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 1500

SPONSOR: Committee on Ethics and Elections and Senator Cowin

SUBJECT: Elections

DATE: April 22, 2003 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Fox	Rubinas	EE	Fav/CS
2.			RC	
3.				
4.				
5.				
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I. Summary:

Committee Substitute for Senate Bill 1500 is an omnibus elections bill that accomplishes the following major purposes:

- **HAVA:** Retrofits many of Florida's existing laws to meet the new, somewhat technical election administration requirements in the federal Help America Vote Act of 2002 ("HAVA").
- **Second Primary Election:** Continues the current moratorium on the second primary election through December 31, 2005.
- **Leadership Funds:** Authorizes and prescribes the requirements for the use of leadership funds by legislative leaders.
- **Issue Advocacy:** Adopts reporting and disclaimer requirements for issue advocacy political advertisements.
- **Other Campaign Finance Changes:** Modifies: (a) the disposition of surplus funds by unopposed candidates; and, (b) sponsorship disclaimers for political advertisements on the Internet.

The Committee Substitute substantially amends, creates, or repeals the following sections of the Florida Statutes: 97.012, 97.021, 97.052, 97.053, 97.0535, 97.028, 98.097, 98.0977, 98.461, 98.471, 101.043, 101.048, 101.049, 101.111, 101.62,101.64, 101.65,101.657,101.6921, 101.6923, 101.6925, 101.694, 102.141, 106.011, 106.021, 106.025, 106.04, 106.08, 106.11, 106.141, 106.1433, 106.1437, 106.147, 106.148, 106.17, 106.29, 106.295, 106.33. The Committee Substitute also creates unnumbered sections of Florida Statutes.

II. Present Situation:

HAVA

In October, 2002, the U.S. Congress passed and the President signed the Help America Vote Act of 2002 ("HAVA").[1] It authorizes over $3 billion dollars over 3 years in federal aid to the States to upgrade antiquated voting equipment, to assist the States in meeting the new election administration requirements in the bill, and for other election administration projects. It also contains a host of new, highly-technical substantive requirements. Florida expects to receive about $83 million dollars this fiscal year from HAVA disbursements, the bulk of which must be used to bring the State into compliance with the new substantive federal requirements and for future election administration projects.

HAVA is, at least in part, a response to circumstances surrounding the 2000 U.S. presidential recount and the subsequent problems experienced in two of Florida's largest counties during the September 2002 primary election. Having had occasion to grapple with these issues firsthand, the Florida Legislature has already enacted a number of reforms that go a long way toward meeting the new federal requirements. Thus, it should come as no surprise that many of the key components of HAVA reflect the fixes adopted by the Florida Legislature in the Florida Election Reform Act of 2001 and subsequent glitch legislation. Despite this apparent kinship, there are still many provisions of Florida law that need retrofitting to meet HAVA's new, somewhat technical substantive requirements.

Some of the more important substantive requirements of HAVA include:

- **Voting Systems for the Disabled:** by January 1, 2006, every polling place must have technology that allows an individual with a disability to cast a secret and independent ballot.[2]
- **Statewide Voter Registration System:** by January 1, 2006 (pursuant to requested waiver of a 2004 deadline by the State of Florida), the State must have operational a statewide voter registration system that will serve as the official registration record for all federal elections; the system database must be cross-referenced against driver's license and social security administration data to confirm the identities of persons registering to vote.
- **Expanded Use of Provisional Ballots**
  - *"Late-Voted" Provisional Ballots:* Voters who vote after polls close *pursuant to court or other order extending hours* must vote by provisional ballot. Any such "late-voted" provisional ballots must be held separate and apart from other provisional ballots.

[1] H.R. 3295 (2002) [Enrolled].

[2] In order to comply with this January 1, 2006 deadline, the State may choose to begin appropriating funds in advance of this date for the purchase of disability-friendly voting systems to be located in counties without touch screen voting systems. Any such appropriation would trigger the provisions of last year's disability voting bill (Chapter 2002-281, Laws of Florida), which has essentially the same requirement as HAVA --- that each precinct have a disability-friendly voting machine in operation one year after the legislature appropriates the funds. Thus, *under current federal and state law*, Florida will be required to have a disability-friendly voting machine in place in each precinct by January 1, 2006, or one year after the State appropriates funds for such purpose, whichever occurs earlier.

