SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 1656

SPONSOR: Committee on Ethics and Elections and Senator Smith

SUBJECT: Campaign Finance; Issue Advocacy

DATE: April 19, 2001 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Fox	Bradshaw	EE	Favorable/CS
2.			AGG	
3.			AP	
4.			RC	
5.				
6.				

I. Summary:

Committee Substitute for Senate Bill 1656 adopts what is called the "time-delimited" approach to regulating issue advocacy advertisements.

Specifically, the bill provides that a person sponsoring a political ad in print or broadcast medium within 60 days before an election that names or depicts a candidate for office for that election must report the source, amount and recipient of the funds 10 days before the election.

This bill creates section 106.115 of the Florida Statutes.

II. Present Situation:

Political advertising that discuss non-ballot issues of public interest and which may include references to, or likenesses of, candidates are not regulated under Florida law, regardless of the practical impact on the election or defeat of a candidate. As such, these advertisements do not have to include the phrase "paid political advertisement," or similar expression, nor does the advertisement have to identify the sponsoring individual or group. Groups that exclusively run these ads and do not otherwise participate in elections by contributing to campaigns or running ads expressly advocating the election or defeat of a candidate or ballot issue need not register as a political committee or committee of continuous existence. Because such an advertisement is not considered to be a contribution or expenditure under the Florida Election Code, there is no limit to the amount that can be spent in coordination with, or independent of, any candidate.

III. Effect of Proposed Changes:

Committee Substitute for Senate Bill 1656 provides that a person sponsoring a political ad in print or broadcast medium within 60 days before an election, that names or depicts a candidate for office for that election, must report the source, amount and recipient of the funds. The report must be filed 10 days before the election, and must be filed with the qualifying officer of the candidate depicted in the ad. Failure to do so results in civil fines.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

D. Other Constitutional Issues:

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 is 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." (emphasis added). *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," and other similar

synonyms. *Id*. at 646-47 & fn. 52. By adopting this bright line limitation, the *Buckley* Court effectively created two categories of political advocacy: "express" and "issue" advocacy. Advocacy using the "magic words" expressed in *Buckley* and later affirmed in *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 107 S.Ct. 616 (1986), could be permissibly regulated. Conversely, advocacy falling outside these parameters could not.

With very few exceptions, most notably the Ninth Circuit's decision in *Federal Elections Commission v. Furgatch*,[1] the reported case decisions on issue advocacy have adopted and applied a strict interpretation of the *Buckley* "express advocacy" test to invalidate state campaign finance laws which seek to regulate pure issue ads. *Federal Elec. Comm'n 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) , *aff'd*., 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), *aff'd, Florida Right to Life, Inc. v. Lamar*, No. 00-10245 (11th Cir. 2001).

While no Florida court has ruled on the matter, the "time-delimited" approach advocated in the bill has received unfavorable treatment from at least three federal district courts. See *Planned Parenthood Affiliates of Michigan, Inc. v. Miller*, 21 F.Supp. 2d 740 (E.D. Mich. 1998) (Michigan administrative rule prohibiting corporate expenditures for advertisements using a candidate's name or likeness within 45 days before an election unconstitutionally chilled speech by prohibiting protected issue advocacy and was overbroad); *Right to Life of Michigan, Inc., v. Miller*, 23 F.Supp. 2d 766 (W.D.Mich) (rejecting the assumption that ads which merely include the name or likeness of a candidate published 45 days prior to an election are "express advocacy" candidate ads which may be regulated); *West Virginians for Life v. Smith*, 960 F.Supp. 1036 (S.D.W.Va. 1996) (group publishing voter's guide within 60

[1] 807 F.2d 857 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 151. 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)]. Furgatch held that an advertisement could expressly advocate in the absence of the "magic" words if the content and context of the advertisement unmistakably advocate in support or opposition to a candidate, and no alternative reading could be suggested. Although clearly the overwhelming minority view, the Oregon State Court of Appeals adopted the *Furgatch* approach and held that an advertisement with no "magic words" nonetheless contained express advocacy and therefore could be regulated under Oregon state law. *State ex rel. Crumpton v. Keisling*, 982 P.2d 3 (1999), *rev'w denied*, 994 P.2d 132 (2000).

days of an election containing candidate's names, votes, and positions on non-ballot issues cannot be regulated as express advocacy groups; 60-day time frame, without regard to ad content, created an unconstitutional presumption that the communication was express advocacy).

Critics of the bright-line approach charge that advertisements which include the name or likeness of a candidate, but do not expressly advocate the election or defeat of a candidate by using express words of advocacy, are a loophole increasingly being used by political parties and other groups to circumvent either contribution limits and/or disclosure requirements. Nonetheless, the Supreme Court's decision in *Buckley* and the prevailing opinion of the vast majority of federal courts, some of whom have squarely addressed and rejected the foregoing argument,[2] suggest that political advertisements which do not expressly advocate the election or defeat of a candidate using express words of advocacy may be beyond the scope of the government to regulate.

Not only does the bill seek to regulate issue advocacy in the face of some pretty weighty legal precedent to the contrary, it also effectively prohibits issue ads in the 10 day period immediately preceding an election. By requiring reporting 10 days before an election, persons are precluded from making issue advocacy expenditures after the deadline. The courts have repeatedly held that the guarantee of free speech is most urgent in the period leading up to an election. See, e.g., *Town of Lantana v. Pelczynski,* 303 So.2d 326 (Fla. 1974) (ordinance prohibiting the publication of candidate attack ad seven days before an election unless personally served upon the aggrieved candidate at least seven days before the election constituted clear incursion on First Amendment rights and was unconstitutional); see also, *Florida Right to Life v. Mortham*, 98-770-CIV-ORL-19A, at p. 3 (M.D. Fla. 1999), *aff'd, Florida Right to Life, Inc. v. Lamar*, No. 00-10245 (11th Cir. 2001) (election day is the most important time for free interchange of political ideas and speech).

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

[2] As one U.S. district court explained:

> What the Supreme Court did was draw a bright line that may err on the side of permitting things that affect the elections process, but at all costs, avoids restricting in any way, discussion of public issues. … The advantage of this rigid approach, from a First Amendment point of view, is that it permits a speaker or writer to know from the outset exactly what is permitted and what is prohibited. … The result is not very satisfying from a realistic communications point of view and does not give much recognition to the policy of the election statute to keep corporate money from influencing elections in this way, but it does recognize the First Amendment interest as the Court has defined it.

Maine Right to Life Committee, Inc. v. Federal Elec. Comm'n, 914 F.Supp. 8, 12 (D. Maine 1996), *aff'd,* 98 F.3d 1 (1st Cir. 1996) (appellate court essentially adopts the lower court decision).

VIII. Amendments:

None.