SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1512

SPONSOR: Committee on Ethics and Elections and Senator Klein

SUBJECT: Elections; campaign finance

DATE: March 21, 2000 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Fox	Bradshaw	EE	Favorable/CS
2.				
3.				
4.				
5.				

I. Summary:

Committee Substitute for Senate Bill 1512 ("the committee substitute") is an omnibus election reform bill. Specifically, the committee substitute: amends the definition of "political committee;" revises the definition of "political advertisement" to include certain expenditures made during the election cycle which mention or show a clearly identified candidate and which reasonably could be understood to contain an electioneering message; eliminates the so-called "3-pack" exemption for multiple candidate endorsements from political parties and political committees; modifies the registration and campaign finance reporting requirements for political committees and committees of continuous existence to more clearly identify affiliated businesses and special interests; limits contributions to political parties to an aggregate of $5,000 per calendar year; provides that all in-kind contributions from political parties to candidates count toward the $50,000 aggregate contribution limit; repeals the section of Florida Statutes which bars a political committee or committee of continuous existence from making most types of independent expenditures if it accepts public funds or resources to collect dues; and, eliminates a requirement that state executive committees of a political party report all contributions from the national executive committee of the party to a party candidate.

This bill substantially amends the following sections of the Florida Statutes: 106.011, 106.021, 106.03, 106.04, 106.07, 106.08, 106.087, and 106.29. The committee substitute also reenacts s. 106.19(1), Florida Statutes, for purposes of a cross-reference.

II. Present Situation:

Definition of Political Committee

On December 15, 1999, the Federal District Court for the Middle District of Florida held that several provisions of Florida law, including the definition of "political committee," violated the First and Fourteenth Amendments to the U.S. Constitution. *Florida Right to Life v. Mortham*,

No. 98-770-CIV-ORL-19A (M.D. Fla. 1999). Florida law defines "political committee" in pertinent part to mean:

> 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, (ballot) issue, or political party, which accepts contributions or makes expenditures during a calendar year in an aggregate amount in excess of $500 ...

(emphasis added) s. 106.011(1), F.S. The court held that this existing statutory definition was too broad because it subjected pure issue advocacy groups --- groups which only advocate non-ballot political issues and which never *expressly advocate* for or against a candidate or ballot issue --- to the registration and reporting requirements of Florida's campaign finance laws. The case is currently on appeal to the Court of Appeals for the Eleventh Circuit. For practical purposes, Florida now has no enforceable definition of "political committee," which may allow groups to evade the campaign finance registration and reporting laws.

Issue Advocacy

So-called "issue ads," ads which discuss non-referendum issues of interest to the electorate and which include references to or likenesses of candidates, are arguably not regulated under Florida law. The ad does not need to include the phrase "paid political advertisement" or similar expression. It does not need to identify the sponsoring individual or group. It is not considered a contribution nor an expenditure under Florida's campaign finance laws, thus there is no limit to the amount which can be spent on issue ads in coordination with or independent of any candidate.

"3-Packs"

Florida law exempts a political committee or political party advertisement jointly endorsing three or more candidates from the contribution limits. s. 106.021(3), F.S. The law provides that any expenditure for these so-called "3-packs" is considered neither an expenditure nor a contribution for campaign finance purposes. *Id.* The Legislature created the "3-packs" in the major election reform package of 1997, reducing the minimum number of candidates which the ad needs to jointly endorse from six to three in order to qualify for the exemption. Ch. 97-13, s. 9, at 22, Laws of Fla.

Campaign Finance Reporting Requirements

Clever political committees and committees of continuous existence are able to mask their special interest ties in political advertisements behind generic committee names such as "The Committee for a Better Florida" or "Floridians for Citizen Rights." Despite the fact that Florida law requires most paid "political advertisements" to carry a "paid for by" disclaimer indicating the persons or group sponsoring the ad, in these cases the disclaimer information alone may not be sufficient to identify the affiliations or motivations of the sponsoring group. ss. 106.071 and 106.143, F.S. The public or the media must research the committee's registration or contribution reports and try to piece together the business or special interests which may be funding the committee. This delay can be particularly problematic with regard to last-minute attack ads. Neither the public nor the

candidate under attack may be able to find out who is truly sponsoring the ads until the election is over.