- *Certain First-Time Voters/Mail-In Registrants at the Polls:* Persons who register by mail, are voting for the first-time, and do not bring the requisite identification to the polls must be allowed to vote a provisional ballot.
- *Certain First-Time Voters/Mail-In Registrants at the Polls:* Persons who register by mail, are voting for the first-time by absentee ballot, and do not include the requisite identification must have their absentee ballot treated as a provisional ballot.

- **New Identification Requirements for First-Time Voters Who Register by Mail (hereinafter, "Unknown Voters"):** Unknown voters must provide a copy of a current, valid photo ID or other prescribed document with voter's name & address at the time of registration or when voting, either in person or by absentee ballot; otherwise, they must vote provisionally. Exceptions exist for absent military and overseas voters and their families, persons voting pursuant to the federal Elderly and Handicapped Act, and anyone otherwise entitled to vote an absentee ballot under federal law.

Second Primary Moratorium

The second primary election is a runoff election between the two top vote-getters to determine the nomination of major party candidates for office. A second primary election is held when no candidate wins a majority in the first primary election.

Florida held its first runoff election in 1904. It is currently one of only about 9 or 10 states that holds a second primary election --- all Southern states, with the exception of South Dakota.

Since 1984, with the exception of the 2002 election cycle, Florida's first primary election has been held 9 weeks prior to the general election and the second primary election has been held 5 weeks prior to the general election. Because of this tight schedule and the difficulties in mailing and receiving ballots, a federal court has ordered Florida to count certain absentee ballots from overseas voters received up to 10 days following the general election (*see infra*, **VII. Related Issues**: Second Primary Moratorium).

The Florida Election Reform Act of 2001[3] eliminated the second primary election for the 2002 election cycle only. The second primary will return for the 2004 election cycle and thereafter by operation of law if the Legislature does not enact legislation to further suspend its operation.

Leadership Funds

Leadership funds have been prohibited by statute in Florida since January 1, 1990.

[3] Ch. 2001-40, Laws of Fla.

Issue Advocacy

a. Reporting Requirements

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 ("the Division"). 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.

b. Sponsorship Disclaimer

Section 106.1437,[4] Florida Statutes, requires a sponsorship identification disclaimer for ads intended to influence public policy or the vote of a public official that are published on billboards, bumper stickers, radio, and television, and in newspapers, magazines, or periodicals (exempting editorial endorsements). Arguably, this section can be seen as requiring a disclaimer on so-called "issue ads."

Other Campaign Finance Changes

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 designed 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.[5] 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, committee, or campaign, must include a statement disclosing all information required of political advertisements under s. 106.143.

[4] 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")

[5] 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 of this position, paid Internet ads supporting or opposing candidates or ballot issues should already be regulated.

This language appears broad enough to cover both political advertisements and communications that qualify 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 this statute as applied to non-ballot issue advocacy messages. (*See infra* **Section VI.D., Other Constitutional Issues**: Issue Advocacy)

Surplus Campaign Funds; Unopposed Candidates

Florida law[6] provides a number of methods for unopposed candidates to dispose of surplus campaign funds. For example, unopposed candidates may purchase "thank you" advertising expressing their appreciation for the support of their contributors for up to 75 days *after becoming unopposed*. A final report detailing how the candidate has disposed of his or her campaign funds must be filed with the Division of Elections within 90 days *of becoming unopposed*.

Since most candidates become unopposed at the end of the qualifying period in July by failing to draw a challenger, the deadline for purchasing "thank you" advertising falls at the end of September/beginning of October --- right as things are getting geared up for the general election. It can be confusing for a contributor to receive a "thank you" note or see thank you advertising for helping elect someone when an election is imminent.

