

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 2346 & 516

SPONSOR: Ethics and Elections Committee, Senators Lee and Constantine

SUBJECT: Elections; campaign finance

DATE: March 24, 2004 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Fox</u>	<u>Rubinas</u>	<u>EE</u>	<u>Fav/CS</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	<u>RC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Committee Substitute for Senate Bill 2346 (“the CS” or “the bill”) addresses the following principal areas of campaign finance law:

- Issue Advocacy Regulation
- Reporting Requirements for Committees of Continuous Existence (“CCEs”)
- Political Advocacy on the Internet

The bill creates a definition for “electioneering communications” --- paid issue advocacy advertisements affecting candidates or ballot issues that are run proximate to an election and, for candidate ads, are targeted to 1,000 or more persons in the district the candidate seeks to represent. The bill regulates these issue advocacy advertisements in essentially the same manner as existing Florida law governing the registration, periodic reporting, and sponsorship disclaimer requirements that apply to political committees and/or persons making independent expenditures.

With regard to CCEs, the bill requires the individual reporting of member dues, with a \$250 per year aggregate *de minimus* exception. This closes the so-called “membership dues” loophole, which currently allows CCEs to report contributions from their “members” *in the aggregate* on periodic campaign finance reporting forms and conceal the identities of large donors. The CS also expands CCE reporting to include individual and total “expenditures,” correcting a reporting gap.

Finally, the bill expands the definition of “communications media” for campaign finance purposes to include the Internet, thereby clarifying that many political advertisements and electioneering communications on the Internet must carry a sponsorship disclaimer.

The bill takes effect July 1, 2004, and substantially amends or repeals the following sections of the Florida Statutes: 106.011, 106.04, 106.07, 106.071, 106.143, 106.148.

II. Present Situation:

Issue Advocacy

Issue advocacy advertisements are those political ads that typically attack or support candidates, without ever *expressly advocating* for or against any particular candidate (i.e., “vote for,” “vote against,” “support,” “oppose”). Issue advocacy advertisements may also occur in connection with referendum issue elections.

a. Reporting Requirements

Groups and individuals publishing advertisements that discuss non-referendum issues of public interest and that may include a reference to or likeness of a candidate, 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”).¹ This often enables individuals and groups that engage *solely* in this type of pure issue advocacy to conceal the sources of their funding.

b. Sponsorship Disclaimers

Section 106.1437, Florida Statutes,² 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 advocacy ads.³ Without a concurrent registration and reporting requirement identifying the groups’ principals, however, persons are often able to conduct “shadow” campaigns under the guise of such benign names as the “Citizens for Everglades Preservation” or “Floridians for Fair Representation.”

¹ Some of these groups, however, may be subject to certain federal disclosure and reporting requirements under sec. 527 of the federal tax code.

² 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”)

³ Florida law also requires a sponsorship disclaimer on all “political advertisements,” defined to include paid ads that “support or oppose” an “elected public official.” See sections 106.011 and 106.143, F.S. On its face, this law seems to endorse another form of issue advocacy regulation. There is a strong likelihood, however, that a court would interpret the phrase “support or oppose” to mean “expressly advocate and not regulate ads with “elected public officials” who are not candidates. See *McConnell v. Federal Election Comm’n*, 124 S.Ct. 619 (2003) (issue advocacy regulations must be *easily understood* and *objectively determinable* to pass constitutional muster).

CCEs

A CCE is a political group that registers with the Division⁴ and can accept unlimited contributions, *provided* that at least 25% of its annual revenue comes from “member dues.”⁵ A CCE is only supposed to expend funds “on behalf of a candidate” by making a contribution to the candidate’s treasurer. This leaves open the issue of whether a CCE can run issue advocacy advertisements that may indirectly benefit candidates; case law suggests that such advertisements might not be sufficiently “on behalf of” candidates to trigger a prohibition against issue advocacy ads.

With regard to reporting, Florida law requires CCEs to register with the Division of Elections and file periodic campaign finance reports.⁶ These periodic reports detail each group’s contributions activities; the reports *do not* required a detailed reporting of expenditures.

