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 1842, 1124, and 498

SPONSOR: Committee on Ethics and Elections, Senators Lee, Futch, Smith, and others

SUBJECT: Elections

DATE: February 13, 2002 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Fox	Rubinas	EE	Favorable/CS
2.				
3.				
4.				
5.				
6.				

I. Summary:

Committee Substitute for Senate Bills 1842, 1124, and 498 ("Committee Substitute" or "CS") addresses a number of election issues, including the "political committee" definition, issue advocacy, campaign expenditures, and surplus fund termination reports.

Specifically, the bill:

- Amends the definition of Apolitical committee@ in Chapter 106, Florida Statutes, to include any group that: 1) makes or accepts contributions; or, 2) expressly advocates any candidate or ballot issue, in an aggregate amount of more than $500 in a calendar year.
- Establishes reporting and sponsorship disclaimer requirements for issue advocacy groups that run certain types of "electioneering advertisements."
- Expands the definition of "communications media" for campaign finance purposes to include the Internet.
- Modifies the fines for late-filed termination reports on the disposition of surplus funds, and establishes a notice requirement to apprise candidates that the report is coming due.
- Authorizes campaign expenditures to be made by debit card tied to the primary campaign depository, as well as with traditional paper bank checks.
- Increases the petty cash amount that a campaign can spend on a single transaction from a maximum of $30 to $100.
- Increases the amount of surplus funds that certain successful candidates can contribute to an office account.

- Expands the prohibition against using state officers/employees for campaign purposes during working hours to include county, municipal, and district officers/employees.

This bill substantially amends the following sections of Florida Statutes: 106.011, 106.07, 106.11, 106.12, 106.141, 106.1437, 106.15, and 106.19.

II. Present Situation:

"Political Committee" Definition

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 Apolitical 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). 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. Pure issue advocacy groups are essentially groups that support a particular non-ballot issue, are not controlled by a candidate, and whose *major purpose* is not the election or defeat of a candidate. On January 17, 2001, the Eleventh Circuit U.S. Court of Appeals affirmed the district court opinion, *per curiam*. *Florida Right to Life, Inc. v. Lamar*, No. 00-10245 (11th Cir. 2001).

The courts' decision permanently enjoins the Florida Elections Commission from enforcing the definition of Apolitical committee@ in section 106.011(1), Florida Statutes. For practical purposes, there is currently no statutory definition of Apolitical committee.@ Since this definition impacts numerous other provisions of the campaign finance law dealing with political committee registration and reporting requirements, its precise impact is unclear.

During the 2000 election, new political groups (those not registered with the Division of Elections as a political committee prior to the district court's ruling on December 15, 1999) were not required to register as political committees and file contribution and expenditure reports. As a result, a number of negative advertising campaigns surfaced during the 2000 elections funded by "shadow" groups with no public accountability.

Some very adverse consequences may accompany the Legislature=s failure to adopt a new definition of Apolitical committee.@ Possible adverse impacts include:

- **$** *Contribution Limits*: although persons and groups are still limited to making $500 contributions to *candidates*, *Florida Right to Life* may allow any person or group to make an unlimited contribution to groups supporting or opposing candidates (formerly known as political committees).

- **$** *Contribution and Expenditure Reports*: *Florida Right to Life* may eliminate the requirement that groups which were formerly known as political committees file periodic reports of contributions and expenditures pursuant to s. 106.07.

- *Political Advertising Disclaimers*: sponsorship disclaimers are still required on political advertisements and independent expenditures after *Florida Right to Life*; however, since new political groups no longer need to register as political committees, it would be very difficult to trace the source of funding for such groups who use misleading names --- such as the ACommittee for Goodness and Virtue@ or the ACommittee for Equity and Justice.@

Any one, or a combination, of these impacts could undermine the overall integrity of Florida=s campaign finance laws.

Issue Advocacy

Section 106.1437, Florida Statutes, arguably requires a sponsorship identification disclaimer for certain issue advocacy ads (ads intended to influence public policy or the vote of a public official) published on billboards, bumper stickers, radio, television, newspapers, magazines, or periodicals.[1] The section specifically exempts editorial endorsements.

