

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 659 Sponsorship Identification Disclaimers

SPONSOR(S): Andrade

TIED BILLS: **IDEN./SIM. BILLS:** SB 82

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Public Integrity & Elections Committee	17 Y, 0 N	Pardo	Rubottom
2) State Affairs Committee	22 Y, 0 N	Toliver	Williamson

SUMMARY ANALYSIS

The Florida Election Code regulates political advertising and disclosure requirements in election campaigns. Currently, telephone calls to voters supporting or opposing a candidate, elected public official, or ballot proposal must disclose the persons or organizations sponsoring the call. No similar requirement exists for political advertising conducted by text message.

Political advertisement refers to a paid expression in a communications medium that expressly advocates for or against a position on an issue. An independent expenditure is an expenditure in support of or against a candidate by someone completely independent from the candidate. An electioneering communication is a type of communication that does not expressly advocate for or against a candidate or issue. Such communications refer to a candidate but without expressly advocating for or against the candidate's election or defeat. All of these types of communication require disclosures of the source of the funding.

The bill establishes new disclosure requirements for text messages to potential voters. Political advertisements, independent expenditures, and electioneering communications sent by text message must have a sponsorship disclaimer, URL, or hyperlink to a website containing the disclaimer. The bill exempts text messages sent by individuals not being paid and without the assistance of mass distribution technology and texts that require the recipient to sign up or opt in. The bill requires those individuals and groups subject to texting disclaimer requirements to register and maintain a registered in-state registered agent for legal process as is currently required for those engaging in political advertisement telephone calls. If a person willfully violates the disclosure requirement, he or she commits a misdemeanor of the first degree.

The bill may have a positive indeterminate fiscal impact on county jail beds by creating a new misdemeanor offense for violating the text message disclosure requirements.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

The requirements for sponsorship disclaimers for political text messages differ depending on whether it is: (1) a political advertisement, (2) an independent expenditure, or (3) an electioneering communication.

Political Advertisements

A political advertisement is a paid expression in a communications medium¹ such as radio, television, newspaper, magazine, periodical, campaign literature, direct mail, or display which expressly advocates the election or defeat of a candidate or the approval or rejection of an issue.² Courts have consistently interpreted “express advocacy” to require the use of so-called “magic words,” such as “vote for,” “vote against,” “support,” or “oppose.”³

Candidates and others who send a political advertisement by text message are required to include a sponsorship identification disclaimer,⁴ unless the text or message is sent by short message service (SMS) and:

- Is less than 200 characters in length; or
- Requires the recipient to sign-up or opt-in to receive it.⁵

Independent Expenditures

An independent expenditure (IE) refers to an expenditure by a person with the purpose of expressly advocating the election or defeat of a candidate or the approval or rejection of an issue, which expenditure is not controlled by, coordinated with, or made upon consultation with, any candidate, political committee, or agent of such candidate or committee.⁶ IE’s are essentially a subcategory of political advertisement where the expenditure is not controlled by, coordinated with, or made in consultation with any candidate, political committee, or agent of such candidate or committee.⁷

Any political *advertisement* paid for by an independent expenditure must prominently state the words “Paid political advertisement paid for by (Name and address of person paying for advertisement) independently of any (candidate or committee).”⁸

Electioneering Communications

¹ The term “communications medium” means broadcasting stations, newspapers, magazines, outdoor advertising facilities, printers, direct mail, advertising agencies, the Internet, and telephone companies; but with respect to telephones, an expenditure is deemed to be an expenditure for the use of communications media only if made for the costs of telephones, paid telephonists, or automatic telephone equipment to be used by a candidate or a political committee to communicate with potential voters but excluding the costs of telephones incurred by a volunteer for use of telephones by such volunteer; however, with respect to the Internet, an expenditure is deemed an expenditure for use of communications media only if made for the cost of creating or disseminating a message on a computer information system accessible by more than one person but excluding internal communications of a campaign or of any group. S. 106.011(4), F.S.

² S. 106.011(15), F.S.

³ “Speech containing the “magic words” is “unambiguously campaign related,” *Buckley v. Valeo*, 96 S.Ct. 612, 81 (1976), while speech without these words is not,” *McConnell v. Federal Election Comm’n*, 540 U.S. 93, 281 (2003); see also Department of State, Division of Elections, Advisory Opinion DE 05-06 (2005).

⁴ S. 106.143(1), F.S.

⁵ S. 106.143(10)(f), F.S.

⁶ S. 106.011(12)(a), F.S.

⁷ S. 106.011(12)(a), F.S.

⁸ S. 106.071(2), F.S.

