

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

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

BILL: SB 82

INTRODUCER: Senator Baxley

SUBJECT: Sponsorship Identification Disclaimers

DATE: February 15, 2021 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Rey</u>	<u>Roberts</u>	<u>EE</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 82 creates a comprehensive sponsorship disclaimer policy for most text message political advertisements, independent expenditures, and electioneering communications. Text messages must carry a sponsorship disclaimer, or a URL address or hyperlink to a website containing the disclaimer. The bill specifically exempts texts:

- Sent by individuals not being paid and without the assistance of mass distribution technology; or
- That require the recipient to sign-up or opt-in to receive it.

The new texting provisions incorporate some existing telephone-bank solicitation protections, including an in-state registered agent requirement for service of legal process.

The bill takes effect October 1, 2021.

II. Present Situation:

Florida law has a disjointed approach to sponsorship disclaimer requirements for political text messaging, depending on whether the text message meets the definition of a political advertisement (disclaimer required, with exemptions), an independent expenditure (disclaimer required; no applicable exemptions), or an electioneering communication (probably no disclaimer required).

Political Advertisements

A “political advertisement” is a paid expression in “communications media,” such as the *Internet* or a *telephone company*, which “*expressly advocates* the election or defeat of a candidate or the

approval or rejection of an issue.”¹ Courts have consistently interpreted “express advocacy” to require the use of so-called “magic words,” such as “vote for,” “vote against,” “support,” or “oppose.”²

Candidates and others who send a *political advertisement* by text must include a sponsorship identification disclaimer, 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.³

Independent Expenditures

An “independent expenditure” (IE) is a specific *type* or *subset* of political advertisement, one where the expenditure is “not controlled by, coordinated with, or made upon consultation with, any candidate, political committee, or agent of such candidate or committee.”⁴ The independent expenditure must still *expressly advocate* as indicated above.

Section 106.071, Florida Statutes, appears to require individuals and groups to include a sponsorship identification disclaimer on ALL text messages, without exemption.⁵ Subsection (2) of that section provides as follows:

(2) Any *political advertisement* paid for by an independent expenditure shall prominently state “Paid political advertisement paid for by (Name and address of person paying for advertisement) independently of any (candidate or committee).” (emphasis added)

¹ Section 106.011(4),(15), F.S.

² “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 Com’n*, 540 U.S. 93, 281 (2003).

³ Section 106.143(1), (10)(f), F.S.

⁴ Section 106.011(12)(a), F.S.

⁵ Section 106.071(2),(3), F.S. Subsection (3) exempts “novelty items” valued at \$10 or less that support, but do not oppose, a candidate or issue; it is difficult to see how such an exemption could apply to a text message.

An argument can be made that the exemptions that apply to general political advertisements discussed in the previous section should also apply (i.e., less than 200 characters in length or recipient opted-in), because IEs are a subset of political advertisements. But this argument seems likely to fail, as it would contravene a well-established principal of statutory construction: the *specific* controls over the *general*.

In this case, *specific* IE sponsorship disclaimer requirements are embodied in their own section of statute (s. 106.071), separate and apart from the *general* political advertisement disclaimer requirements and exemptions (s. 106.143). Further, the *specific* IE sponsorship disclaimer requirement at issue expressly acknowledges that it’s a *political advertisement* ... “Any *political advertisement* paid for by independent expenditure....” This makes it difficult to argue that the Legislature intended to apply the exemptions of a *more general* political advertisement disclaimer to IE text messages. In further support of this conclusion is the fact that the IE section includes *verbatim* the same \$10 exemption for certain novelty items that the political advertisement section contains. See ss. 106.071(3), *infra*, and 106.143(8). Thus, the Legislature was clearly aware of the relationship between political advertisements and IEs, and chose, for whatever reason, NOT to carry over the texting exemption to the IE section.

Electioneering Communications

An electioneering communication (EC), on the other hand, does NOT expressly advocate for or against any candidate or issue. It is unclear whether the statutes require an EC text message to carry a sponsorship identification disclaimer; arguably, they do not.

An electioneering communication generally means 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.⁶

All ECs require a sponsorship identification disclaimer, except for certain EC telephone calls.⁷

The question of whether text messages that otherwise meet the requirements would trigger the disclaimer requirement turns on the *method of communication*; specifically, whether the term “telephone” in the definition is broad enough to embrace text messaging.