Groups and individuals publishing advertisements that discuss non-referendum issues of public interest and that may include references to or likenesses of candidates, but that do not "support or oppose" any candidate, are not required to report contributions and expenditures or register with the Division of Elections. Thus, groups that *solely* engage in this type of pure issue advocacy are often able to conceal the source of the funding for these issue ads. Finally, because such advertisements are not considered a contribution or expenditure under Florida law, there is no limit to the amount that can be spent on such ads in coordination with, or independent of, any candidate.

Regulation of Political Advertisements on the Internet

Most of the political advertising provisions of the Florida Election Code (106.011(13), (17), 106.071, 106.143, F.S.) were adopted prior to the advent of the Internet as we know it today. Some have argued that the fact that most political advertisements on the Internet are transmitted to remote computer user sites via *telephone or cable lines* brings them within the ambit of regulation under current Florida law.[2] However, no Florida court has ruled on the issue.

In 1997, the Legislature adopted Section 106.148, Florida Statutes, requiring a sponsorship disclaimer on certain computer messages:

> A message placed on an information system accessible by computer by a candidate, political party, political committee, or committee of continuous existence, (or their agent), which message is accessible by more than one person, other than an internal communication of the party,

[1] There are no reported case decisions interpreting this provision of Florida law; there has been no judicial determination as to its constitutionality. For reasons cited *infra* in this analysis, it is likely that this provision, if challenged, would face significant constitutional hurdles. (*See infra* Section VI.D., "Other Constitutional Issues: Issue Advocacy")

[2] The argument goes something like this. Florida law requires a political advertisement to carry a sponsorship disclaimer identifying the origin of the ad. Section 106.143, F.S. A "political advertisement" is a paid expression in any "communication media" that supports or opposes any candidate or issue. Section 106.011(17), F.S. "Communications media" is defined to include "broadcasting stations" and "telephone companies." Section 106.011(13), F.S. Thus, according to proponents, paid Internet ads supporting or opposing candidates or ballot issues should already be regulated.

committee, or campaign, must include a statement disclosing all information required of political advertisements under s. 106.143.

This language appears broad enough to cover both political advertisements and communications that qualifies as non-ballot issue advocacy. Unfortunately, there are no reported case decisions interpreting this provision of Florida law. If challenged, the State might have a difficult time defending the statute. (*See infra* Section VI.D., "Other Constitutional Issues: Issue Advocacy")

Surplus Campaign Funds

Florida law provides that candidates who withdraw, become unopposed, are eliminated, or become elected must file a report within 90 days with their qualifying officer detailing the disposition of surplus campaign funds.[3] There is currently no provision in law to notify the candidate that the report is coming due. Late-filed reports are subject to same fines as most late-filed campaign finance reports during the election season --- $50/day for the first three days late, $500/day thereafter --- up to and including a maximum of 25 percent of the receipt or expenditures for the reporting period.

With regard to disposing surplus campaign funds, Florida law allows successful candidates to deposit the following amounts in an office account:[4]

- $10,000 total, for statewide candidates;
- $2,500 for each year of the candidate's term, for state legislative candidates; and,
- $1,000 for each year of the candidate's term, for county, municipal, or intra-county candidates.

Campaign Expenditures

Florida law authorizes expenditures from a candidate's primary campaign depository only through the use of a paper bank check, with the exception that relatively minor expenses can be paid for out of petty cash. There are several reasons for this restriction, including maintaining a paper trail for expenditures and preventing campaigns from overdrawing their accounts.

Advancing technology, however, has resulted in a basic shift in the way business is conducted. Cash/check transactions are increasingly being replaced by credit/debit card transactions. Some merchants simply do not accept checks. The Internet has opened up a new frontier of electronic commerce (i.e. candidates purchasing airline tickets from on-line travel sites) that requires a credit/debit card number.

The law does allow campaigns to keep a small amount of cash on hand in a petty cash fund, and to make cash expenditures for office supplies, transportation expenses, and other necessities in amounts of less than $30 per transaction.[5]

[3] Section 106.141, F.S.
[4] Section 106.141(5), F.S.
[5] Section 106.12, F.S.