Limits on Contributions to Political Parties

There is no limit on the amount of contributions by persons or groups, including political committees and committees of continuous existence, *to* the executive committee of state or county political parties. Florida law does provide, however, that any funds received by a political party less than 5 days before an election may not be used or expended on behalf of any candidate, issue, or political party participating in the election. s. 106.29(4), F.S. Florida law also prohibits "earmarked" contributions to political parties — contributions specifically designated for use by a particular candidate. s. 106.08(6), F.S. Despite this prohibition against earmarked funds, public interest groups claim that corporations, special interest groups, and wealthy individual donors are able to funnel large sums of money in support of candidates through unrestricted contributions to the candidates' political parties --- thereby effectively circumventing the $500 general contribution limit.

Federal law limits contributions to the executive committee of a national party "in connection with" federal elections, known as "hard money." However, there is no limit to the amount of "soft money" which a person or organization, including a corporation or labor union, can contribute to a national political party for so-called "get-out-the-vote" or "party-building" activities, or, more recently, to fund issue ads.

Twenty-two states plus the District of Columbia place some limits on the amount which an individual may contribute to a political party. Feigenbaum and Palmer, *Campaign Finance Law 98*, at Chart 2A, "Contribution and Solicitation Limitations" (published by Federal Elections Commission, 1998). Twenty-one states plus the District of Columbia restrict contributions by political action committees to political parties. *Id*. Thirty-six states plus the District of Columbia limit or prohibit contributions by corporations to political parties, and thirty states limit or prohibit contributions by labor unions. *Id.* In a few of the states, like Maryland and New York, the limits apply only to "hard money" contributions. *Id*.

Contributions by Political Parties to Candidates

Candidates are currently prohibited from accepting contributions of more than $50,000 in the aggregate from a political party. s. 106.08(2)(a), F.S. Expenditures for polling services, research services, campaign staff, professional consulting services, and telephone calls are not counted toward the $50,000 aggregate limit. s. 106.08(2)(b), F.S. All other expenditures and in-kind contributions are counted toward the $50,000 limit. These expenditures must be reported by both the candidate and the party.

Independent Expenditures

An independent expenditure is an expenditure by a person advocating the election or defeat of a candidate or the approval or rejection of a ballot issue:

> [W]hich expenditure is not controlled by, coordinated with, or made upon consultation with, any candidate, political committee, or agent of such candidate or committee.

s. 106.011(5), F.S. Section 106.087(2), Florida Statutes, effectively prohibits any political committee or CCE from making most types of independent expenditures if it accepts public funds, personnel, or resources to collect dues from its members. s. 106.087(2), F.S.

Campaign Finance Reports by State Executive Committees

The state executive committee of a political party is required to report all contributions from the national executive committee of the party to a party candidate. s. 106.29(6)(a).

III. Effect of Proposed Changes:

Definition of Political Committee

The committee substitute seeks to require all groups making or receiving contributions, or making express advocacy expenditures, in excess of $500 per calendar year to register and report as a political committee --- while carving out a narrow exemption for groups which engage exclusively in issue advocacy. Specifically, the committee substitute amends the definition of "political committee" to include any group which: 1) makes or accepts contributions[1] in support or opposition to any candidate, ballot issue, or political party; or, 2) expressly advocates the election or defeat of any candidate or ballot issue, in an aggregate amount of more than $500 per calendar year.

Issue Advocacy

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

- Substantially mentions or shows a clearly-identifiable candidate for election or reelection;
- 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");
- Can reasonably be understood as a communication made for the purpose of influencing the results of an election on that candidacy (contains an electioneering message); and,
- Aggregate more than $1,000 in expenditures on like advertisements.

The committee substitute creates two new exemptions. A paid expression in any communications media which mentions or shows a clearly identifiable candidate for election or reelection is not a "political advertisement" where it:

[1] "Contribution" means essentially anything of value, including money, gifts, loans, etc., *made for the purpose of influencing the results of an election*. s. 106.011(3), F.S. As such, pure issue advocacy groups do not make or receive "contributions" as defined by Florida Statutes, although their activities and advertisements may have an *incidental effect* upon the election of a candidate or issue. See, e.g., *Buckley v. Valeo*, 96 S.Ct. 612, 645-47 (1976) (candidates may be intimately tied to public issues).

- 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.

One clear effect of the definition change is to require the sponsors of such issue ads to identify them as "paid political advertisements" and, in most cases, to include a sponsorship disclaimer identifying who they are. s. 106.143(1), F.S.; 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).

It is less clear whether the modification would bring issue ads within the scope of the terms "contribution" and/or "expenditure" for campaign finance reporting and contribution limit purposes. If so, the effects would be significant. Issue ads by a political party which are coordinated with a candidate would be allocable to the $50,000 party contribution limit. 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.