Under current law, CCEs *are not required to provide a detailed accounting of each contribution received in the form of member dues*;⁷ only the **aggregate amount** of member dues need be reported together with the **total number** of dues-paying members.⁸ Thus, a CCE can effectively conceal the identity of large contributors by characterizing each as a “member” and accepting their contribution as “membership dues” (the so-called “membership dues loophole”).

Regulation of Political Speech 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. Hence, the term “communications media” in Chapter 106, which governs the type of “political advertisements” requiring a sponsorship disclaimer, does not *explicitly* include “the Internet” or Internet communications. 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* makes the Internet a “communications media,” bringing Internet communications within the ambit of regulation under current Florida law.⁹ However, no Florida court has ruled on the issue.

⁴ For certification as a CCE, a group must provide certain organizational information to the division, including:

- A written charter or set of bylaws;
- Name and address of the committee;
- Names, addresses, and relationships of affiliated or connected organizations;
- Name, address, and positions held by principals and officers of the group;
- Copy of the dues schedule, or a formula by which dues are levied.

Changes to certification information must be filed with the division annually.

⁵ For example, a CCE that collects \$25,000 in regular dues can accept up to \$75,000 in contributions --- from a single contributor or numerous contributors.

⁶ See Sections 106.03(2), 106.04(2), F.S.

⁷ Refers to those fixed “member dues” that are paid pursuant to a schedule filed with the Division of Elections.

⁸ Section 106.04(4)(c)1., F.S.

⁹ 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.

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.

This language appears broad enough to cover both “political advertisements” that expressly advocate for or against a candidate or ballot issue, and communications that qualify as non-ballot, issue advocacy. Unfortunately, there are no reported case decisions interpreting this provision of Florida law.

III. Effect of Proposed Changes:

Issue Advocacy

The CS subjects each person or group funding certain “electioneering communications” (a/k/a, *issue advocacy* advertisements) to registration, periodic campaign finance reporting of contributions and expenditures, and sponsorship disclaimer requirements. The advertisements subject to regulation are:

- *Paid* expressions;
- In any *communications media*;¹⁰
- Published proximate to an election (after candidate qualifying in a race for an office; after an issue receives ballot position or 120 days before the election on the issue, whichever occurs first);
- That *refer to* or *depict a candidate* for office in that election or *contain a clear reference indicating that an issue is to be voted on* at an election; and,
- For a candidate communication, those targeting 1,000 or more persons in the district the candidate seeks to represent.

The bill specifically exempts:

- **Internal Newsletters:** Newsletters distributed by existing organizations that are distributed only to members of the organization;
- **Media:** An editorial endorsement, news story, commentary, or editorial by any newspaper, radio, television station, or other recognized news medium; and,
- **Public Debates/Forums:** Communications made in a public debate or forum which includes at least two opposing candidates for office or one advocate and one opponent of an issue on the ballot, and for materials promoting the debate or forum, provided the staging organization is either a:

¹⁰ “Communications media” means “broadcasting stations, newspapers, magazines, outdoor advertising facilities, printers, direct mailing companies, advertising agencies, and telephone companies ...”. This bill also proposes to add the Internet to the foregoing list (see *infra* subsections entitled, *Regulation of Political Speech on the Internet*).

- Non-partisan, charitable organization; or,
- Recognized news medium; and,
- The debate is structured in an unbiased manner.

a. Reporting Requirements

The bill folds into the Chapter 106 definition of “political committee” any group making expenditures for, or accepting contributions for the purpose of making, electioneering communications exceeding \$500 per calendar year --- and modifies the definitions of “contribution,” “expenditure,”¹¹ and “independent expenditure,” to conform. Thus, any combination of two or more persons who run issue advocacy advertisements exceeding \$500 will be required to register as a political committee¹² and periodically report contributions and expenditures at the same time, in the same manner, and subject to the same penalties as any other political committee (or candidate not accepting public financing).¹³

Individuals who make expenditures for electioneering communications exceeding \$100 will be required to file a report of their expenditures at the same time, in the same manner, and subject to the same penalties as persons making “independent expenditures” that expressly advocate for or against a candidate or ballot issue. Independent expenditures are reported on the same schedule as periodic campaign finance reporting by political committees (and candidates not accepting public financing).¹⁴

¹¹ The term “expenditure” has also been amended to provide that, in the context of electioneering communications, an expenditure occurs when the earliest of the following occurs:

- A person executes a contract for an electioneering communication;
- A person pays for an electioneering communication; or,
- The electioneering communication is publicly disseminated.

