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**HOUSE OF REPRESENTATIVES**  
**PROCEDURAL & REDISTRICTING COUNCIL**  
**ANALYSIS**

**BILL #:** CS/CS/HB 273

**RELATING TO:** Reporting requirements under the Florida Election Code

**SPONSOR(S):** Procedural & Redistricting Council; Committee on Rules, Ethics, & Elections; and Representatives Ross, Goodlette, and Byrd

**TIED BILL(S):** CS/HB 275

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

- (1) RULES, ETHICS, & ELECTIONS (PRC) YEAS 13 NAYS 0
  - (2) PROCEDURAL & REDISTRICTING COUNCIL YEAS 17 NAYS 1
  - (3)
  - (4)
  - (5)
- 

**I. SUMMARY:**

CS/CS/HB 273 is an act relating to reporting requirements under the Florida Election Code. Specifically, the bill makes the following substantive changes to Chapter 106, F.S.:

- Modifies the definition of “political committee” in response to *Florida Right to Life v. Mortham*, No. 98-770-CIV-ORL-19A (M.D. Fla. 1999), *affirmed*, *Florida Right to Life v. Lamar*, No. 00-10245 (11<sup>th</sup> Cir. January, 17, 2001). The current definition of “political committee” was determined to be unconstitutionally over broad because it subjected pure issue advocacy groups to the registration and reporting requirements of Florida’s campaign finance laws.
- Modifies the definition of “communications media” to include the Internet.
- Requires the statement of organization of a political committee and committees of continuous existence (“CCE’s”) to include the principle employer of every officer. CCE’s are required to report membership dues in the same manner as regular contributions.
- Candidates, committees, and political parties who receive contributions or make expenditures in an aggregate amount over \$10,000 in a calendar year will be required to file campaign treasurer’s reports by electronic means via the Division of Elections’ Internet web site. Statewide candidates engaged in a campaign wherein one of the candidates has requested to receive contributions under the provisions of the Florida Election Campaign Financing Act are required to file the report due on the Friday immediately preceding the general election no later than noon, rather than 5 p.m. Requires the Division to adopt specific rules and systems to administer electronic filing requirements.
- Reporting periods are condensed for political committees, committees of continuous existence, and independent expenditures to require weekly reporting periods when within the period between the last day of qualifying to the ensuing general election. Otherwise, reports are to be filed monthly.
- Creates a new category of advertisements, “campaign-related advertisements,” subject to registration, reporting, and disclaimer requirements under the campaign financing provisions of the Florida Election Code.
- Revises provisions relating to the reporting of certain independent expenditures made during the period following the last day of qualifying through the ensuing general election.

With the exception of section 1, the bill has an effective date of October 1, 2001.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- |                                   |   |  |   |
|-----------------------------------|---|--|---|
| 1. <u>Less Government</u>         | Yes <input type="checkbox"/>            | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/>            |
| 2. <u>Lower Taxes</u>             | Yes <input type="checkbox"/>            | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u>      | Yes <input type="checkbox"/>            | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/>            | N/A <input type="checkbox"/>            |
| 5. <u>Family Empowerment</u>      | Yes <input type="checkbox"/>            | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |

The bill imposes registration, reporting and disclaimer requirements on groups engaged in campaign-related advertisements not currently regulated under the Florida Election Code.

B. PRESENT SITUATION:

**Definition of "Political Committee"**

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).

On December 15, 1999, the Federal District Court for the Middle District of Florida held several provisions of the Florida Election Code, including the definition of "political committee," in violation of the First and Fourteenth Amendments to the United States Constitution. The court held that the existing statutory definition was too broad because it subjected pure issue advocacy groups to the registration and reporting requirements of Florida's campaign finance laws. [*Florida Right to Life v. Mortham*, No. 98-770-CIV-ORL-19A (M.D. Fla. 1999)]. The term "issue advocacy" generally refers to advertisements run by non-candidate groups and organizations that support or oppose a particular public issue, but do not expressly advocate the election or defeat of a candidate. [See generally *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 252 n.6 (1986)].