III. Effect of Proposed Changes:

A section-by section explanation of the Committee Substitute is provided below:

HAVA

Section 1. *General Duties (s. 97.012)* -- Modifies the responsibilities of the Secretary of State; replaces the term "central voter file" with "statewide voter registration database"; designates an office within the Department of State to provide information regarding registration and absentee ballot procedures to military and overseas voters.

Section 2. *Definitions (s. 97.021)* – Deletes an obsolete definition ("central voter file"); amends the definition of "provisional ballot" to mean generally a "conditional" ballot that meets certain other criteria, thereby accommodating HAVA's expanded use of provisional balloting (i.e., extended polling hours voting, first-time voter, mail-in registrant without proper identification). The specific circumstances under which a provisional ballot is issued and canvassed are enumerated in the substantive statutes.

Section 3. *First-Time Voters Who Registered By Mail (hereinafter, "Unknown Voters") (s.97.052)* -- Amends the statewide voter registration application; adds a statement informing first-time, mail-in registrants that they will be required to provide identification prior to voting.

Section 4. *Voter Registration Application/Requirements for Acceptance (s. 97.053)* -- Modifies the requirements for acceptance of voter registration application; provides that an application

[6] Sections 106.11(5), 106.141(4), (5), F.S.

must contain one of the following: a Florida driver's license number; the identification number from a Florida identification card; or, the last four digits of the applicant's social security number.

Section 5. *Unknown Voters/Voter Registration (s. 97.0535)* -- Contains additional identification requirements for mail-in voter registrants who have never previously voted in the county; allows such voters to include required picture identification with registration application in lieu of having to produce documentation at the time of voting; lists acceptable forms of identification; provides exemptions for certain active duty military voters and their spouses/dependents, overseas voters, voters over 65 years of age, and persons with temporary or permanent physical disabilities.

Section 6. *Administrative Complaint Procedure (s. 97.028)* – Effective upon becoming a law, establishes a summary administrative complaint procedure within the Department of State for alleged violations of Title III of HAVA (substantive election administration provisions); provides for an administrative hearing; authorizes the Department to issue orders to remedy violations; specifically excludes the new administrative complaint procedure from procedures in Chapter 120, Florida Statutes.

Section 7. *Central Voter File (s. 98.097)* – Repeals an obsolete provision of Florida law governing the central voter file, which has been replaced by the Statewide Voter Registration Database.

Section 8. *Statewide Voter Registration Database (s. 98.0977)* – Provides that the Department shall continue to operate the statewide voter registration database until the Statewide Voter Registration System mandated by HAVA is operational; deletes obsolete references.

Section 9. *Statewide Voter Registration System (unnumbered)* – Contains a timetable and plan for developing and implementing the Statewide Voter Registration System mandated by HAVA, such system to be operational no later than January 1, 2006; authorizes State to request waiver from the 2004 HAVA deadline, which cannot practically be met; provides for a periodic progress report to the Governor and Legislature.

Section 10. *Precinct Registers (s. 98.461)* – Modifies the items included in the precinct register; removes a permissive provision relating to permissible picture identification; deletes an obsolete reference.

Section 11. *Picture I.D. at the Polls (s. 98.471)* – Clarifies the types of picture identification a voter must present at the polls; provides that if a first-time, mail-in registrant at the polls does not have the requisite picture I.D., he or she votes a provisional ballot; also, moves the provision to s. 101.043, F.S.

Section 12. *Provisional Ballots (s. 101.048)* – Modifies the Provisional Ballot Voter's Certificate and Affirmation to include a line for "driver's license number or last four digits of social security number"; authorizes the Department of State to further prescribe the form of the provisional ballot envelope; authorizes the use of electronic, or "touch screen," provisional ballots provided the system is certified by the Division of Elections; requires each supervisor of

elections to set up a free access system to allow provisional voters to find out if their vote counted no later than 30 days after the election, and, if not, why not; requires poll workers to give written instructions to provisional voters regarding the free access system.

Section 13. *Provisional Ballots/Extended Polling Hours (s. 101.049)* -- Creates a sub-category of provisional ballots called "late-voted" provisional ballots, consisting of ballots cast after the polls close *pursuant to court or other order extending polling hours*; requires these "late-voted" provisional ballots to remain segregated from all other ballots for purposes of counting and canvassing; authorizes the use of electronic, or "touch screen," provisional ballots provided the system is certified by the Division of Elections.