The U.S. Supreme Court expressly authorized “advance disclosure requirements” for electioneering communication executory contracts, to prevent circumvention of BCRA’s new reporting requirements. See *McConnell v. Federal Election Comm’n*, 124 S.Ct. 619, 692-94 (2003).

¹² The registration requirement mandates that the committee identify, among other things, the:

- Name and address of the committee;
- Names, addresses, and relationships of affiliated or connected organizations; and,
- Name, address, and positions held by principals and officers of the group.

See ss. 106.03(2); F.S.

¹³ Reporting is currently handled on a quarterly basis, with the frequency of reporting increasing after the last day of qualifying (periodic reporting dates during the election season are the 32nd, 18th and 4th day immediately preceding the first primary election, and the 18th and 4th day immediately preceding the second primary and general election). Section 106.07(1), F.S.

¹⁴ See *supra* fn. 13 (discussing reporting dates for political committees and candidates not accepting public financing).

b. Sponsorship Identification Disclaimers

The bill folds “electioneering communications” into the definitions of “political advertisements” and, where appropriate, “independent expenditures.” This means that the current sponsorship identification disclaimers for political advertisements that expressly advocate for or against a candidate or ballot issue,¹⁵ and independent expenditures that do the same, will now apply to electioneering communications.

To provide more information, the current sponsorship disclaimers for “political advertisements” and “independent expenditures” have been modified to require the sponsors full name and street address (instead of just the name of the sponsoring group or individual) and the following statement, “For more information about campaign finance, visit the Florida Division of Elections web site at (Insert web address for the Florida Division of Elections home page).”

The CS also simplifies the current sponsorship disclaimer for a candidates’ campaign ads, by providing specific language for the disclaimer.¹⁶

CCEs

The bill closes the “membership dues loophole” by requiring CCEs to periodically report membership dues in the same manner as regular contributions. The full name, address, and occupation¹⁷ of each person who has made one or more contributions that represent the payment of membership dues must be reported *individually*. Regular payments of membership dues not exceeding an aggregate of \$250 per calendar year, however, may continue to be reported in a lump sum as “membership dues.”¹⁸

The CS also modifies the oversight whereby CCEs are not required to report “expenditures” on their periodic campaign finance reports. Reported incidents whereby CCEs have used funds for the payment of personal expenses and not for the “purpose of influencing the results of an election,” as required by law,¹⁹ will thereby be exposed to public scrutiny and may be redressed.

Finally, the bill clarifies that CCEs *may not* make electioneering communications. Under current law, a CCE is only able to expend funds “on behalf of a candidate” by means of a contribution to the candidate’s treasurer. This left open the issue of whether the CCE could run issue advocacy ads which indirectly may have supported or opposed candidates. This bill clarifies that CCEs are prohibited from making electioneering communications, by deeming that “electioneering communications” are made “on behalf of” a candidate.

¹⁵ Section 106.143, F.S.

¹⁶ Sum and substance of SB 2130 (2003) and SB 1332 (2002), both by Senator Sebesta (favorable by Ethics and Elections Committee; died on Senate Calendar).

¹⁷ CCEs need not report the occupation of persons contributing \$100 or less. Section 106.04(4)(c)1., F.S.

¹⁸ These *de minimus* dues must be paid pursuant to a fixed schedule on file with the Division of Elections.

¹⁹ See sections 106.011(3), (4), F.S. (defining “contributions” and “expenditures” as “for the purpose of influencing the results of an election”).