At the preliminary injunction stage, the court was able to apply a narrowing construction to the statute, thereby limiting its reach to organizations whose *major* purpose was engaging in "express advocacy," as defined by the United States Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley*, the Court stated that "express advocacy" is present only when there are "explicit words of advocacy of election or defeat of a candidate." For purposes of providing further clarity, the Court listed words that constituted "express words of advocacy" as follows: "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject." [*Buckley* at 44, n. 52].

Nonetheless, at the summary judgment stage, the court found that this narrowing construction was inadequate to address the Plaintiff's complaint that the statute has a chilling effect on the exercise of First Amendment rights. Therefore, the court held that absent an authoritative narrowing construction, s. 106.011(1), F.S., remains unconstitutionally over broad. The court issued an order permanently enjoining the Florida Elections Commission from enforcing the definition. On January 17, 2001, the United States Court of Appeals for the Eleventh Circuit affirmed the lower court's order enjoining the enforcement of s. 106.011(1), F.S. [*Florida Right to Life v. Lamar*, No. 00-10245 (11<sup>th</sup> Cir., 2001)]. Accordingly, there appears to be no enforceable definition of Apolitical committee@ and therefore, it is questionable whether the Secretary of State may require any political committee to register and report their political contributions or expenditures.

### **Definition of "Communications Media"**

For purposes of the Florida Election Code, the term "communications media" is defined as meaning "broadcasting stations, newspapers, magazines, outdoor advertising facilities, printers, direct mailing companies, advertising agencies, and telephone companies; but with respect to telephones, an expenditure shall be deemed to be an expenditure for the use of communications media only if made for the costs of telephones, paid telephonists, or automatic telephone equipment to be used by a candidate or a political committee to communicate with potential voters but excluding any costs of telephones incurred by a volunteer for use of telephones by such volunteer." The current definition does not expressly include the Internet.

### **Registration and Reporting Requirements for Political Committees and Committees of Continuous Existence ("CCE's")**

Under the Florida Election Code, political committees and CCE's are required to register with the Division of Elections and file periodic financial reports. [See ss. 106.03, 106.04 and 106.07, F.S. (2000)]. The statement of organization for these groups must include the following information:

- 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.

The periodic financial reports detail the group's contribution and expenditure activities. Further, CCE's must file an annual report outlining essentially the same organizational information required of the committee's initial registration. Under current law, CCE's are not required to provide a detailed accounting of contributions which represent the payment of dues by its members in a fixed amount pursuant to a schedule on file with the Division of Elections; only the aggregate amount of such contributions must be listed, together with the number of members paying such dues and the amount of the membership dues. [s. 106.04(4)(c)1., F.S. (2000)].

### **Campaign Treasurer's Reports**

Generally, candidates, political committees, CCE's, and state executive committees of political parties are required to report all contributions received and expenditures made by way of campaign treasurer-s reports filed with the Division of Elections.

Reports must be filed quarterly except after the last day of qualifying when the reports are due every two weeks leading up to each of the three elections: the first and second primaries and the general election [corresponding statutory days are the 32nd, 18th, and 4th days preceding the first primary and the 18th and 4th days preceding the second primary and general election]. For candidates receiving funds under the provisions of the Florida Election Campaign Financing Act (public financing of campaigns), reports are due weekly preceding each of the three elections [corresponding due dates are the 32nd, 25th, 18th, 11th, and 4th days preceding the first primary and the 25th, 18th, 11th, and 4th days preceding the second primary and general election]. Committees of continuous existence resume filing quarterly reports after the general election.

Campaign treasurer-s reports include the following components:

- Campaign Treasurer-s Report Summary (form DS-DE 12) - Shows a snapshot of the aggregate amount of contributions received and expenditures made for the reporting period.
- Campaign Treasurer-s Report - Itemized Contributions (form DS-DE 13) - Itemized ledger including contributor-s name, address, occupation, contribution type, and amount.
- Campaign Treasurer-s Report - Itemized Expenditures (form DS-DE 14) - Itemized ledger including name and address of entity receiving payment, purpose of expenditure, expenditure type, and amount.
- Magnetic Diskette - Computer diskette that includes itemized contributions and expenditures in an uploadable electronic format.

For committees and candidates who are unable to provide a magnetic diskette, paper copies of the forms are acceptable.