However, the ability of a state to regulate issue advocacy ads raises significant constitutional free speech issues (see IV. Constitutional Issues; D. *Other Constitutional Issues*, below).

"3-Packs"

The committee substitute completely eliminates the current exemption for "3-pack" multiple endorsement advertisements and subjects such advertisements to Florida's campaign finance laws.

Campaign Finance Reporting Requirements

The committee substitute modifies the registration and reporting requirements for political committees and CCEs. The committee substitute requires that the committee's name include the corporation, labor union, professional association, political committee, CCE, business entity, or special or economic interest responsible for setting up the committee, if any. The committee substitute requires that this information be updated, where necessary. The committee substitute also requires the committee's treasurer and other principal officers to identify their principal employer on the committee's statement of organization.

Limits on Contributions <u>to</u> Political Parties

The committee substitute limits contributions to any state or county political party executive committee, or any subordinate committee, to an aggregate amount of $5,000 per calendar year. A single knowing and willful violation is a first-degree misdemeanor; a multiple violation is a third-degree felony. Corporations and other business entities, political committees, and political parties are also subject to enhanced civil penalties and other equitable remedies.

Contributions by Political Parties to Candidates

The committee substitute provides that *all* in-kind contributions are allocable toward the $50,000 aggregate limit on contributions from a political party to a candidate. It eliminates the current exemptions which allow a political party to provide unlimited polling services, research services, campaign staff, professional consulting services, and phone banks to a candidate.

A recent federal district court case held that *any* monetary limits on *coordinated expenditures* by a political party in consultation with a candidate are unconstitutional. *Federal Elections Comm. v. Colorado Republican Federal Campaign Committee*, 41 F.Supp.2d 1197(D. Colo. 1999)[hereinafter, *Colorado Republican II*]. *Colorado Republican II* constitutes *persuasive authority* only, is not binding on any Florida court, and may be tied up in the federal courts for years. However, were a Florida court to adopt the *Colorado Republican II* reasoning, or were the U.S. Supreme Court to ultimately uphold *Colorado Republican II*, it would effectively undermine the utility of the current $50,000 limit on political party contributions to candidates --- parties could just get around the limit by coordinating expenditures on behalf of candidates instead of making direct contributions.

Independent Expenditures

The committee substitute repeals section 106.087(2), Florida Statutes, which bars any political committee or CCE from making most types of independent expenditures if it accepts public funds, personnel, or resources to collect dues from its members.

Campaign Finance Reports by State Executive Committees

The committee substitute eliminates a requirement that state executive committees of a political party report all contributions from the national executive committee of the party to a party candidate. s. 106.29(6)(a).

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Issue Advocacy

The regulation of issue advocacy has arguably not been squarely placed before the U.S. Supreme Court for debate. Therefore, a number of reform groups maintain that the concept of regulation is still "open" and remains a valid subject of state legislation.

In *Buckley v. Valeo,* 96 S.Ct. 612 (1976), the U.S. Supreme Court was faced with the constitutionality of various expenditure limits in the Federal Election Campaign Finance Act of 1974. In order to save the statute from an overbreadth problem, the Court held that the term "expenditure" encompassed "only funds used for communications which *expressly advocate* the election or defeat of a clearly-identified candidate." *Buckley*, 96 S.Ct. at 663. Express advocacy was limited to communications containing express words of advocacy such as "vote for," "elect," "support," "vote against," etc. *Id.* at 647.

With very few exceptions, most notably the Ninth Circuit's decision in *Florida Elections Commission v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), the reported case decisions on issue advocacy have adopted and applied a strict interpretation of the "express advocacy" test articulated in *Buckley v. Valeo,* 96 S.Ct. 612 (1976) and affirmed in *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc*, 107 S.Ct. 616 (1986), to invalidate campaign finance laws which seek to regulate pure issue ads. *Federal Elections Commission v. Christian Action Network*, 894 F.Supp. 946, 952 (W.D.Va. 1995); see also, *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*); *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); *Maine Right to Life Committee, Inc. v. Federal Elections Commission*, 914 F.Supp. 8 (D. Maine 1996) , *affd.*, 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).

Recently, the Federal District Court for the Middle District of Florida held that the definition of "political committee" violated the First and Fourteenth Amendments to the U.S. Constitution because it required issue advocacy groups to register and report contributions and expenditures. *Florida Right to Life v. Mortham*, No. 98-770-CIV-ORL-19A (M.D. Fla. 1999).

