The Florida Senate

VETO MESSAGE BILL ANALYSIS

(This document is based on the enrolled bill, as presented to the Governor.)

Prepared By: The Professional Staff of the Ethics and Elections Committee

BILL: CS/CS/HB 1207

INTRODUCER: Economic Development and Community Affairs Policy Council, Governmental Affairs Policy Committee, and Rep. McKeel

SUBJECT: Campaign Financing

DATE: April 7, 2010 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Fox	Rubinas	EE	**Withdrawn**
2.				
3.				
4.				
5.				
6.				

I. Summary:

The bill reenacts and amends provisions related to electioneering communications and electioneering communication organizations ("ECOs") to do the following:

- Redefine "electioneering communication" by removing references to issue elections and the number of persons in a geographic area who must be "targeted," specifying the distribution media subject to regulation, regulating advocacy that is the functional equivalent of express advocacy, and providing limited timeframes for when communications can be regulated.
- Redefine "electioneering communications organization" to clarify that it includes only those organizations with "election-related activities" that are limited to electioneering communications and that its activities would not require the group to register as a political party, political committee, or committee of continuous existence.
- Require an organization to register as an ECO upon receipt or expenditure of an aggregate amount exceeding $5,000, rather than when it "*anticipates* receiving contributions or making expenditures" for electioneering communications --- without regard to amount.
- Increase the amount an *individual* can expend before being subject to electioneering and independent expenditure disclosure requirements from $100 to $5,000.
- Remove prohibitions against an ECO accepting contributions from certain 527 and 501(c)(4) organizations and restrictions against ECOs using contributions received proximate to an election.
- Move the registration and reporting requirements for ECOs from a definitional section to the substantive provisions of Chapter 106.

Also, the bill authorizes the leader of each political party conference of the state Senate and House of Representatives to establish a separate, affiliated party committee ("APC") to support the election of candidates of the leader's political party. "Leader" is defined as President of the Senate, Speaker of the House of Representatives, and the minority leader of either house of the Legislature, until a person is designated by a political party conference of members of either house to succeed to the position, at which time the designee becomes the leader for purposes of the APC. The appropriate APC receives the two-percent party assessment for its candidates for state senator and member of the House of Representatives who pay the qualifying fee to run for office. The bill provides that specified requirements and exemptions for political parties and state executive committees apply to an APC. Finally, the bill removes the 28-day time limitation prior to a general election for contributions from political parties and APCs to candidates.

This bill substantially amends, creates, or repeals the following sections of the Florida Statutes: 103.081, 103.092, 103.121, 106.011, 106.021, 106.025, 106.03, 106.04, 106.0701, 106.0703, 106.0705, 106.071, 106.08, 106.088, 106.141, 106.1439,106.147, 106.165, 106.17, 106.23, 106.265, 106.27, 106.29, 11.045, 112.312,112.3215, and reenacts: 106.011(1)(b),(3),(4),(18),(19), 106.022(1), 106.03(1)(b), 106.04(5), 106.0703, 106.0705(2)(b), 106.071(1), 106.08(7), 106.1437, 106.1439, and 106.17.

II. Present Situation:

Electioneering

The Bipartisan Campaign Reform Act of 2002 ("BCRA") amended the Federal Election Campaign Act by adding a new category of political communications, "electioneering communications," to "express advocacy" communications already governed by the Act. BCRA defines electioneering communications to mean:

- Broadcast, cable, or satellite communications not qualifying as express advocacy;
- That refer to a clearly identified candidate for federal office;
- Are publicly distributed within 60 days before a general election or 30 days before a primary election; and,
- Are "targeted" to the relevant electorate (the communication can be received by 50,000 or more persons).[1]

Individuals and entities that make electioneering communications aggregating more than $10,000 in a calendar year are subject to certain BCRA reporting and disclosure requirements.