Regulation of Political Speech on the Internet

The bill adds the Internet to the list of “communications media” defined in Chapter 106, along with broadcasting stations, newspapers, magazines, etc. The effect of this addition is to expand the disclaimer requirement to include things like corporations and wealthy individuals engaging in political advocacy on the Internet. Another effect is to clarify that paid *political advertisements* on the Internet that expressly advocate for or against a candidate or ballot issue must carry a sponsorship identification disclaimer. Including the Internet as a part of “communications media” would also require *electioneering communications* appearing on the Internet to carry a sponsorship disclaimer.

The current exemption in s. 106.148 for internal computer communications of a political party, a candidate’s campaign, a political committee, or a CCE is re-located to the definition of “communications media” in s. 106.011(13), and expanded to include internal Internet communications of any campaign or group. Section 106.148, Florida Statutes, relating to sponsorship disclaimer requirements for certain computer messages, is accordingly repealed.

Constitutional protections, however, may limit the scope of application of this new Internet regulation to individuals acting independently and spending only modest sums of their own money. (See *infra* Section IV.D., *Other Constitutional Issues: Regulation of Political Speech on the Internet*)

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

In *McConnell v. Federal Election Comm’n*, 124 S.Ct. 619 (2003), the U.S. Supreme Court expressly approved the regulation of issue advocacy advertisements as they relate to candidates for federal office --- provided the regulations include components that are ***easily understood*** and ***objectively determinable***. The *McConnell* case impacts only issue advocacy advertisements containing clearly-identified *candidates* for *federal office*, but opens the door to similar state regulation of state and local candidates.

The *McConnell* case offers no concrete guidance on whether issue advocacy ads run in connection with a *referendum election* may be similarly regulated. The Florida Supreme Court, however, has opined that it is permissible to require some form of reporting and sponsorship disclaimer in connection with referendum issue elections.²⁰

Specifically, the *McConnell* Court approved the “electioneering communications” provisions of the federal Bipartisan Campaign Reform Act (“BCRA”), which apply to *paid* advertisements:

- *Publicly disseminated* on broadcast, cable, and satellite *radio and television stations*;
- *Clearly identifying a candidate* for federal office;
- Aired within a *specific time period* (60 days before a general election; 30 days before a primary); and,
- *Targeted* to the relevant electorate (at least 50,000 viewers or listeners, in the case of Congressional candidates).

The *McConnell* Court’s decision authorizes the reporting of both electioneering *expenditures* and *major contributors* of those funding electioneering communications. In addition, Court’s decision did not strike down the new BCRA provision extending federal sponsorship disclaimer requirements for “political advertising” to the new “electioneering communications.”

Regulation of Political Speech on the Internet

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.²¹ The Court would likely carve out an “as-applied” exemption from the sponsorship 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:

Individuals and groups that formerly were not required to register or periodically report contributions and expenditures may incur additional administrative costs to comply with the new law. Also, CCEs may incur additional administrative costs to track and report member dues over \$250 annually, which must now be reported as contributions under the

²⁰ *Doe v. Mortham*, 708 So.2d 929, 932-33 (Fla. 1998).

²¹ *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).

bill. The impact to each group will differ, depending on the size of the group and the scope of its electioneering/ political activities or membership dues structure.

C. Government Sector Impact:

The Department of State (and some local supervisors of elections) may incur some additional expense in having to process registration and periodic campaign finance reports of individuals and groups not formerly required to register and report. Any additional expenses, however, are minimized by the fact that the new law utilizes existing registration and reporting mechanisms.

VI. Technical Deficiencies:

None.

VII. Related Issues:

It is customary when a bill imposes new criminal penalties to provide for an effective date of January 1 of the year following adoption (or, at the earliest, October 1 of the year of adoption) --- to provide notice to those who might be affected by the new criminal law. The effective date of the CS is July 1, 2004. As a practical matter, however, there is really alternative to the effective date in the bill if it is to impact the 2004 election cycle --- as candidate qualifying begins around mid-July.

VIII. Amendments:

None.