It is unclear whether any law which burdens issue ads could pass constitutional muster under the First Amendment free speech and overbreadth doctrines in the absence of a requirement that the ad contain express words of advocacy.

Limits on Contributions to Political Parties

There is an ongoing debate among legal scholars and practitioners concerning the constitutionality of limiting contributions to political parties. No court has ruled definitively on the issue. However, on balance, it appears more likely than not that some form of restriction on contributions to political parties will pass constitutional muster.

Limits on contributions implicate First Amendment free speech and association rights. The U.S. Supreme Court has employed a test called "closest scrutiny" to review the constitutionality of contribution limits --- a contribution limit will be upheld if the government can demonstrate that the limit is "closely drawn" to match a "sufficiently important interest." *Nixon v. Shrink Missouri Government PAC*, 120 S.Ct. 897, 904 (2000); *Buckley v. Valeo*, 96 S.Ct. 612, 637-38 (1976). While the precise parameters of this constitutional test are uncertain, it is clear that the "closest scrutiny" test is something much less than the "strict scrutiny" standard the Court has historically applied to review other government regulations which abridge fundamental constitutional rights. *Shrink*, 120 S.Ct. at 922 (Thomas, J., dissenting).

Perhaps the most instructive case bearing on the issue of the constitutionality of limiting contributions to political parties is *California Medical Ass'n v. Federal Election Comm'n*, 101 S.Ct. 2712 (1981). In *California Medical*, the U.S. Supreme Court upheld a $5,000 per year limit on the amount an individual or unincorporated association could contribute to a multi-candidate political action committee under the Federal Election Campaign Act. The Court specifically rejected the argument that because the contributions flow to a political committee rather than a candidate, the danger of corruption or the appearance of corruption as recognized in *Buckley v. Valeo*[2] as justification for contribution restrictions is not present. *California Medical*, 101 S.Ct. at 2721. The Court held that the restriction furthered the government's interest in preventing actual or apparent corruption, by preventing individuals and unincorporated associations from circumventing the limitations on contributions upheld as constitutional in *Buckley* ($1,000 limit on contributions from individuals and unincorporated associations *directly* to candidates). *Id*. at 2722-23. The Court explained:

> If appellants' position -- that Congress cannot prohibit individuals and unincorporated associations from making unlimited contributions to multicandidate political committees -- is accepted, then ... (this) contribution limit could easily be evaded. ... It is clear that this provision is an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld by this Court in *Buckley*.

Id. at 2723.

California Medical can reasonably be read for the proposition that limits on contributions to certain *groups* supporting candidates can be constitutional if they prevent persons from circumventing the type of direct contribution limits held constitutional under *Buckley*. *Cf. Colorado Republican Federal Campaign Committee v. Federal Election Comm'n*, 116 S.Ct. 2309, 2316 (1996). The same circumvention argument was viewed favorably in *Austin v. Michigan Chamber of Commerce*, 108 L.Ed.2d 652 (1990) to uphold limitations on independent expenditures by the Michigan Chamber of Commerce. See *Austin*, 108 L.Ed.2d at 667 (absent restriction, business corporations could circumvent the contribution limits in Michigan's campaign finance statute by funneling money through the Michigan Chamber of Commerce's general treasury). Restrictions on contributions, such as those contemplated in the committee substitute, require less compelling justification than restrictions on independent expenditures. *FEC v. Mass. Citizens for Life*, 107 S.Ct. 616, 629 (1986).

[2] 96 S.Ct. 612 (1976).

A strong argument can be made that limits on contributions to political parties in the committee substitute are similar to the limits approved by the U.S. Supreme Court in *California Medical*; they restrict contributions to a political organization for the purpose of preventing corporations, labor unions, and wealthy individual donors from circumventing the $500 direct contribution limit in Florida law. This, so the argument goes, is "closely drawn" to promote the state's "sufficiently important" interest in preventing the "reality or appearance of corruption" by restricting large campaign contributions from special interest donors. Provided that a "sufficient quantum of empirical evidence" exists to demonstrate that the direct contribution limits in Florida law may be circumvented by unrestricted donations to political parties, this argument may well prove determinative.

Although no court has specifically ruled on the issue, it appears more likely than not that a reasonable limitation on contributions to political parties implemented for the purpose of preventing special interests from circumventing Florida's $500 limit on contributions to candidates will survive First Amendment scrutiny.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Restricting contributions to political parties to an aggregate of $5,000 per person, per year, may adversely impact party fund-raising. The extent to which total dollars contributed will be reduced is indeterminable.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.