After the U.S. Supreme Court upheld the electioneering provisions of BCRA against constitutional attack in 2003,[2] many states, including Florida, viewed the decision as a green light to enter the arena of electioneering regulation. In 2004, Florida adopted its first electioneering law that, while modeled partially on BCRA, was broader.[3] For example, the 2004 Florida law regulated electioneering communications involving *issue* elections; there was no

[1] BCRA, s. 201(a) (2002) (codified at 2 U.S.C. s. 434(f)(3)(A),(C))
[2] McConnell v. Fed. Elec. Comm'n, 124 S.Ct. 619 (2003)
[3] *See generally*, Ch. 2004-252, LAWS OF FLA. (CS/SBs 2346 & 516 (2004))

parallel in BCRA. In 2006, the legislature again amended Florida's electioneering laws to go even further.[4] For example, the 2006 amendments eliminated the timing requirement for when candidate electioneering ads could be regulated; BCRA, in contrast, only regulates ads distributed 60 days before a general election and 30 days before a primary.

On May 22, 2009, the United States District Court for the Northern District of Florida struck down *en mass* Florida's regulatory scheme for electioneering, finding that it violated first amendment constitutional protections for political speech and association.[5] The court in Broward Condominiums held that the only electioneering ads that can be regulated are those that constitute the "***functional equivalent of express advocacy***," meaning that they are:

1. **Susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate; [6] and,**

2. **No broader than the scope of regulation authorized by BCRA, namely a "broadcast, cable, or satellite communication that refers to a clearly identified candidate within sixty days of a general election or thirty days of a primary election."[7]**

The stricken Florida electioneering communications laws regulate each communication that "refers to or depicts a clearly identified candidate for office or contains a clear reference indicating that an issue is to be voted on at an election, without expressly advocating the election or defeat of a candidate or the passage or defeat of an issue."[8] Any group making an electioneering communication is required to register and report expenditures and contributions in the same manner and at the same time as political committees supporting or opposing an issue or a candidate, and must include a sponsorship disclaimer on electioneering ads.

Affiliated Party Committees

Chapter 103, F.S., requires each political party of the state to be represented by a state executive committee. County executive committees and other committees may be established in accordance with the rules of the state executive committee. The selection of membership to executive committees is provided as well as the responsibilities. Certain information relating to officers, membership, bylaws, and rules and regulations must be filed by the state executive committees with the Department of State. County executive committees file officer and membership information with the state executive committee and with the respective supervisor of elections.[9] Responsibility for maintaining records on receipt and disbursement of all party

[4] *See generally*, Ch. 2006-300, LAWS OF FLA. (CS/CS/SBs 716 & 2600 (2006))
[5] The Broward Coalition of Condominiums, Homeowners Associations and Community Organizations, Inc., v. Browning, 2009 WL 1457972 (hereinafter, "Broward Condominiums")
[6] Id. at 5; *but see*, Citizens United v. Fed. Elec. Comm'n, 130 S.Ct. 876, 913-916 (2010) (affirming the facial constitutionality of BCRA's electioneering disclaimer and disclosure requirements and declining to apply the "functional equivalent of express advocacy" standard to BCRA's section 201 disclosure provisions)
[7] Broward Condominiums at 5; *but see*, Citizens United, 130 S.Ct. at 890-91(indicating that the means of distributing an electioneering ad should not be determinative of the scope of permissible regulation)
[8] Section 106.011(1)(a), F.S.
[9] Section 103.091, F.S.

funds is delineated as well as penalties for misappropriation of funds, unlawful expenditure of funds, or false or improper accounting for committee funds.[10]

For partisan candidates qualifying with the Department of State by fee as opposed to petition, the state executive committee receives a rebate of the two-percent party assessments for its candidates for office --- including state Senators and members of the House of Representatives.[11]

No person or group of persons can use the name, abbreviation, or symbol of any political party or name of groups or committees associated with the political party that is filed by the political party with the Department of State.[12]

Contributions by Political Parties to Candidates / Non-allocables

A candidate is limited to accepting an aggregate of $50,000 ($250,000 for a statewide candidate) from a political party, no more than half of which can be accepted before the 28-day period immediately preceding the general election.[13] The following items, known as "non-allocables," are excluded from the aggregate $50,000 contribution limit ($250,000 limit for statewide candidates): polling services, research services, costs for campaign staff, professional consulting services, and telephone calls.