Section 14. *Provisional Ballots/Challenged Voter (s. 101.111)* – Modifies the written oaths involved with a challenge to a voter's right to cast a ballot at the polls; provides that if a challenged voter refuses to take an oath or if the poll workers doubt the eligibility of the person to vote, the person shall cast a provisional ballot.

Section 15. *Absentee Ballots/Requests For (s. 101.62)* – Technical; adds a cross-reference to conform Section 22 of the Committee Substitute relating to requests for absentee ballots by federal postcard application.

Section 16. *Absentee Ballots/Voter's Certificate (s. 101.64)* – Technical; modifies a reference to the absentee ballot instruction sheet.

Section 17. *Absentee Ballots/Instructions (s. 101.65)* – Directs voters to mark only the number of candidates or issue choices for each race as indicated on the ballot; warns voters that if they vote for more than one choice in a race labeled "Vote for One," their vote in that race will not count.

Section 18. *Absentee Ballots/Voting in Person (s. 101.657)* – Modifies the photo identification requirements for persons seeking to cast an in-office absentee ballot to mirror the requirements at the polls (see Sections 5 and 11 of the Committee Substitute); Unknown Voters who fail to furnish the requisite photo I.D. and who have not previously provided I.D. to the supervisor shall be allowed to cast a provisional ballot.

Section 19. *Unknown Voters/Special Absentee Ballots (s. 101.6921)* – Applies only to unknown voters who have not previously provided the requisite identification information to the supervisor of elections by the time the absentee ballot is mailed; creates a new procedure for absentee balloting requiring the unknown absentee voter to place identification information inside an outer mailing envelope (the ballot is sealed in a secrecy envelope, which is then inserted into the envelope containing the voter's certificate, which, in turn, is inserted into a mailing envelope along with the I.D. information); creates a new voter's certificate; exempts certain voters from the I.D. requirements (as provided in Section 5 of the Committee Substitute) if they certify on the voter's certificate that they are exempt by checking the appropriate box (i.e., 65 years of age or older).

Section 20. *Unknown Voters/Special Absentee Ballot Instructions (s. 101.6923)* – Creates a new instruction sheet to accompany special absentee ballots for unknown voters; identifies the acceptable forms of identification and directs the voter to insert a copy of the identification in the

mailing envelope and notifies the voter that if the identification is inserted into either the secrecy envelope or the envelope bearing the voter's certificate, the ballot will not be counted.

Section 21. *Unknown Voters/Canvassing Special Absentee Ballots (s. 101.6925)* – Creates a procedure for canvassing special absentee ballots of unknown voters; provides that the outer mailing envelope is opened to see if the voter has provided the requisite I.D. or indicated that he or she is exempt for one of the reasons enumerated on the voter's certificate; if so, the supervisor notes that the voter has provided the I.D. on the voter's registration records and proceeds to canvass the ballot like any other absentee ballot; if no I.D. is inside the mailing envelope and no exemption indicated on the voter's certificate, the supervisor shall check the voter registration records to determine if the voter had previously submitted the requisite I.D. or notified the supervisor's office that he or she was exempt from the identification requirements; if not, the envelope with the voter's certificate shall not be opened unless the supervisor has received the required information or written indication of exemption by 7 p.m. on election day.

Section 22. *Absentee Ballots/Requests For (s. 101.694)* – Provides that a request for an absentee ballot made by federal postcard application shall be effective through the next two general elections; other requests are valid for one calendar year, pursuant to s. 101.62(1), F.S.

Section 23. *County Canvassing Board Duties/ Provisional Ballots (s. 102.141)* – Technical/conforming; adds cross-references to incorporate the expanded use of provisional ballots (i.e., "late-filed" provisionals, special absentee ballot provisionals, etc.); requires canvassing boards to canvass provisional ballots such that votes on late-filed provisional ballots can be segregated from other votes.

