

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 890

SPONSOR: Committee on Ethics and Elections and Senator Kurth

SUBJECT: Direct support organizations; campaign contributions

DATE: March 7, 2000 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Fox</u>	<u>Bradshaw</u>	<u>EE</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>ED</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

Committee Substitute for Senate Bill 890 (“committee substitute”) prohibits the direct support organization of a state university, community college, or the statewide community college system from giving any “gift,” which would include a contribution, to a political committee or committee of continuous existence.

This bill substantially amends ss. 240.299, 240.331, and 240.3315 of the Florida Statutes.

II. Present Situation:

A higher education direct support organization (“DSO”) is a *non-profit corporation* authorized by statute and incorporated under Florida law to act in fiscal matters for a state university or community college. Direct-support organizations must be organized and operated exclusively to receive, hold, invest, and administer property and to make expenditures to, or for the benefit of, a state university, community college, or the Community College System. Thus, the DSO is organized and operated exclusively to raise and administer funds on behalf of a state university or community college, and does many things in that regard that the university or college would otherwise do. *Palm Beach Community College Foundation, Inc. v. WFTV, Inc.*, 611 So.2d 588, 589 (Fla. 4th DCA 1993); *see also, e.g.*, s. 240.299(1)(a)2., F.S. In addition to raising and administering funds on behalf of a university or college, some DSOs may receive substantial state grants and matching funds. *Palm Beach Community College*, 611 So.2d at 589. After the Board of Regents certifies that the DSO is operating in a manner consistent with the goals of the university or community college and in the best interests of the state, the DSO may use the name of the university or college that “it serves.” s. 240.299(1)(a)3., F.S.

In response to a recent survey by staff of the House of Representatives Colleges & Universities Committee, the State University System identified 43 active university direct-support organizations. Each of the 10 state universities has at least one direct-support organization. The reported direct-support organizations include:

University of Florida: 15 reported direct-support organizations -- Citrus Research and Education Foundation; Florida Association of Basic Medical Scientists; Florida Foundation Seed Producers; Florida 4-H Foundation; University of Florida Leadership and Education Foundation; Gator Boosters; Southwest Florida Research and Education Foundation; Treasure Coast Agricultural Research Foundation; University Athletic Association; University of Florida National Alumni Association; University of Florida Foundation; University of Florida Orthopaedic Tissue Bank; University of Florida Law Center; University of Florida Research and Development Park; University of Florida Research Foundation.

Florida State University: Six reported direct-support organizations -- FSU International Programs Association; FSU Foundation; FSU Alumni Association; The Florida State University Research Foundation; FSU Financial Assistance; Seminole Boosters.

Florida A&M University: Two reported direct-support organizations -- Florida A&M University National Alumni Organization; Florida A&M University Foundation.

University of South Florida: Six reported direct-support organizations -- USF Alumni Association; USF Foundation; USF Medical Services Support Corporation; USF Research Foundation; The Sun Dome, Inc.; USF Charter School, Inc.

Florida Atlantic University: Two reported direct-support organizations -- FAU Foundation; Florida Atlantic Research Corporation.

University of West Florida: Two reported direct-support organizations -- UWF Foundation; Research Foundation of the University of West Florida.

University of Central Florida: Three reported direct-support organizations -- UCF Foundation; The Research Foundation of the University of Central Florida; Golden Knights Club.

Florida International University: Two reported direct-support organizations -- FIU Research Foundation; FIU Foundation.

University of North Florida: Two reported direct-support organizations -- UNF Foundation; UNF Training and Service Institute.

Florida Gulf Coast University: One reported direct-support organization -- FGCU Foundation.

Board of Regents: One reported direct-support organization -- The Board of Regents Foundation, Inc.

The Community College System identified 36 active community college direct-support organizations. Each of the 28 community colleges reports at least one direct-support

organization. Seven community colleges have more than one direct- support organization. The reported direct-support organizations include:

Brevard Community College: Four reported direct- support organizations -- Cocoa Village Playhouse; Maxwell C. King Center for the Performing Arts; Brevard Teaching and Research Laboratories; and Florida Education and Research Foundation.

Broward Community College: One reported direct-support organization -- Broward Community College Foundation.

Central Florida Community College: Two reported direct-support organizations -- Central Florida Community College Foundation; Patriot Athletic Booster Association.

Daytona Beach Community College: Two reported direct-support organizations -- Coastal Educational Broadcasters, Inc.; Daytona Beach Community College Foundation.

Edison Community College: One reported direct-support organization -- Edison Community College Foundation.

Florida Community College at Jacksonville: One reported direct-support organization -- Florida Community College at Jacksonville Foundation.

Florida Keys Community College: Two reported direct-support organizations -- Florida Keys Educational Foundation; Tennessee Williams Fine Arts Center Founders' Society.

Gulf Coast Community College: Two reported direct-support organizations -- Gulf Coast Community College Foundation; Gulf Coast Athletic Association.