III. Effect of Proposed Changes:

Electioneering

The bill reenacts and revises Florida's electioneering laws to better conform to federal law and to address the constitutional concerns raised in the Broward Condominiums case:

- Redefines "electioneering communication" by:
    - Regulating communications that are publicly distributed by television station, radio station, cable television system, satellite system, newspaper, magazine, direct mail, or telephone --- broader than BCRA (which is limited to broadcast, cable, or satellite broadcasts), but narrower than the stricken Florida law (which includes things like billboards and the Internet).
    - Removing references to issue elections;
    - Only regulating ads that are susceptible of *no reasonable interpretation other than as an appeal to vote for or against a specific candidate*;
    - Deleting an objective targeting requirement that the ads be received by 1,000 or more persons in the geographic area the candidate seeks to

[10] Section 103.121, F.S.
[11] Section 99.103(2), F.S.
[12] Section 103.081, F.S.
[13] Section 106.08(2), F.S.

represent, in favor of simply requiring that the ads be "targeted" to such area;[14]
- Limiting the scope of regulation to ads distributed 60 days before a general election and 30 days before a primary; and,
- Expanding an existing exemption for news stories to include certain news stories distributed through facilities owned or operated by a political party.

- Moves the requirement that an ECO register and report contributions and expenditures like a political committee from a definitional section where it is improperly housed in the statutes to substantive provisions of Chapter 106.
- Creates a $5,000 aggregate, calendar-year threshold requirement for groups receiving contributions or making electioneering expenditures to be required to register as an ECO and report contributions and expenditures.
- Provides for ECO reporting on local timelines and with local officers when they make expenditures in local elections.
- Increases the amount an *individual* can expend before being subject to electioneering disclosure (and independent expenditure) regulation from $100 to $5,000, to conform to the threshold registration and reporting requirements for ECOs.
- Deletes ECO prohibitions stricken by Broward Condominiums that:

  - Prohibit ECOs from using contributions collected in the 5 days immediately preceding the election for that particular election;[15] and,
  - Prohibit ECOs from accepting a contribution from IRS Section 527 or 501(c)(4) organizations unless that organization also registers and reports as an ECO.[16]

- Creates a separate sponsorship disclaimer requirement for electioneering communications by telephone.
- Reenacts various other electioneering sections stricken by the Broward Condominiums court, such as those applying to miscellaneous advertisements in s. 106.1437, F.S.

[14] In the *Order Granting Motion for Preliminary Injunction* issued in Broward Condominiums, the court found Florida's definition of "electioneering communication" vague because it would be impossible for plaintiffs to determine whether certain communications, issued through the Internet or print, will be received by 1,000 or more persons the statute requires. 2008 WL 4791004 at 12 (N.D.Fla. 2008). Instead of removing the objective 1000-person targeting requirement altogether, however, another way to address the court's vagueness concerns might be to retain the numerical requirement but provide that the communication "can be," or "is capable of being," received by 1,000 or more persons. This would mirror the language in BCRA that provides that an electioneering communication is targeted to the relevant electorate if it "can be received" by 50,000 or more persons in the district the federal candidate seeks to represent, and would help overcome a potential constitutional vagueness challenge brought about by the omission of any objective standard. BCRA s. 201(a) (2002) (codified at 2 U.S.C. s. 434(f)(3(C)); *see also*, Citizens United, 130 S.Ct. at 888-889 (interpreting BCRA's 50,000-person targeting requirement as merely requiring that the communication be "technologically capable" of reaching that many people, without regard to how many people were "plausibly likely" to see it).

[15] Section 106.08(4)(b), F.S. (2009)

[16] Section 106.08 (5)(d) (2009)

Affiliated Party Committees

The bill allows the leader of each political party conference of the Florida Senate and House of Representatives to establish a separate APC to support the election of candidates of the leader's political party. "Leader" is defined as the President of the Senate, Speaker of the House of Representatives, and the minority leader of each chamber, until the members of the political party of each house designate a successor to any of the foregoing positions: the successor then becomes the APC leader.