The Division estimates that approximately 40 percent of candidates filing campaign treasurer-s reports file a magnetic diskette. This number is much lower for committees. All paper reports filed must be data-entered by Division staff -- a time-consuming effort. Moreover, some of the software utilized by various campaign treasurers is incompatible with the Division-s computer system, or the magnetic diskettes submitted are unreadable, requiring further use of the Division-s staff to manually input the required information.

Reports are due by 5 p.m. on the designated due date. Reports are accepted as timely filed as long as they are postmarked by midnight on the due date by the U.S. Postal Service. The Division releases the reports to the public upon receipt of all reports for a particular race so as not to benefit one candidate over another. This can, in effect, lengthen the time the Division is able to release this information to the public.

### **Political Advertisements**

In general, groups who wish to support or oppose a candidate, issue, or political party must first register with the Division of Elections as a political committee. For purposes of the Florida Election Code, an "issue" is defined as "any proposition which is required by the State Constitution, by law or resolution of the Legislature, or by the charter, ordinance, or resolution of any political subdivision of this state to be submitted to the electors for their approval or rejection at an election, or any proposition for which a petition is circulated in order to have such proposition placed on the ballot at any election." [s. 106.011(7), F.S. (2000)]. 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. (2000); and *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.

[s. 106.011(17), F.S. (2000)]. Absent any filing requirements for these organizations, the name placed on the disclaimer alone may not adequately identify the persons responsible for the advertisement.

Advertisements that discuss non-referendum 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. 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.

### **Independent Expenditures**

An "independent expenditure" is defined, in pertinent part, as "an expenditure by a person for the purpose of advocating the election or defeat of a candidate or the approval or rejection of an issue, which 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)(a), F.S. (2000)]. Under current law, each person who makes an independent expenditure with respect to a candidate or issue which, in the aggregate, is in the amount of \$100 or more, must file a periodic report with the same officer as a political committee supporting or opposing the candidate or issue would be required to file. The report must contain the full name and address of each person to whom and for whom the expenditure was made; the amount, date, and purpose of the expenditure; a description of the services or goods obtained by the expenditure; and the name, address and office sought by the candidate on whose behalf the expenditure was made. [s. 106.071(1), F.S. (2000)].

Section 106.085, F.S. (2000), requires an individual or organization making an independent expenditure of more than \$1,000 on behalf of or in opposition to a candidate to provide two separate notices:

- *Within 24 hours after obligating the funds for the expenditure, provide notice and a general description of the expenditure.*
- *Notice of the obligation of the expenditure must be made at least five days prior to an election.*

The person making the independent expenditure must provide the notices to all candidates in the affected race and to the candidates' qualifying officer. An expenditure is considered "obligated" upon the purchase of any political advertising or the entering into an agreement to purchase a political advertisement. However, these "unfair surprise" provisions have been held unconstitutional as a prior restraint on speech. [See, *Florida Right to Life v. Crotty*, No. 98-770-CIV-ORL-19A (M.D. Fla. 1999)].

#### C. EFFECT OF PROPOSED CHANGES:

##### **Definition of "Political Committee"**

The bill clarifies the definition of a political committee and what is *not* a political committee. This language passed out of the House in the 2000 Legislative Session, but died in returning messages after an amendment was adopted by the Senate the next to the last day of session. The definition provides that a political committee is a group which, in an aggregate amount in excess of \$500 during a calendar year:

- Accepts contributions for the purpose of making contributions to candidates, political committees, committees of continuous existence or political parties;
- Accepts contributions for the purpose of expressly advocating the election or defeat of a candidate or issue;
- Makes expenditures for the purpose of expressly advocating the election or defeat of a candidate or issue; or
- Makes contributions to a common fund, other than a joint checking account between spouses, from which contributions are made to any candidate, political committee, committee of continuous existence or political party.

##### **Definition of "Communications Media"**

For purposes of the Florida Election Code, the bill clarifies that the Internet is considered a communications medium, and therefore expression over the Internet is subject to the campaign finance provisions if the expression otherwise satisfies the statutory definition of a political advertisement or campaign-related advertisement.

