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 114

SPONSOR: The Committee on Ethics and Elections, Senator Constantine and others

SUBJECT: Elections; issue advocacy

DATE: February 6, 2003 REVISED: _____ _____ _____ _____

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

I. Summary:

Committee Substitute for Senate Bill 114, the "Florida Advertising Campaign Exposure Act," establishes reporting and sponsorship disclaimer requirements for issue advocacy groups that run certain types of "electioneering advertisements." The Act also expands the definition of "communications media" for campaign finance purposes to include the Internet, thereby clarifying that many political advertisements on the Internet must carry a sponsorship disclaimer. Finally, the Act modifies the deadlines for unopposed candidates to purchase "thank you" advertising and file a final report detailing the disposition of surplus campaign funds to 75 days and 90 days after the *general election*, respectively.

The bill takes effect January 1, 2004.

This bill substantially amends sections 106.011, 106.11, 106.141, and 106.1437 of the Florida Statutes.

II. Present Situation:

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,[1] 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."

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.[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, 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 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[3] provides a number of methods for unopposed candidates to dispose of surplus campaign funds. For example, unopposed candidates may purchase "thank you" advertising

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

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

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 to be receiving a "thank you" note or see thank you advertising for helping elect someone when an election is imminent.

III. Effect of Proposed Changes:

Issue Advocacy

The Act 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 <u>only</u> to members of the organization; and,
- Editorial endorsements by any newspaper, radio, or television station or other recognized news medium.

<u>a. Periodic and Contemporaneous Reporting Requirements</u>

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), and makes that person jointly and severally liable for any late-filing fines imposed by the Florida Elections Commission.

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. 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")

Regulation of Political Advertisements on the Internet

The Act 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: Regulation of Political Advertisements on the Internet.")

Surplus Campaign Funds; Unopposed Candidates

The Act 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.

The deadline for unopposed candidates to file a report detailing the final disposition of surplus campaign funds has been moved to 90 days after the *general election* instead of 90 days after *becoming unopposed*, to conform.

These changes effectively place unopposed candidates on the same filing schedule as candidates with general election opposition.

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*,[4] 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*

[4] 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).

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,[5] 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 can incidentally influence the election or defeat of a candidate:

[5] 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).

> … [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.

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.[6] 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:

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.

[6] *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).

VII. Related Issues:

- The Act 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 in Committee Substitute for Senate Bill 114. 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.[7] Oral argument was heard in the case on December 4, 2002, and a decision in this fast-track case is expected in early 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.

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