Political party assessments for Senate and House candidates[17] are paid to the respective APC in each chamber, provided that: the APC affirms in writing that it will abide by applicable contribution limits; and, it has not made in the 6 months leading up to candidate qualifying, and will not make for the upcoming election, an independent expenditure supporting or opposing a candidate.

An APC must: adopt bylaws to include, at a minimum, the designation of a treasurer; conduct campaigns for candidates who are members of the leader's political party; and establish an account to raise and expend funds. Such funds may not be expended or committed unless authorized by the leader. Such funds, if expended for jointly endorsing three or more candidates, are not considered contributions or expenditures to, or on behalf, of such candidates.

An APC is entitled to use the name, abbreviation, or symbol of the political party of its leader. It must file campaign finance reports like an executive committee of a political party, and is subject to the same restrictions and penalties for violations.

Additionally, various provisions of Chapter 106 are amended to conform APCs to political party requirements and restrictions in the areas of: definitions; contribution limits and expenditures; disposition of surplus funds by candidates; political advertisement disclaimers; use of closed captioning and descriptive narrative in television broadcasts; telephone solicitations; polls and surveys relating to candidacies; and, penalties that relate to state executive committees and political parties.

Further, definitional exclusions in the legislative and executive branch lobbying laws and in the gifts law are conformed to treat APCs as if they were a political party.

Contributions by Political Parties to Candidates / Non-allocables

The bill provides that an APC is included along with the executive committees of a political party and subordinate committees with respect to the *aggregate* $50,000 contribution ($250,000 for statewide candidates) limit that can be accepted by each candidate from a political party. The bill also removes an antiquated requirement that a candidate receive no more than 50% of his or her allocable political party/APC contributions prior to 28 days before the general election.

[17] The party assessment equals two percent of the annual salary for the office sought, but applies only to candidates qualifying by the fee method and not by the petition method. Sections 99.092(1) and 99.095(1) F.S.

Section-by-Section Analysis

Section 1. Amends s. 103.081, F.S., to allow an affiliated party committee to use the name, abbreviation, or political party symbol of the party to which its leader belongs.

Section 2. Creates s. 103.092, F.S., to define the term "leader," provide for the establishment of affiliated party committees, and delineate duties and responsibilities of an affiliated party committee.

Section 3. Amends s. 103.121, F.S., to require that certain assessments going to the party county or state executive committees be redirected to the appropriate affiliated party committee.

Section 4. Amends s. 106.011, F.S., to revise the definition of "political committee," "independent expenditure," "person," "filing officer," "electioneering communication," and "electioneering communications organization;" and to re-enact "contribution" and "expenditure."

Section 5. Amends s. 106.021, F.S., to provide that so-called "three-pack" expenditures by an affiliated party committee are not considered a contribution or expenditure to or for a candidate.

Section 6. Reenacts s. 106.022(1), F.S., relating to appointment of a registered agent; duties.

Section 7. Amends s. 106.025, F.S., to exempt an affiliated party committee from certain campaign fundraiser limitations and requirements.

Section 8. Amends s. 106.03, F.S., to provide separate, distinct registration requirements for electioneering communications organizations.

Section 9. Amends s. 106.04, F.S., to require a committee of continuous existence to report receipts from and transfers to an affiliated party committee.

Section 10. Amends s. 106.0701, F.S., to exempt certain state officers from having to report contributions and solicitations on behalf of affiliated party committees.

Section 11. Reenacts and amends s. 106.0703, F.S., to consolidate into one section reporting requirements for an electioneering communications organization.

Section 12. Amends s. 106.0705, F.S., to reenact a provision, add a reference to affiliated party committee, add cross-references, and add a reference to "leader and treasurer" in connection with the electronic filing of campaign finance reports.

Section 13. Reenacts and amends s. 106.071(1), F.S., to increase the aggregate amount of expenditures required for individuals filing certain reports related to independent expenditures or electioneering communications.