In the case of political advertisements, the Legislature has created a specific exemption from the disclaimer requirements for certain text messages. Those political advertisements must, by definition, be communicated by “*communications media*,” which in the case of text messaging means “*the Internet*” and/or “*telephone companies*.”⁸ Thus, the Legislature, *in the context of political advertisements*, has effectively “updated” those terms to embrace the concept of text messaging and wireless carriers.

Whether that legislative *gloss* also extends to the term “telephone” with respect to the communication of EC text messages is an open question. While it might seem like a logical extension, we are talking about two seemingly related, *but not identical*, types of communications media --- “telephone” in the case of ECs and “telephone company” in the case of political advertisements. This makes the gloss far murkier. Further, and perhaps more persuasively, the EC section (s. 106.1439, F.S.) contains a targeted telephone sponsorship disclaimer requirement (in addition to a more general one) that specifically references “calls” and “*making the call*” ... terms not typically associated with *sending text messages*:

- (2) Any electioneering communication telephone call shall identify the persons or organization sponsoring the call by stating either: “Paid for by (insert name of persons or organizations sponsoring the call).” ... This subsection does not apply to any telephone call 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.⁹

⁶ Section 106.011(8)(a), F.S.

⁷ Section 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; the statute is targeted at phone bank operations.

⁸ Section 106.011(4), F.S.

⁹ Section 106.1439(2), F.S.

Finally, the statutes contain parallel telephone disclaimer language in s. 106.147, F.S., which deals exclusively with political advertisement *telephone calls* and NOT text messaging. Thus, the weight of the evidence suggests that EC text messages currently may not be subject to any sponsorship identification disclaimer requirements.

III. Effect of Proposed Changes:

SB 82 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. For ease of administration and because the communications share certain characteristics, the bill incorporates these texting requirements into the existing framework in ss. 106.147 and 106.1475, F.S., addressing telephone call political advertisements.

Specifically, the bill:

- Modifies and simplifies the disclaimer language in recognition of text messaging's inherent technical limitations.
- Requires political advertisements, independent expenditures, and electioneering communications sent by text message to carry a sponsorship disclaimer identifying who paid for the message, or a URL address or hyperlink to a website containing the disclaimer. If using a URL or website, it must remain online and available to the public for at least 30 days after the date of the election at issue.
- Exempts text messages from disclaimer requirements:
 - If sent by individuals without the assistance of mass distribution technology who are not being paid; or
 - That require the recipient to sign-up or opt-in to receive it.
- Includes a number of "safe harbor" provisions for those sending the text messages, including:
 - If an exchange consists of a sequence of multiple text messages sent on the same day, the sponsorship disclaimer is only required to be included with the first text message.
 - A person or an organization is deemed to be in compliance if the required sponsorship disclaimer is included in the text message in the form in which the person or organization intended it to be sent, regardless of the form the carrier relayed it to the recipient (to account for the fact that longer text messages can sometimes be received with information out-of-order.)
 - If a person or an organization includes a working hyperlink or URL in the text message as part of the required disclaimer, the person or organization is deemed to be in compliance with this subsection even if the recipient's device is incapable of accessing the referenced website.
- Mandates that those sending texts expressly advocating for or against a candidate or ballot measure that are coordinated with a candidate or campaign must get the prior written approval of the candidate or ballot sponsor. Also, the candidate or ballot sponsor must file that approval with the appropriate qualifying officer prior to commencing texting, as is currently required for coordinated telephone calls. These new mandates mirror current requirements for telephone calls.

- Requires those individuals and groups subject to texting disclaimer requirements to register and maintain an in-state registered agent for legal process as is currently required for those engaging in political advertisement telephone calls.
- Condenses and reorganizes all text message and telephone disclaimer requirements into one easily identifiable statutory section, for ease of administration.

The bill also makes a number of technical and clarifying changes to other sections of Chapter 106, to conform.

The bill takes effect October 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may increase the cost for private individuals and groups engaging in certain political text messaging who are required to appoint an in-state, registered agent for service. The costs are indeterminate, but expected to be minimal.

C. Government Sector Impact:

Local prosecutors and/or the Florida Election Commission may incur additional costs relating to enforcement and prosecuting violations. The costs are indeterminate, but should be minimal enough to incorporate into existing budgets.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Some of the specific requirements relating to texting disclaimers have been adapted from CAL. GOV'T CODE, tit. 9, § 84504.7.

Given certain similarities in their operation, the bill incorporates all the texting requirements into the existing framework for telephone banks in ss. 106.147 and 106.1475, F.S.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 106.011, 106.071, 106.143, 106.1439, 106.147, and 106.1475.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.