Use of Government Officers/Employees for Campaign Purposes

The law prohibits a candidate from using the services of any *state* officer or employee during working hours in the furtherance of the candidate's campaign.[6] There is no corresponding restriction against using officers and employees of counties, municipalities, or districts.

III. Effect of Proposed Changes:

"Political Committee" Definition

The Committee Substitute adopts the same definition of "political committee" as both the Senate and House have passed on separate bills for the last two legislative sessions, and which is included in a number of Senate bills this year.

The CS amends the definition of Apolitical committee@ to include any group that: 1) makes contributions[7] to a candidate, political committee, committee of continuous existence, or political party --- or accepts contributions for that purpose; 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 subjects each person funding or sponsoring certain "electioneering advertisements" (a/k/a non-ballot, issue advocacy ads) to reporting and sponsorship disclaimer requirements. The ads subject to regulation are those published in any communications media 30 days before an election that name or depict a candidate or reference a clearly-identifiable ballot issue in that election.

Periodic and Contemporaneous Reporting

Each person funding or sponsoring the ad must file periodic campaign finance reports detailing contributions and expenditures at the same time, in the same manner, and subject to the same requirements and penalties as candidates filing such reports. In addition, if the ad is published for the first time after the last periodic report before an election is due (4th day before the election), the person must file the same information with the Division electronically (Internet) or by fax within one hour after the ad's initial publication. The CS directs the Division to adopt rules to develop the online filing system, insure its reasonable security, and elicit certain information to authenticate the identity of the filer.

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[6] Section 106.15(3), F.S.

[7] "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 ballot issue. See, e.g., *Buckley v. Valeo*, 96 S.Ct. 612, 645-47 (1976) (candidates may be intimately tied to public issues).

The CS clearly identifies a single person responsible for the filings (depends on who is funding or sponsoring the ad), and makes that person jointly and severally liable for any late-filing fines imposed by the Florida Elections Commission.

Sponsorship Disclaimer

The electioneering advertisement must contain a sponsorship disclaimer identifying the name and address of the person who paid for or sponsored the ad. Failure to include the proper disclaimer is punishable by an administrative fine of up to $5,000 or the total cost of the advertisements without the proper disclaimer, whichever is greater. The fine shall be determined by the Florida Elections Commission.

Any attempt to regulate non-ballot issue advertisements raises significant constitutional questions, whether in the form of registration, reporting, or sponsorship disclaimer requirements. (See *infra* Section IV.D., "Other Constitutional Issues: Issue Advocacy")

Regulation of Political Advertisements on the Internet

The Committee Substitute adds the Internet to the list of "communications media" as defined in Chapter 106, along with broadcasting stations, newspapers, magazines, etc. The effect of this addition is to require paid expressions on the Internet that expressly advocate for or against a candidate or ballot issue to carry a sponsorship identification disclaimer. It would also require non-ballot "electioneering ads" to carry the disclaimer. Constitutional protections, however, may limit the scope of application of this new regulation. (See *infra* Section IV.D., "Other Constitutional Issues: Regulation of Political Advertisements on the Internet")

Surplus Campaign Funds

The Committee Substitute modifies the fines for late-filed reports to $50/day (not increasing to $500/day after the third day late), not to exceed 25 percent of the total receipts or expenditures for the reporting period.

The CS also requires the filing officer to provide notice to the candidate of the impending report at least 14 days before it is due.

Finally, the CS increases the amount of surplus funds that certain successful candidates can deposit in an office account to: 1) $2,500 for each year of the candidate's term (up from $1,000 per year), for county, municipal, and intra-county candidates; 2) $5,000 for each year of the candidate's term (up from $2,500), for state legislators; and 3) $20,000 total (up from $10,000 total), for statewide candidates.