Second Primary Moratorium

Section 24. *Effective January 2, 2004,* provides that the State will not have a second primary election during the 2004 election cycle by suspending the second primary election through December 31, 2005. After that date, the second primary would return by operation of law should the Legislature fail to affirmatively act to further suspend its operation or repeal it.

For 2004, the Committee Substitute also returns the primary election to 9 weeks before the general election (August 31, 2004), consistent with the pre-2001 law governing the timing of the first primary election.

Leadership Funds

Section 25. *Definitions (s. 106.011)* – Effective upon becoming law, re-defines the terms "political committee," "independent expenditure," and "person," to conform to the authorization of leadership funds.

Section 26. *Three-Pack Ads (s. 106.021)* – Effective upon becoming a law, exempts leadership fund expenditures for communications jointly endorsing three or more candidates from the limits applicable to candidate contributions.

Section 27. *Campaign Fundraisers (s. 106.025)* – Effective upon becoming a law, exempts leadership fund fundraisers from campaign fundraiser requirements, to conform to the treatment of party fundraisers. Expenditures for such leadership fund fundraisers would need to be reported pursuant to s. 106.29.

Section 28. *Committees of Continuous Existence ("CCEs") (106.04)* – Effective upon becoming a law, provides that groups involved in making contributions to leadership funds may qualify as CCEs.

Section 29. *Contributions (s. 106.08)* – Effective upon becoming a law, exempts leadership funds from the $500 limits that apply to most persons making contributions to candidates and political committees supporting candidates; allows candidates to accept contributions from leadership funds, provided that the aggregate contributions from leadership funds and political parties do not exceed $50,000 per election cycle; prohibits leaders who are candidates from using their own leadership funds to support their own candidacy; exempts contributions from leadership funds from the statutory proscription against making indirect contributions; limits the activities of leadership funds with regard to soliciting from, and making contributions to, charitable and philanthropic groups; prohibits leadership funds from accepting earmarked contributions designed to benefit a specific candidate; and, prescribes penalties for violations.

Section 30. *Telephone Banks (s. 106.147)* – Effective upon becoming a law, includes leadership fund phone banks within the telephone solicitation requirements and proscriptions, including the need for a sponsorship disclaimer.

Section 31. *Computer Political Solicitations (s. 106.148)* – Effective upon becoming a law, subjects leadership funds to sponsorship disclaimer requirements applicable to computer solicitations.

Section 32. *Candidate Polls (s. 106.17)* – Effective upon becoming a law, authorizes leaders to conduct polls and surveys relating to candidates provided he or she mains control over the poll in all aspects.

Section 33. *Reporting Requirements (s. 106.29)* – Effective upon becoming a law, provides that leaders operating leadership funds must report contributions and expenditures at the same time, in the same manner, and subject to the same penalties for false or inaccurate reporting as political party executive committees (quarterly reporting, plus reporting on the Friday preceding the primary and general elections). If two leaders operate the same leadership fund during a single reporting period, each must file a separate report as required by law for the period that he or she operated the fund.

Section 34. *Leadership Funds; generally (s. 106.295)* – Effective upon becoming a law, re-defines the terms "leader" and "leadership funds," and authorizes the use of such funds; requires the leader to appoint a leadership fund treasurer and designate a primary leadership depository for the purpose of depositing all contributions and disbursing all expenditures; expenditures from the depository must be made by bank check or debit card, subject to the same restrictions that apply to candidate expenditures from a primary campaign depository; authorizes the withdrawal of petty cash in the amount of $500 per calendar quarter or $500 per week during the election

season; requires the fund treasurer to keep records and accounts of transactions relating to the leadership fund in the same manner as campaign treasurers keeping the books of candidates.

Section 35. *Public Financing/Contributions (s. 106.33)* – Modifies the contribution limit applicable to candidates accepting public financing, limiting them to an aggregate of $25,000 from political parties and leadership funds.