##### **Registration and Reporting Requirements for Political Committees and Committees of Continuous Existence (CCE's)**

CS/CS/HB 273 requires that additional information be provided in the registration of both political committees and CCE's. Specifically, under the bill these committees would be required to include the principal employer of the custodian of books and accounts, and the principal employer of each other principal officer. The bill also requires that membership dues of committees of continuous existence be reported in the same manner as regular contributions. The full name, address, and occupation of each person who has made one or more contributions that represent the payment of membership dues would be reported. The bill removes the discretionary authority of the Division of Elections to make available membership lists for inspection.

### **Campaign Treasurer's Reports**

The bill streamlines the reporting process by providing campaign treasurers direct access to the Division's computer servers via the Division's Internet web site to either directly transfer the campaign treasurer's report data, or to directly input the information. Second, heightened public disclosure will be available, as the information contained in the campaign treasurer's report will immediately become accessible on the Division's Internet web site for public scrutiny.

CS/CS/HB 273 specifically requires candidates, political committees, committees of continuous existence, and political party executive committees to file these reports by electronic means if they receive contributions or make expenditures in the aggregate of \$10,000 in a calendar year. Reports required to be filed electronically are due by 5 p.m. on the due date. There exists no grace period for the timely filing of electronic reports. For statewide candidates engaged in a race wherein one of the candidates has requested to receive contributions under the Florida Election Campaign Financing Act, the candidates must file their last report not later than noon on the Friday immediately preceding the general election, rather than the current 5 p.m. deadline. Additionally, the Division is given rulemaking authority to administer the provisions contained in the bill.

The bill also shortens the current quarterly and bi-weekly reporting periods for political committees, committees of continuous existence, independent expenditures and campaign-related advertisements (as created in this bill) by requiring **monthly** reports in lieu of quarterly reports and **weekly** reports in lieu of bi-weekly reports. Monthly reports will be due three business days after the close of the reporting period, while weekly reports will be due two days after the close of the reporting period leading up to the general election.

The amount authorized to be withdrawn by a campaign treasurer for a political committee for a petty cash fund is modified from \$500 per calendar quarter to \$200 per month. This is a conforming change from quarterly reporting periods to monthly reporting periods effectuated by the bill.

### **Political Advertisements**

CS/CS/HB 273 creates a new section to the campaign finance provisions of the Florida Election Code requiring certain organizations that sponsor "campaign-related advertisements" to register and submit regular contribution and expenditure reports to the Division of Elections. The advertisements would also have to include a disclaimer. The bill defines a "campaign-related advertisement" as:

A paid expression in any communications media described in s. 106.011(13), whether radio, television, newspaper, magazine, periodical, campaign literature, direct mail, the Internet, or display or by means other than the spoken word in direct conversation, which does not specifically support or oppose any candidate, elected public official, or issue, but which does substantially mention or show 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, and is distributed within the geographical location represented by the office sought by the candidate mentioned or shown and which, when examined by a reasonable person, would be understood as, and is therefore presumed to be, a communication made for the purpose of influencing

the results of an election on that candidacy during that period, and for which aggregate expenditures on like advertisements exceed \$1,000.

The bill provides that any "organization" that engages in campaign-related advertising must register with the Division. Registration must occur within 24 hours after the publication of any campaign-related advertisement sponsored by the organization. The registration would consist of the same information required of political committees under s. 106.03(2), F.S., with the addition of a complete financial statement summarizing all income received and expenses incurred by the organization since the end of its last completed fiscal year.

For purposes of this section, the term "organization" means a person as defined in s. 106.011(8), F.S. and those organizations recognized under s. 501(c) of the Internal Revenue Code, or political organizations recognized under s. 527 of the Internal Revenue Code. However, "organization" does not include individuals who act independently and expend only their own resources.