Hillsborough Community College: One reported direct-support organization -- Hillsborough Community College Foundation.

Indian River Community College: One reported direct-support organization -- Indian River Community College Foundation.

Lake-Sumter Community College: One reported direct-support organization -- Lake-Sumter Community College Foundation.

Manatee Community College: One reported direct-support organization -- Manatee Community College Foundation.

Miami-Dade Community College: One reported direct-support organization -- Miami-Dade Community College Foundation.

North Florida Community College: One reported direct-support organization -- North Florida Community College Foundation.

Okaloosa-Walton Community College: One reported direct-support organization -- Okaloosa-Walton Community College Foundation.

Pasco-Hernando Community College: One reported direct-support organization -- PHCC Foundation, Inc.

Palm Beach Community College: One reported direct-support organization -- Palm Beach Community College Foundation.

Pensacola Junior College: Two reported direct-support organizations -- Pensacola Junior College Foundation; WSRE-TV Foundation.

Polk Community College: One reported direct-support organization -- Polk Community College Foundation.

St. Johns River Community College: One reported direct-support organization -- St. Johns River Community College Foundation.

St. Petersburg Junior College: Three reported direct-support organizations -- St. Petersburg Junior College Development Foundation; St. Petersburg Junior College Athletic Boosters; St. Petersburg Junior College Alumni Association.

Santa Fe Community College: One reported direct-support organization -- Santa Fe Community College Endowment Corporation.

Seminole Community College: One reported direct-support organization -- Seminole Community College Foundation.

South Florida Community College: One reported direct-support organization -- South Florida Community College Foundation.

Tallahassee Community College Foundation: One reported direct-support organization -- Tallahassee Community College Foundation.

Valencia Community College: One reported direct-support organization -- Valencia Community College Foundation.

Staff of the State Board of Community Colleges reports one active statewide community college direct-support organization -- The Foundation for Florida's Community Colleges.

A DSO may perhaps best be described as a *quasi-governmental* entity, a private corporation performing a government-related function. For purposes of Florida public records law, a higher education DSO is an "agency." *Palm Beach Community College*, 611 So.2d at 589; *see* s. 119.011, F.S. (specifically defining "agency" to include private corporations acting on behalf of a public agency for purposes of public records law). However, a higher education DSO's donor list is confidential and exempt from public records disclosure. *See, e.g.*, s. 240.299(5), F.S. The

DSO may also be subject to Florida's Government in the Sunshine Law. *Attorney General Opinions 92-53, 97-17*. For purposes of state contracting and procurement statutes in Chapter 287, Florida Statutes, however, a DSO is not an "agency." *Attorney General Opinions 92-53*.

The driving force behind this bill is an incident which occurred during the Summer of 1999. Two direct-support organizations, one from a state university and one from a community college, contributed \$449,000 to a political committee in support of a referendum to increase a local sales tax to fund transit projects. Supporters of the contributions suggested that success of the referendum would provide greater access for students by virtue of improved transportation as well as free up local funds to provide increased funding for scholarships at the respective institutions. Thus, they were permissible expenditures because they were made for the benefit of the university or community college. Opponents of the contributions questioned the appropriateness of using funds from direct-support organizations to support political referendums rather than in support of traditional educational expenditures such as funding for scholarships, faculty travel, or research efforts, particularly since the referendum failed.

Opponents of the contributions to the political committee also expressed concern about the public records exemption provided to direct-support organizations which protects the identity of donors who wish to remain anonymous. The names of contributors to the DSOs in question, who in turn made contributions to the political committee supporting the tax referendum, were not discoverable. This procedure provides a mechanism for unscrupulous persons to anonymously contribute large sums of money indirectly to political committees and CCEs, although staff is not aware of any such specific allegations in the 1999 case.

The Board of Regents recently authorized the Chancellor to revise the Chancellor's Memorandum, an internal policy document, to prohibit state university DSOs from making contributions to political committee and committees of continuous existence. However, this practice will not impact contributions by community college DSOs.

III. Effect of Proposed Changes:

The committee substitute prohibits a state university DSO, community college DSO, or statewide community college DSO from giving a gift, presumably including a "contribution," to any political committee¹ or committee of continuous existence ("CCE").

¹ In December, 1999, a federal district court in Orlando struck down the current statutory definition of "political committee" as unconstitutionally over broad, and enjoined the Florida Elections Commission from enforcing the definition. *Florida Right to Life v. Mortham*, No. 98-770-CIV-ORL-19A (M.D. Fla. 1999). The case is currently on appeal to the Eleventh Circuit. However, until the "political committee" issue is resolved either by the courts or by the Legislature's adoption of a new definition, the precise impact of this bill's prohibition on DSO contributions to political committees will remain unclear.