Issue Advocacy Regulation

Section 36. *Definitions (s. 106.011)* – 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 clarify that paid expressions on the Internet that expressly advocate for or against a candidate or ballot issue must 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**: Other Campaign Finance Changes, Regulation of Political Advertisements on the Internet")

Section 37. *Surplus Campaign Funds/ Unopposed Candidates (s. 106.11)* – Provides that unopposed candidates may dispose of their surplus campaign funds by purchasing "thank you" advertising up to 75 days after the *general election* instead of 75 days after *becoming unopposed*, as provided in current law. This change will preclude the need to send out "thank you" advertising during the height of the election season, where it could be somewhat confusing to voters.

Section 38. *Disposition of Surplus Funds (s. 106.141)* – Pushes back the deadline for unopposed candidates to file a report detailing the final disposition of surplus campaign funds to 90 days after the *general election* instead of 90 days after *becoming unopposed*, to conform to Section 37.

The changes in Sections 37-38 effectively place unopposed candidates on the same filing schedule as candidates with general election opposition.

Section 39. *Issue Advocacy Regulation (s. 106.1433)* – Subjects each person or group 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 medium 30 days before an election that name or depict a candidate or reference a clearly-identifiable ballot issue in that election. The bill specifically exempts:

- Newsletters distributed by existing organizations that are distributed only to members of the organization; and,
- Editorial endorsements by any newspaper, radio, or television station or other recognized news medium.

a. Periodic and Contemporaneous Reporting Requirements

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 who do not accept public financing. 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 bill 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.

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

Except for leadership funds, the bill also prohibits indirect contributions made in the name of another for the purpose of funding an electioneering advertisement.

b. 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 and a statement that such person approved 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, whether in the form of registration, reporting, or sponsorship disclaimer requirements, raises significant constitutional questions. (See *infra* **Section IV.D., Other Constitutional Issues**: Issue Advocacy)

Section 40. *Miscellaneous Advertisements (s. 106.1437)* – Exempts electioneering ads that carry a sponsorship disclaimer pursuant to newly-created s. 106.1433, F.S., from the disclaimer requirements applicable to certain miscellaneous advertisements intended to influence public policy.

Section 41. *Severability Clause (unnumbered).*

Effective Date

Section 42. *Effective Date* – Except as otherwise provided, the Committee Substitute takes effect January 1, 2004 (election administration provisions are subject to preclearance by the U.S. Justice Department, as provided by federal law).

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Issue Advocacy

The regulation of non-ballot issue advocacy has not been squarely addressed by the U.S. Supreme Court. Therefore, it can be argued that regulation is still an "open," 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*,[7] the reported case decisions on issue advocacy have adopted and applied a strict interpretation of the *Buckley* "express advocacy" test to invalidate

[7] 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).

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).

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 "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,[8] 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

[8] 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).

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

Buckley, 96 S.Ct. at 646.

Any state regulation in the area of issue advocacy would certainly face the overwhelming weight of this negative judicial precedent.

Other Campaign Finance Changes

Regulation of Political Advertisements on the Internet

The Act 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.[9] 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.

[9] *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).

B. Private Sector Impact:

Second Primary Moratorium

The Committee Substitute reduces *overall* contribution limits for most partisan candidates from $1,500 to $1,000 per contributor, per *election cycle*.

Leadership Funds

The creation of leadership funds may alter the financial structure of political parties and/or the financial relationships between the party, its' candidates, and/or its' donors.

C. Government Sector Impact:

HAVA

HAVA authorizes about $3.65 billion in federal funding to the States over a 3-year period. While it is doubtful all this funding will be specifically appropriated by Congress, Florida's share of the first year monies (already specifically appropriated by Congress) is over $83 million. Most of this money is tied to election administration, and would not be available as General Revenue to fund non-election-related projects.

The two main costs associated with the HAVA portion of the Committee Substitute are: the design, development, and operation of the new statewide voter registration system; and, purchasing and locating one disability-friendly, touch screen voting system with audio ballot capacity in every polling place in the State (which will take place by January 1, 2006, or one year after the State begins funding the purchase of voting machines for the disabled, whichever occurs earlier). There are also other comparatively minor costs associated with: reprinting voter registration forms, ballot instructions, and ballot envelopes; and, additional election administration efforts by the Division of Elections and local supervisors.