In addition to the registration requirement, such organizations would be required to file regular reports of all contributions and expenditures in the same manner as is required for political committee reports, including the electronic filing provisions as introduced in this bill. Within 24 hours after publication of a campaign-related advertisement under this section, the organization must file a report of the advertisement with the qualifying officer of the candidate mentioned or shown in the advertisement. Any expenditure published on the day of an election must be reported on that day. The report must contain the full name and address of each person to whom payment of the advertisement has been made or obligated; the date and purpose of the advertisement; a description of the advertisement; and the name and address of, and office sought by, each candidate mentioned or shown in the advertisement. Any organization failing to file a report on the designated due date is subject to the fines provided for in the Florida Election Code for submitting late reports. [See generally, ss. 106.07(5) and 106.07(8), F.S. (2000)].

The bill provides that campaign-related advertisements regulated under this provision contain a disclaimer providing the name of the organization paying for the advertisement, and further stating that it was neither paid for nor authorized by the candidate. In addition, the advertisement must contain the name and address of the person paying for the campaign-related advertisement. Any person responsible for submitting reports on behalf of an organization registered or required to register under this section shall be responsible for including the disclaimer. Any such person who willfully fails to include the disclaimer shall be liable for a civil fine of up to \$5,000, or the entire amount of the expenditure, whichever is greater.

The Division is given rule-making authority to implement the provisions of this section of the bill.

The ability of a state to regulate individuals or groups engaged in issue advocacy raises significant constitutional issues. [See the discussion of the constitutional issues in the COMMENTS section, below].

### **Independent Expenditures**

In an effort to provide consistency, the bill makes changes to the reporting requirements for independent expenditures to mirror the reporting requirements for "campaign-related" advertisements. Specifically, the bill provides that any person who makes an independent expenditure with respect to a candidate which in the aggregate exceeds \$1,000, and is made at any point during the period following the last day of qualifying through the ensuing general election for that candidacy, must report the expenditure within 24 hours after publication. The report must be filed with the qualifying officer of the candidate supported or opposed by the expenditure. For expenditures published on the day of an election, the report must be submitted on that same day.



The report must contain the full name and address of each person to whom and for whom the expenditure has been made; the amount, date, and purpose of the expenditure; a description of the services or goods obtained by the expenditure; and the name and address of, and office sought by, each candidate on whose behalf the expenditure was made. Each report must be signed by the person submitting it and certified as being true and correct, subject to penalties provided for under the Florida Election Code. Failure to file a timely report shall subject the person making the expenditure to the same fines provided for in s. 106.07(8), F.S. (2000), for submitting late reports.

D. SECTION-BY-SECTION ANALYSIS:

[See, EFFECT OF PROPOSED CHANGES]

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Division of Elections estimated in 2000, that approximately \$90,000 is spent during election years and \$50,000 during non-election years, for personnel needed to input campaign treasurer's reports filed by hard copy. The bill would eliminate a high percentage of these expenditures since most reports will be filed directly to the Division's computer server, either by direct file transfer or by direct input. However, the positive fiscal impact may be offset by increased costs associated with the increased reporting periods. The Division would still be required to maintain enough personnel to input information for entities and individuals not meeting the \$10,000 threshold and thus filing by hard copy.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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 mandates of Art. VII, s. 18, of the Florida Constitution.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

Election laws are exempt from the mandates of Art. VII, s. 18, of the Florida Constitution.

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

Election laws are exempt from the mandates of Art. VII, s. 18, of the Florida Constitution.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

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 its' 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); *Citizens for Responsible Government v. Davidson*, Nos. 99-1414, 99-1431, 99-1434 & 99-1435 (10<sup>th</sup> Cir. December 26, 2000)(applied a bright-line view of what constitutes "express advocacy"); *Perry v. Bartlett*, No. 99-1955(L) (4<sup>th</sup> Cir. October 3,

2000)(North Carolina statute requiring the disclosure of sponsors of political advertisements that “intended” to advocate the election or defeat of a candidate was unconstitutionally overbroad)].

Critics 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. Irrespective, the Court’s decision in *Buckley*, and the prevailing opinion of most federal courts suggest that issue advocacy 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.

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)]. *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 minority view, the Oregon State Court of Appeals held that an advertisement with no “magic words” nonetheless contained express advocacy and therefore could be regulated under Oregon state law. [*Crumpton v. Keisling*, 1999 WL 308739 (Or. App. 5/12/99); see also, *State of Wisconsin v. Wisconsin Manufacturers & Commerce*, Case No. 98-0596 (Supreme Court of Wisconsin, 7/7/99) (deferred ruling on express advocacy but suggested a middle course between “magic words” and “context factors” tests)].