An electioneering communication (EC), in contrast, does not expressly advocate for or against any candidate or issue. An electioneering communication is a communication that is publicly distributed by a television station, radio station, cable television system, satellite system, newspaper, magazine, direct mail, or telephone that:

- Refers to a clearly-identified candidate without expressly advocating the election or defeat of any candidate, but that is susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate;
- Is made within 30 days before a primary or 60 days before a general election; and
- Is targeted to the relevant electorate in the geographic area the candidate would represent if elected.⁹

All EC telephone calls require a sponsorship identification disclaimer that indicates the communication is a paid electioneering communication and includes the name of the person or organization sponsoring the call.¹⁰

Telephone Solicitation

Any telephone call supporting or opposing a candidate, elected public official, or ballot proposal must identify the persons or organizations supporting the call by stating one of the following disclosures:

- “Paid for by... ” (insert name of persons or organizations sponsoring the call); or
- “Paid for on behalf of... ” (insert name of persons or organizations authorizing call).¹¹

The disclosure requirement does not apply to:

- Telephone calls where the individual making the call is not paid and the participants know each other; and
- Any telephone call conducted for the purpose of polling respondents concerning a candidate or elected public official, which is a part of a series of like telephone calls that consist of fewer than 1,000 completed calls and averages more than two minutes in duration.¹²

Any telephone call not conducted by independent expenditure, which expressly advocates for or against a candidate or ballot proposal, must have prior written authorization by the candidate or sponsor of the ballot proposal that the call supports.¹³ A copy of such written authorization must be placed on file with the qualifying officer by the candidate or sponsor of the ballot proposal prior to the time the calls commence.¹⁴

Effect of Proposed Change

The bill requires most political advertisements, independent expenditures, and electioneering communications sent by text message to carry a sponsorship disclaimer, or a URL address or hyperlink to a website containing the disclaimer.

The bill expands the definition of electioneering communication to include text message communication. The bill exempts political advertisement text messages from the requirement that they display the disclaimer listing the source of the advertisement funding.

The bill removes two provisions that allowed political advertisements distributed through text message and electioneering communication conducted through telephone call to be sent without a disclaimer.

⁹ S. 106.011(8)(a), F.S.

¹⁰ S. 106.1439, F.S. EC telephone calls in which the individual making the call is not being paid and the individuals participating in the call know each other prior to the call are exempt from the disclaimer requirement.

¹¹ S. 106.147(1)(a), F.S.

¹² S. 106.147(1), F.S.

¹³ S. 106.147(2), F.S.

¹⁴ *Id.*

The bill revises the telephone solicitation disclosure provisions of the Florida Election Code to include text messages. The bill requires:

- Any text message or telephone call supporting or opposing a candidate, an elected public official, or a ballot measure or any electioneering text message or telephone call to include a disclosure that includes the name of the person or organization sponsoring the communication. A text message or telephone call may not imply that the caller represents a person or organization unless that person or organization has given approval in writing consenting to such representation.
- Text messages to include a working hyperlink or a uniform resource locator (URL) to a website containing the required sponsorship disclosure. The hyperlinked website or URL in the text message must remain online and available to the public for at least 30 days after the date of the election. A person or organization is in compliance if the disclaimer is included in the text message in the form the sender intended, regardless of the form the carrier relays to the recipient, or if the recipient's device is incapable of accessing the hyperlink or URL in the text message. Additionally, if multiple text message are sent on the same day, the disclaimer is required only with the first text message.
- Text messages not conducted by an independent expenditure that expressly advocate for a candidate or ballot measure to include written authorization by the candidate or sponsor of the ballot measure that the text message or telephone call supports. A copy of the written authorization must be placed on file with the qualifying officer by the candidate or sponsor of the ballot measure before text messaging or phone calling begins.
- Any person or organization conducting business in Florida consisting of sending text messages or placing telephone calls to file with the Division of Elections a registered agent. The registered agent must be a resident of the state, a domestic corporation, or a foreign corporation authorized to do business in the state. Conducting business in the state includes sending text messages either from or to locations within the state.

If a person willfully violates the disclosure requirement, he or she commits a misdemeanor of the first degree. The disclosure requirement does not apply to individuals making a telephone call that are part of a series of like telephone calls consisting of less than 1,000 calls averaging two minutes for the purpose of polling respondents. In addition, these provisions do not apply to an individual sending text messages without the assistance of mass distribution technology or that require the individual to opt in to receive communications.

B. SECTION DIRECTORY:

Section 1. amends 106.011, F.S., relating to the definition of electioneering communication.

Section 1. amends 106.071, F.S., relating to political advertising funded by independent expenditure.

Section 3. amends 106.143, F.S., relating to political advertisements prior to elections.

Section 4. amends 106.1439, F.S., relating to electioneering communications.

Section 5. amends 106.147, F.S., relating to telephone solicitation disclosures.

Section 6. amends 106.1475, F.S., relating to penalties for violations of the disclosure requirements.

Sections 7. provides an effective date of October 1, 2021.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill may have a positive indeterminate fiscal impact on county jail beds by creating a new misdemeanor offense for violating the text message disclosure requirements.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may reduce the cost of required disclosures when organizations use text messaging for political advertisements, independent expenditures, or electioneering communications.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not create new rulemaking authority nor modify existing rulemaking authority. Section 106.22(9), F.S., already provides the Division of Elections within the Department of State with rulemaking authority over chapter 106, F.S.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Line 98 introduces the phrase "electioneering text message." The term is not defined. Throughout chapter 106, F.S., wherever the term "electioneering" is used it is always followed by "communications," which is a defined term under s. 106.011(8), F.S.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.