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:

Blanket Ban on Contributions

To the extent that a court were to view a DSO as a governmental agency or entity for campaign finance purposes, there *may* be no constitutional impediment prohibiting contributions to political committees or CCEs. *But see, People Against Tax Revenue Mismanagement, Inc. v. County of Leon*, 583 So.2d 1373 (Fla. 1991) (local government agencies and leaders had not only a right but a duty to spend money to advocate local sales tax referendum). However, were a court to view the DSO as essentially a private entity for purposes of Florida's campaign finance laws, the bill's absolute prohibition against contributions to political committees and CCEs would raise significant constitutional questions. Unfortunately, committee staff's research failed to identify any case which might provide some guidance in determining how a court would characterize a DSO in a campaign finance context.

To the extent that a court were to view the DSO as a *private entity* for the purpose of making political contributions, there are a number of potential problems with the bill. First, the does not differentiate between contributions to political committees supporting or opposing *candidates* and those supporting or opposing *issues*. The courts have repeatedly held that states cannot limit contributions in referendum elections; limitations run afoul of the First Amendment's free speech and association guarantees. *First Nat'l Bank of Boston v. Bellotti*, 98 S.Ct. 1407 (1978); see, *Citizens Against Rent Control v. City of Berkeley*, 102 S.Ct. 434 (1981); *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980) (Florida statute limiting contributions to political committees supporting or opposing a constitutional amendment to \$3,000 violated First Amendment speech and association rights).

In *First Nat'l Bank of Boston v. Bellotti*, 98 S.Ct. 1407 (1978), the U.S. Supreme Court invalidated a Massachusetts criminal statute prohibiting corporations from making contributions or expenditures to influence the outcome of a vote on any question submitted to the voters other than questions materially affecting the property, business, or assets of the corporation. In so doing, the Court held that a corporation has the same right as an individual

to speak out on public issues. *First Nat'l Bank*, 98 S.Ct. at 1420. The *First Nat'l Bank* Court stated:

In the realm of protected speech, the [Massachusetts] legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. (citation omitted) If a legislature may direct business corporations to “stick to business,” it also may limit other corporations --- religious, *charitable*, or civic --- to their respective “business” when addressing the public. *Such power in government to channel the expression of views is unacceptable under the First Amendment.*

(emphasis added). *First Nat'l Bank*, 98 S.Ct. at 1420. Distinguishing referenda elections from candidate elections, the Court further opined:

Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections ... simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it ...

(footnotes and citations omitted). *First Nat'l Bank*, 98 S.Ct. at 1423, cited in, *Let's Help Florida v. McCrary*, 621 F.2d at 200 (same passage cited). In light of the case law, the bill's absolute ban on contributions to political committees supporting or opposing *ballot issues* would be constitutionally suspect.

Second, only slightly less suspect would be the bill's absolute ban on contributions to CCEs and political committees supporting or opposing candidates.² States generally have the authority to enact reasonable contribution limits in candidate elections to deter corruption or the appearance of corruption, provided the limit is “closely drawn” to achieve that objective. *Nixon v. Shrink Missouri Government PAC*, 120 S.Ct. 897, 904 (2000). Florida law currently limits any person or group to contributing \$500 per election to any political committee supporting or opposing candidates. s. 106.08(1), F.S. There is no limit to the amount which may be contributed to a CCE, provided that at least 25% of the CCE's total funding is derived from dues of its members.

Although in rare cases courts outside Florida have upheld absolute bars to contributions by specific groups, such blanket prohibitions are generally disfavored. *Zeller v. The Florida Bar*, 909 F.Supp. 1518, 1526 & n.12 (N.D. Fla. 1995) (invalidating judicial canon restricting judicial candidates from expending funds or soliciting contributions more than a year before the general election), *citing*, *First National Bank of Boston v. Bellotti*, 435 U.S. 765, *reh'g denied*, 438 U.S. 907 (1978). In most such cases, the absolute ban which was upheld was very narrowly tailored to specific elections. *See Wachsman v. City of Dallas*, 704 F.2d 160, 173-75 (5th Cir.) (upholding provision of municipal charter prohibiting city employees from making contributions to city council candidates), *cert. denied*, 464 U.S. 1012 (1983); *Gwinn*

² For practical purposes, it is doubtful that a DSO would ever contribute to a candidate: doing so would jeopardize the DSO's federal tax exempt status. 26 U.S.C. s. 501(c)(3). However, the language of the bill is broad enough to prohibit contributions to political committees and CCEs supporting or opposing candidates, so the constitutional impact of such a prohibition is discussed *supra*.

v. State Ethics Comm'n, 426 S.E.2d 890, 893 (Ga. 1993) (upholding state Ethics in Government Act provision prohibiting insurance companies from making contributions to insurance commissioner candidates); *but see, Soto v. New Jersey*, 565 A.2d 1088 (N.J. Super. 1989) (upholding a complete ban on contributions by the gaming industry to candidates or any party or group organized to support such candidates). Thus, it would be surprising were a court to approve the broad blanket prohibition against contributions embodied in the committee substitute.

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.

VIII. Amendments:

None.