CS/CS/HB 273 in defining “campaign-related” advertisements does include a number of components that may prove helpful in defending against a constitutional overbreadth challenge: (1) the regulation would only apply to certain organized groups, not individuals acting independently and expending their own resources [See *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 115 S. Ct. 1511, 131 L.Ed.2d 426 (1995)], (2) a “reasonable person” approach - referencing the perceptions of a reasonable person, (3) a “delimited time period” approach – regulating campaign-related advertisements that are published during the time period between the last day of qualifying and the ensuing general election, (4) a geographical threshold – regulating campaign-related advertisements distributed within the geographical location represented by the office sought by the candidate mentioned or shown in the advertisement, (5) a legal presumption that can be rebutted, instead of a hard and fast rule, and (6) a monetary threshold – regulating expenditures that exceed \$1,000.

**B. RULE-MAKING AUTHORITY:**

CS/CS/HB 273 grants specific rule-making authority to the Division of Elections to carry out the provisions relating to the electronic filing of campaign treasurer’s reports and the registration and reporting of organizations engaged in campaign-related advertisements.

**C. OTHER COMMENTS:**

CS/CS/HB 273 requires the use of passwords and other secure means to access the Division’s computer servers to input or transfer campaign treasurer’s reports via the Division’s Internet web site. Passwords, identification numbers and other secure information necessary to identify the campaign treasurer to the record being accessed must be exempt from the public records

requirements found under the provisions of s. 119.07, F.S. (2000). [Please see, tied bill – CS/HB 275].

Under the electronic filing provisions of the bill, it is unclear whether the Division will continue their current policy of releasing campaign treasurer's reports upon receipt of all reports for a particular race, or whether the data will be immediately released upon receipt.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The Committee on Rules, Ethics, & Elections adopted eight amendments to HB 273 at its meeting held on February 6, 2001, and the bill was made into a committee substitute:

**Amendment No. 1** – Added the Internet to the definition of communications media for purposes of the Florida Election Code.

**Amendment No. 2** – Substantially revised s. 106.073, F.S., which is a new section of law created in the bill, to replace the term "issue advertisements" with "campaign-related advertisements;" to include for-profit and not-for-profit organizations under the registration and filing requirements, in addition to specific organizations recognized under the Internal Revenue Code; to include a geographical element to the registration and reporting requirements; to clarify the reporting requirements with respect to the initial publication of a campaign-related advertisement; and to clarify the appropriate penalty for failure to include a disclaimer.

**Amendment No. 3** – Technical amendment removing statutory references to conform to Amendment No. 2.

**Amendment No. 4** – Provided a severability clause.

**Amendment No. 5** – Returned candidates and political parties to current law for reporting purposes.

**Amendment No. 6** – Technical amendment to conform to Amendment No. 5.

**Amendment No. 7** – Technical amendment to conform to Amendment No. 5.

**Amendment No. 8** – Changed the filing deadline of the final report for statewide candidates in races where one of the candidates has requested contributions under the Florida Election Campaign Financing Act from 5 p.m. on the Friday immediately preceding the general election to noon of that day.

The Procedural & Redistricting Council adopted one amendment to CS/HB 273 at its meeting held on February 22, 2001, and the bill was made into a council substitute:

**Amendment No. 1** – Removed everything after the enacting clause and inserted new language. The amendment consisted largely of technical and conforming changes which were identified by committee staff and staff of the Division of Elections. One substantive change was made in Section 7 of the bill relating to campaign-related advertisements to provide a definition of the term "organization", strictly for purposes of that section.

VII. SIGNATURES:

COMMITTEE ON RULES, ETHICS, & ELECTIONS:

Prepared by:

Dawn Kimmel Roberts, Esq.

Staff Director:

R. Philip Twogood

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**DATE:** March 1, 2001

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AS REVISED BY THE PROCEDURAL & REDISTRICTING COUNCIL:

Prepared by:

Council Director:

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Dawn Kimmel Roberts, Esq.

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P.K. Jameson, Esq.