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HOUSE OF REPRESENTATIVES
COMMITTEE ON
RULES, ETHICS & ELECTIONS (PRC)
ANALYSIS

BILL #: HB 1261

RELATING TO: Florida Election Code/Reporting

SPONSOR(S): Representative(s) Needelman

TIED BILL(S):

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

(1) RULES, ETHICS & ELECTIONS (PRC)
(2) PROCEDURAL & REDISTRICTING COUNCIL
(3)
(4)
(5)

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I. SUMMARY:

HB 1261 addresses a number of issues related to the definition of political committee, issue advocacy, independent expenditures and political advertising. Specifically, the bill:

- Creates a new definition of "political committee" to exclude issue advocacy groups;
- Amends the definition of "independent expenditure" to include certain issue advocacy advertisements;
- Amends the definition of "issue" to clarify its applicability to ballot issues only.
- Amends the definition of "communications media" and “political advertisement” to include the Internet.
- Creates reporting requirements for independent expenditures relating to any candidate that in the aggregate exceed $1,000 and are made at any point during the period following the last day of qualifying for that candidacy through the ensuing general election.
- Provides penalties for reports of independent expenditures that are late or knowingly incorrect, false, or incomplete; and
- Provides for civil penalties in lieu of criminal penalties for failure to provide the required disclaimer in political advertisements paid for by independent expenditure.

The bill is effective upon becoming a law.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No [x]	N/A []
2.	Lower Taxes	Yes []	No []	N/A [x]
3.	Individual Freedom	Yes []	No []	N/A [x]
4.	Personal Responsibility	Yes [x]	No []	N/A []
5.	Family Empowerment	Yes []	No []	N/A [x]

HB 1261 imposes additional reporting requirements on persons who use independent expenditures to run certain political advertisements.

B. PRESENT SITUATION:

Definition of Political Committee

HB 1261 modifies the definition of "political committee" in response to the federal court decision, *Florida Right to Life, Inc. v. Mortham.*[1] The current definition found in s. 106.011(1), F.S., was determined to be unconstitutionally overbroad because it subjected pure issue advocacy groups to the registration and reporting requirements of Florida's campaign finance laws.

A similar definition was adopted by the House in the 2000 Legislative Session (HB 2165) but died in returning messages after the Senate placed an amendment on the bill. The provisions were again adopted by the House in the 2001 Legislative Session as part of CS/CS/HB 273 but died in Senate Appropriations.

Political Advertisements

Political advertisements are currently defined in s. 106.011(17), F.S. (2001), and regulated under ch. 106, F.S., of the Florida Election Code.

With few exceptions, "political advertisements" must include a "paid for by" disclaimer that identifies the entity responsible for the particular advertisement.[2] "Political advertisement" is defined in s. 106.011(17), F.S., in pertinent part, as:

> 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.

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[1] 1999 WL 33204523 (M.D. Fla. 1999), *affirmed*, *sub nom.*, *Florida Right to Life, Inc. v. Lamar*, 238 F.3d 1288 (11th Cir. 2001).

[2] See generally, ss. 106.071 and 106.143, F.S. (2001); and *Doe v. Mortham*, 708 So.2d 929 (Fla. 1998).

Absent any filing requirements for organizations that publish political advertisements, the name included in the disclaimer alone may not adequately identify the entity or person(s) 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 actual impact on the election or defeat of a candidate. As such, these advertisements are not required to include the phrase "paid political advertisement," or similar expression, nor must the advertisements identify the sponsoring individual or group with a "paid for by" disclaimer. Because such advertisements are not considered to be a contribution or expenditure under the Florida Election Code, there is no limit to the amount of funds that can be spent in coordination with, or independent of, any candidate.

C. EFFECT OF PROPOSED CHANGES:

HB 1261 makes a number of changes relating to definitions and reporting requirements in the Florida Election Code.

Definition of "Political Committee"

The bill clarifies what is considered a Apolitical committee@ and what is not a Apolitical committee.@ Similar language was adopted by the House in the 2000 Legislative Session (HB 2165), but died in returning messages after an amendment was placed on the bill by the Senate. The legislation was again introduced in 2001 (HB 273), but died in Senate Appropriations. The proposed 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 any candidate, political committee, committee of continuous existence or political party;
- Accepts contributions for the purpose of expressly advocating the election or defeat of a candidate or the passage or defeat of an issue;
- Makes expenditures for the purpose of expressly advocating the election or defeat of a candidate or the passage or defeat of an 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.

In addition, it clarifies that issue advocacy groups that support or oppose an issue that is not on the ballot and whose major purpose is not the election or defeat of a candidate are not considered political committees.

Definition of "Independent Expenditure."