Campaign Expenditures

The Committee Substitute authorizes the use of a limited number of debit cards (maximum of three) tied to the primary campaign depository in place of paper bank checks for the purpose of making campaign expenditures. The CS requires essentially the same paper trail as with a bank check, and limits use of the cards to the campaign treasurer, deputy treasurer, or authorized user

on file with the Division of Elections. It also prohibits the user from receiving cash back on debit card transactions.

The CS essentially codifies a 2000 Division of Elections opinion[8] that recognizes a debit card as "an electronic check" for campaign finance purposes, and expressly authorizes a candidate, political committee or political party to use a debit card to make campaign expenditures.

Additionally, the CS increases the petty cash amount that can be spent on a single transaction from $30 to $100.

Use of Government Officers/Employees for Campaign Purposes

The Committee Substitute expands the current restriction against using state officers or employees for campaign purposes during working hours to county, municipal, and district officers and employees.

Severability Clause

The bill contains a severability clause.

Effective Date

The CS takes effect on July 1, 2002, in time to apply to this year's election cycle but also providing sufficient notice for the new criminal and administrative penalties created.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

[8] *See* DE 00-03.

D. Other Constitutional Issues:

Issue Advocacy

The regulation of non-ballot issue advocacy has arguably not been squarely addressed by the U.S. Supreme Court. 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 (a/k/a the "magic words"). *Id*. at 646-47 & fn. 52. In adopting this "bright line" standard, the *Buckley* Court effectively created two categories of political advocacy: "express" and "issue." Advocacy using the "magic words" 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*,[9] 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).

[9] 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 advocated 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).

In December of 1999, the Federal District Court for the Middle District of Florida held that Florida's 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).

Critics of the "bright-line," "magic words" approach charge that advertisements that contain 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 used by political parties and other groups to circumvent either contribution limits and/or disclosure requirements. Nevertheless, 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,[10] suggest that political advertisements that 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.

The argument has been forwarded that limiting the regulation of these candidate-depiction advertisements to a time proximate to the election would address the constitutional concerns. This so-called "time-delimited" approach, however, has not found favor with the courts --- although no Florida court has directly ruled on the matter. See, e.g., *Right to Life of Michigan, Inc. v. Miller*, 23 F.Supp.2d 766 (W.D. Mich. 1998) (Michigan administrative rule prohibiting corporations from using general treasury funds to pay for communications made within 45 days of election and containing the name or likeness of a candidate was unconstitutionally overbroad; rule was based on impermissible assumption that any mention of a candidate within 45 days of an election constitutes express advocacy); *West Virginians for Life v. Smith*, 960 F.Supp. 1036, 1039 (S.D.W.Va. 1996) (presumption in West Virginia statute that express advocacy includes dissemination of a voter's guide distributed within 60 days of the election detailing legislators' voting records and positions on specific issues, was unconstitutional). The reasoning of these courts strongly echoes the *Buckley* Court's acknowledgement that issue advocacy might incidentally tend to influence the election or defeat of a candidate:

> … [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates,

[10] 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. (emphasis added).

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).

> especially incumbents, are intimately tied to public issues involving legislative proposals and government action.

Buckley, 96 S.Ct. at 646.

In light of the foregoing, prudence dictates that the Legislature proceed with caution in this area of regulation.

Regulation of Political Advertisements on the Internet

The Committee Substitute seeks to regulate political advertisements and non-ballot issue ads on the Internet by requiring a sponsorship identification disclaimer. For reasons cited in the previous section on issue advocacy, there is a possibility that a court would require only those paid advertisements that *expressly advocate* the election or defeat of a candidate or ballot issue to carry the disclaimer.

Further, the Florida Supreme Court has held that individuals sponsoring political ads acting on their own and using only modest resources have a constitutional right to advertise anonymously.[11] The Court would likely carve out an "as-applied" exemption from the disclaimer requirement for such individuals, thereby exempting things like e-mail communications and some less expensive web sites from the scope of regulation.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

[11] *Doe v. Mortham*, 708 So.2d 929 (Fla. 1998). *See also, McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) (individual disseminating flyers in connection with local referendum issue, acting independently and using only modest resources, has free speech right to anonymously advertise).

VIII. Amendments:

None.