The State should realize a sizeable net gain from the initial influx of federal funds, anticipated to begin around the end of this year, even if the Congress does not specifically appropriate any further money in Years 2 and 3 as HAVA directs.

Second Primary Moratorium

Until 2001, a statewide election was estimated to cost a minimum of $4 to $5 million. It is unclear precisely how the introduction of new voting technology in 41 of Florida's 67 counties in 2001-2002 will impact these cost estimates. The experiences of the 2002 election cycle suggest that these costs could be much higher. Current estimates are somewhere between $10 million and $13 million.

Issue Advocacy

The Division of Elections may incur some costs to set up the electronic filing system to report 11th hour "electioneering advertisements."

VI. Technical Deficiencies:

None.

VII. Related Issues:

Second Primary Moratorium; Overseas Absentee Ballots

In the early 1980's, the Federal Government sued the State of Florida claiming that the state's system of holding three elections from September to November violated the Uniformed and Overseas Citizens Voting Rights Act and the Federal Voting Assistance Act. The suit alleged that the time frame did not provide sufficient time for supervisors of elections to prepare absentee ballots, mail them to overseas voters, and have the voters return them by election day. A federal district court entered a temporary restraining order on November 6, 1980, extending by 10 days the deadline for receipt of the 1980 general election ballots cast pursuant to the federal acts.

In early 1982, the State of Florida and the Federal Government entered into a consent decree covering federal contests. The decree required overseas absentee ballots in the 1982 general election to be counted if the ballots were postmarked by election day and received by the supervisors no later than 10 days after the election. In addition, the decree required that absentee ballots for the 1982 first primary be mailed to overseas electors at least 35 days before the first primary. Finally, the consent decree directed that the State draw up a plan of compliance to provide for the mailing of overseas ballots at least 35 days prior to the deadline for the receipt of ballots in future elections.

In 1984, the federal district court approved Florida's plan of compliance, which modified the election schedule and resulted in the adoption of Rule 1C-7.013, F.A.C. (subsequently renumbered as 1S-7.013, F.A.C.). This rule required the supervisors of elections to mail overseas absentee ballots for federal office at least 35 days prior to the election. The rule also provided that, with respect to a presidential preference primary or general election for federal office, an otherwise proper overseas ballot postmarked or signed and dated no later than the date of the election must be counted if received up to 10 days after the election.

In an effort to further facilitate absentee voting by overseas electors, the 1989 Legislature adopted the advance ballot system still in use today. Under Florida's advance ballot system, supervisors of elections mail first primary absentee ballots to qualified overseas electors not less than 35 days before the first primary. Subsequently, the supervisors mail *advance* ballots for the second primary and general election at least 45 days prior to these elections, followed by regular second primary and general election ballots when they become available. If both ballots for the same election are returned, only the regular ballot is counted.

Issue Advocacy

- The Issue Advocacy component of the Committee Substitute is similar to the consensus committee product that emerged from a workshop conducted last year by the Senate Ethics and Elections committee in an effort to develop a unified approach to the subject of issue advocacy regulation. Four issue advocacy bills were filed in 2002 and discussed at the workshop: SB 1842 (by Senator Lee); SB 1726 (by Senator Constantine); SB 1124 (by Senator Futch); and, SB 498 (by Senator Smith). The consensus committee product that emerged from the workshop comprised the issue advocacy component of CS/SB 1842, 1124, and 498 (2002). It was removed from the bill on the Senate floor, and did not pass.

- In March 2002, the U.S. Congress passed the Bi-Partisan Campaign Reform Act ("BCRA"). BCRA contains some issue advocacy regulations similar to those contained in the Committee Substitute. The constitutionality of these provisions, along with the bulk of BCRA, are the subject of a lawsuit pending in the federal district court in Washington D.C.[10] Oral argument was heard in the case on December 4, 2002, and a decision in this fast-track case is expected sometime in 2003. That decision will likely be appealed to the U.S. Supreme Court, who may finally offer some additional guidance on the scope of permissible regulation of issue ads.

VIII. Amendments:

None.

[10] *McConnell v. Fed. Elec. Comm'n*, Civ. No. 02-582 (D.D.C. 2002)