Section 14. Amends s. 106.08, F.S., to remove certain limitations on contributions received by an electioneering communications organization, provide that an affiliated party committee is treated like a political party regarding limitations on contributions, delete the 28-day restriction

on acceptance of certain funds preceding a general election, place certain restrictions on solicitation for and making of contributions, provide guidelines for acceptance of in-kind contributions, and add an affiliated party committee to entities subject to penalties.

Section 15. Creates s. 106.088, F.S., to require an oath or affirmation by the leader or treasurer of an affiliated party committee as a condition precedent of receiving a rebate of party assessments, and to provide penalties for violation of oath or affirmation.

Section 16. Amends s. 106.141, F.S., to add affiliated party committee to the groups that can receive not more than a specified amount of surplus funds being disposed of by any candidate.

Section 17. Amends s. 106.143, F.S., to require that an affiliated party, like a political party, must have a political advertisement offered by or on behalf of a candidate approved in advance by the candidate and the advertisement must contain certain information.

Section 18. Reenacts s. 106.1437, F.S., relating to miscellaneous advertisements.

Section 19. Reenacts and amends s. 106.1439, F.S., to provide a separate sponsorship disclaimer for electioneering communication telephone calls.

Section 20. Amends s. 106.147, F.S., to delete references to electioneering communication telephone calls and to add affiliated party committee to the list of entities included in the definition of "person."

Section 21. Amends s. 106.165, F.S., to add affiliated party committee to the list of entities that must use closed captioning and descriptive narratives in all television broadcasts.

Section 22. Amends s. 106.17, F.S., to add affiliated party committee to the list of entities that are required to maintain jurisdiction over polls, surveys, and other such public-sentiment gauges relating to candidacies.

Section 23. Amends s. 106.23, F.S., to add affiliated party committee to the list of persons and organizations that may request and be provided with advisory opinions by the Division of Elections.

Section 24. Amends s. 106.265, F.S., to authorize the imposition of civil penalties by the Florida Elections Commission for certain violations by an affiliated party committee.

Section 25. Amends s. 106.27, F.S., to add affiliated party committee to the list of groups subject to certain civil actions by the Florida Elections Commission.

Section 26. Amends s. 106.29, F.S., to require filing of certain reports by an affiliated party committee, provide restrictions on certain expenditures and contributions, and to provide penalties.

Section 27. Amends s. 11.045, F.S., to exclude contributions or expenditures made by or to an affiliated party committee from the definition of "expenditure."

Section 28. Amends s. 112.312, F.S., to exclude from the definition of "gift" contributions or expenditures by an affiliated party committee.

Section 29. Amends s. 112.3215, F.S., to exclude contributions or expenditures made by or to an affiliated party committee from the definition of "expenditure."

Section 30. Provides a July 1, 2010, effective date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Party assessments for state Senate and House candidates not filing by the petition method that currently go to the executive committees of the respective political parties instead would be refunded to the appropriate APC of the candidates' political party in each respective legislative house. The precise fiscal impact is indeterminate and will vary from election-cycle to election-cycle, depending on how many candidates choose to qualify by the petition method versus paying a qualifying fee that includes the two-percent party assessment.

C. Government Sector Impact:

Any state government costs associated with requirements for affiliated party committees are estimated by the Department of State to be minimal. The provisions would entail only coding an entry for receiving such electronic reports and receiving and processing the reports as is currently done for other committees, candidates, and parties. The payment of the assessment to the applicable leader likewise would be minimal as the Department of State currently pays the political parties their assessment.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Veto:

A. Governor's Stated Reason for Veto:

The Governor determined that the affiliated party committees created in the bill were synonymous with leadership funds the Legislature banned over 20 years ago, and rejected, without specific detail, the notion that they would result in more transparency and accountability for the public.

B. Professional Staff Comments:

The Governor appears to be fundamentally opposed to broadening the *direct* fundraising powers of individual legislative leaders, opting instead to maintain the *status quo* whereby leaders solicit *unlimited* contributions for their political parties that are, in turn, used to support candidates. The indirect nature of the current system makes it difficult for the public to trace contributors to specific legislative candidates or campaigns; APCs go a long way toward simplifying the process and promoting the "who-gave-it, who-got-it" policy that underlies Florida's entire campaign finance disclosure system.