The bill adds to the definition of independent expenditure in s. 106.011(5), F.S., any expenditure for a paid expression in any communications media (including the Internet) that does not specifically support or oppose any candidate or ballot issue, but that references a clearly identifiable candidate or ballot issue, which is $100 or more and made within 30 days of an election. The language in this section is similar to that contained in HJR 709 relating to campaign-related advertisements.

Definition of "Issue"

The bill modifies the definition of "issue" in s. 106.011(7), F.S. to clarify that it applies only to *ballot* issues. Conforming changes are made throughout the bill to ss.101.031, 101.663, 104.185, 106.03, 106.04, 106.07, 106.085, 106.125, 106.143 and 106.29, F.S.

The Internet and Political Advertising

The bill expands the definition of "communications media" in s. 106.011(13), F.S., and "political advertisement" in s. 106.011(17), F.S. to include the Internet.

Independent Expenditures and Reporting Requirements

The bill amends s. 106.071, F.S. relating to reporting requirements for independent expenditures. Specifically, any independent expenditure in excess of $1,000 that is made between the time of qualifying and the general election must be reported within 24 hours of its publication by hand or mail (postmarked by deadline).

For advertisements that are published on the day of the election, the independent expenditure must be reported on that day by hand delivery or fax transmission.

Willfully filing an incorrect, false or incomplete report or failing to file a report by the date due subject a person to the penalties prescribed in s. 106.07(5), F.S. (first degree misdemeanor) and s. 106.07(8), F.S. (monetary penalties for each late day), respectively.

Political Advertisements and Disclaimers

The bill provides for civil penalties in lieu of criminal penalties (first degree misdemeanor) for a failure to include the proper disclaimer on a political advertisement. The fine is $5,000 or an amount equal to the expenditure in question whichever is greater.

Effective Date

The bill's provisions are effective upon becoming a law.

D. SECTION-BY-SECTION ANALYSIS:

N/A

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

2. Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

N/A

D. FISCAL COMMENTS:

N/A

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

A. APPLICABILITY OF THE MANDATES PROVISION:

N/A

B. REDUCTION OF REVENUE RAISING AUTHORITY:

N/A

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

N/A

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

There has been a series of significant federal cases on the regulation of issue advocacy groups. In 1974 the Federal Election Campaign Act of 1974 (the "Act") 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 were considered by the United States Supreme Court in *Buckley v. Valeo.*[3] In reviewing the Act, the Court held unconstitutional a number of statutory limits but upheld limitations on contributions. In its analysis, the Court used the long established practice of applying a "strict scrutiny" standard to balance First Amendment rights and governmental interests. This standard dictates that any encroachment on constitutionally protected freedoms must be *narrowly tailored* to advance a demonstrated *compelling state interest*.[4] This line of authority holds that the only compelling interest sufficient to justify infringement on First Amendment rights is the prevention of corruption or the appearance of corruption.

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[3] 96 S.Ct. 612 (1976).

[4] *Williams v. Rhodes*, 393 U.S., at 31, and *NAACP v. Button*, 371 U.S. 415, 438.

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*."[5] (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.[6] 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 Comm'n. v. Massachusetts Citizens for Life, Inc.*[7] can be regulated. Conversely, advocacy falling outside these parameters cannot.[8]

Although most courts have directly followed this strict definition, a few courts, most notably the Ninth Circuit in *Federal Election Comm'n v. Furgatch*[9], 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."[10] (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. Other cases support this view. The Oregon State Court of Appeals has held that an advertisement with no "magic words" nonetheless contained express advocacy and therefore could be regulated under Oregon state law.[11] Similarly, in *Chamber of Commerce v. Moore*, an unreported case from the Southern District of Mississippi, the United States District Court concluded, "a finding of any use of 'magic words' becomes unnecessary when an advertisement clearly champions the election of a particular candidate." The case is currently pending on appeal in the Fifth Circuit Court of Appeals.[12]

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[5] *Buckley*, 96 S.Ct. at 663.

[6] *Id.* at 646 n. 52.

[7] 107 S.Ct. 616 (1986).

[8] 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 (10th Cir. December 26, 2000)(applied a bright line view of what constitutes "express advocacy"); *Perry v. Bartlett*, No. 99-1955(L) (4th 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).

[9] 807 F.2d 857 (9th Cir. 1987) *cert. denied*, 108 S.Ct. 151.

[10] *Id.* at 864.

[11] *Crumpton v. Keisling*, 1999 WL 308739 (Or. App., May 5, 1999); see also, *State of Wisconsin v. Wisconsin Manufacturers & Commerce*, Case No. 98-0596 (Supreme Court of Wisconsin, July 7, 1999) (deferred ruling on express advocacy, but suggested a middle course between "magic words" and "context factors" tests).

[12] Docket No. 00-60779.

Critics of the judicial authority emanating from *Buckley* point out 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. The *Buckley* decision and the prevailing opinion of most federal courts, however, 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 state regulation.

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON RULES, ETHICS & ELECTIONS (PRC):

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