring Effects:

Not applicable.

3. Long Run Effects Other Than Normal Growth:

Not applicable.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

None.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

Election laws are exempt from the provisions of Article VII, section 18 of the Florida Constitution.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

Not applicable.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

Not applicable.

V. COMMENTS:

Registration and Reporting Requirements of Committees

Florida statutes relating to the registration and reporting requirements of political committees have been upheld as serving a compelling state interest when challenged against constitutional rights of association and free speech. [Falzone v. State, 500 So.2d 1337 (Fla. 1987)(upholding scope of "political committee" to include groups organized to support or oppose a candidate, issue, political party, or constitutional amendment); State v. Greco, 479 So.2d 786 (Fla.App. 2 Dist. 1985)(statute providing political committees to file statement of organization was not unconstitutionally vague or over broad; gave reasonable notice as to proscribed conduct; and State had legitimate interest in insuring that public knew who was involved in raising and spending money for political purposes)]. These cases have been limited, however, to groups and campaigns for elections and do not directly address advertising campaigns against incumbent public officers.

Political Advertisement and "Issue Advocacy"

When Congress passed the Federal Election Campaign Act of 1974 (the "Act"), it sought to regulate federal campaigns by placing limitations and disclosure requirements on campaign contributions and expenditures. Challenges to the constitutionality of various provisions of the Act placed it before the U.S. Supreme Court in Buckley v. Valeo, 96 S.Ct. 612 (1976). In reviewing the Act, the Supreme Court held unconstitutional a number of expenditure limits but upheld limitations on contributions as passing constitutional muster. In their analysis, the Court used the long-established practice of applying a "strict scrutiny" standard to test the infringement of First Amendment rights against governmental interests. This standard dictates that any encroachment on constitutionally protected freedoms must be **narrowly tailored** to advance a demonstrated **compelling state interest**. [Williams v. Rhodes, 393 U.S., at 31 and NAACP v. Button, 371 U.S. 415, 438]. The Buckley Court and progeny have asserted that the only compelling interest to justify infringement on First Amendment rights is the prevention of corruption or the appearance of corruption.

In saving various provisions of the Act from an overbreadth problem, the Court interpreted the term "expenditure" to encompass "only funds used for communications that **expressly advocate the election or defeat of a clearly identified candidate**." [Buckley, 96 S.Ct. at 663 (emphasis added)]. As previously stated, express advocacy was limited to communications containing express words of advocacy of election or defeat such as "vote for," "elect," "support," "vote against," and other identical synonyms. [*Id.* at 646 n. 52]. By adopting this bright line limitation, the Buckley Court effectively segregated political advocacy into two categories: "express" and "issue" advocacy. Advocacy using the "magic words" expressed in Buckley and later affirmed in Federal Election Com'n v. Massachusetts Citizens for Life, Inc., 107 S.Ct. 616 (1986), could be permissibly regulated. Conversely, advocacy falling outside these parameters could not. [See, West Virginians for Life, Inc. v. Smith, 960 F.Supp. 1036, 1039 (S.D.W.Va. 1996) (it is clear from Buckley and its progeny that the Supreme Court has made a definite distinction between express advocacy, which generally can be regulated, and issue advocacy, which cannot); Planned Parenthood Affiliates of Michigan, Inc. v. Miller, 21 F.Supp. 2d 740, 743 (E.D. Mich. 1998) (government can regulate express advocacy but issue advocacy cannot be prohibited or regulated, citing Buckley and MCFL); Maine Right to Life Committee, Inc. v. Federal Elections Commission, 914 F.Supp. 8 (D. Maine 1996), *affirmed.*, 98 F.3d 1 (1st Cir. 1996), *cert.*

denied, 118 S.Ct. 52 (1997) (Buckley adopted a bright-line test that expenditures must in express terms advocate the election or defeat of a candidate in order to be subject to limitation)].

Although most courts have directly followed this strict definition, a few courts, most notably the Ninth Circuit in Federal Election Com'n v. Furgatch, 807 F.2d 857 (9th Cir. 1987) *cert. denied*, 108 S.Ct. 151, have attempted to broaden this strict interpretation. The Furgatch Court held that "speech need not include any of the words listed in Buckley to be express advocacy ... but when read as a whole, and with limited reference to external events, be susceptible of **no other reasonable interpretation** but as an exhortation to vote for or against a specific candidate. [*Id.* at 864 (emphasis added)]. This approach however, has been directly challenged by the Fourth Circuit in Federal Election Com'n v. Christian Action Network, Inc., 110 F.3d 1049 (C.A.4 (Va.) 1997). **Although controversy exists on this issue between two circuits, the U.S. Supreme Court has declined to grant review at this time.**

Advertisements Against Public Officials

Advertisements against public officials have been held allowable even if statements contained in those ads are false. In New York Times Co. v. Sullivan, 376 US 254, (1964), a libel suit was brought by a public official against the New York Times for a libelous paid advertisement. In repudiating the claim, the U.S. Supreme Court noted that the First Amendment affords even unpleasant political free speech against public officials. The Court recognized that "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasant sharp attacks on government and public officials." [*Id.* at 270]. Florida District Courts of Appeal have followed the New York Times standard in cases brought against parties defaming or libeling public officials. [*Cf. Cronley v. Pensacola News-Journal, Inc.*, 561 So.2d 402 (Fla.App. 1 Dist. 1990); Ford v. Rowland, 562 So.2d 731 (Fla.App. 5 Dist. 1990); and Shiver v. Apalachee Pub. Co., 425 So.2d 1173 (Fla.App. 1 Dist 1983)].

Florida does not regulate the content of political advertisements; however, the State does require certain political advertisements include a "pd. pol. ad." and "paid for by" disclaimer. The Florida Supreme Court in Doe v. Mortham, 708 So.2d 929 (Fla. 1998), held these requirements constitutional so long as they did not require disclaimers by individuals engaged in personal pamphleteering acting independently and using their modest resources.

To the extent that the provisions of this bill are construed to regulate "issue advocacy," it is unclear whether it could pass constitutional scrutiny under the First Amendment free speech and overbreadth doctrines. It is arguable that the regulation of "issue advocacy" has not been fully addressed by the U.S. Supreme Court and therefore, a number of reform groups maintain that the concept of regulation is still "open" and remains a valid subject of state legislation.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The House Committee on Election Reform adopted HB 559 with three amendments. The bill was made a committee substitute styled as CS/HBs 559, 171, & 565.

On April 14, 1999, the House Committee on Governmental Operations adopted a strike-everything amendment, and CS/HBs 559, 171, & 565 was made into a committee substitute for a committee substitute (CS/CS/HB 559, 171, & 565). CS/CS/HB 559, 171, & 565 is different from CS/HB 559, 171, & 565 in two significant ways:

- 1) CS/CS/HB 559, 171, & 565 creates s. 104.31(2), relating to political activities of state, county, and municipal officers and employees. This new subsection prohibits any public officer, agency employee, or local government attorney from using or authorizing the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of promoting or opposing a candidate, or for testimonials, thank you promotions, or other forms of paid media advertising on behalf of a public official. It clarifies what is included and what is excluded by the term "facilities of a public office or agency".

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- 2) It deletes the provision in CS/HB 559, 171, & 565 that would have required candidates and political parties to report contribution and expenditures made for obtaining "3-pack" advertisements which allocate equal time, space, or service to three or more candidates.

VII. SIGNATURES:

COMMITTEE ON ELECTION REFORM:

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