

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 869 Political Advertisements

SPONSOR(S): Eisnaugle and others

TIED BILLS: IDEN./SIM. BILLS: SB 1672

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Governmental Affairs Policy Committee		McDonald	Williamson
2)	Economic Development & Community Affairs Policy Council			
3)				
4)				
5)				

SUMMARY ANALYSIS

Under Florida law, each political advertisement on behalf of a candidate is required to include a political disclaimer indicating that the advertisement is a political advertisement and stating who paid for the advertisement, along with the party affiliation and office sought by the candidate. Exceptions for disclaimers are provided for advertisements worn by a person, such as a tee shirt or cap, and novelty items having a retail value of \$10 or less which support, but do not oppose, a candidate or issue.

The bill provides a shorter disclaimer for candidate political advertisements that are paid for by the candidate, similar to that which is used by candidates for Federal office.

The bill also provides for additional exceptions to the disclaimer requirements for messages or political advertising via Internet websites, text messages, or other technologies if it is:

- Placed as a paid link on an Internet website, is no more than 200 characters in length, and directs the user to a website that complies with disclaimer requirements.
- Placed as a graphic or picture link on an Internet website that directs the user to another website in compliance with disclaimer requirements; however, the link must contain the required disclaimer which makes up at least 5 percent of the total link and cannot be illegible or concealed.
- Placed at no cost on an Internet website where there is no cost to post content for public users.
- Placed or distributed on an unpaid profile or account available free to the public or on a social networking website, provided the source of the message or advertisement is clear from the content or format of the message or advertisement.
- Distributed as a text message or Short Message Service, provided the message is no more than 200 characters in length or requires the recipient to sign up or opt in to receive the message.
- Connected with or included in any software application or accompanying function, if the user signs up, opts in, downloads, or accesses the application from a website that is in compliance with the disclaimer requirements.
- Sent by a third party user from or through a campaign or committee website that is in compliance with the disclaimer requirements.
- Contained in or distributed through any other technology-related item, service, or device for which compliance with the disclaimer requirement is not reasonably practical.

The bill does not have a fiscal impact on state or local government revenues or expenditures.

The bill takes effect July 1, 2010.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Present Situation**

##### Florida Law - Required Disclaimers

Under Florida law, each political advertisement on behalf of a candidate is required to include a political disclaimer indicating that the advertisement is a political advertisement and stating who paid for the advertisement, along with the party affiliation and office sought by the candidate. Exceptions for disclaimers are provided for advertisements worn by a person, such as a tee shirt or cap, and novelty items having a retail value of \$10 or less which support, but do not oppose, a candidate or issue.<sup>1</sup>

In 2004, changes were made to the definition of "communications media" for campaign finance purposes to include the Internet, thereby clarifying that many political advertisements and electioneering communications on the Internet must carry a sponsorship disclaimer.<sup>2</sup>

Florida law does not distinguish between the Internet, short message systems, or similar systems or any other type of system or format that could be used for political advertisement.

##### Other States - Disclaimers & the Internet

In a recent review of state statutes, rules, ethics and election commission opinions, and legislation, staff of the National Conference of State Legislatures (NCSL) found that<sup>3</sup>:

- Most states basically ignore the existence of Facebook, Twitter, etc., when it comes to political communications. In a nutshell, social media is just beginning to come onto the radar with regards to state campaign finance. The broader category of electronic political communications, which seems more directed at websites and e-mails, is only minimally addressed.
- Fourteen states parallel the federal law, that is, they do not specifically address Internet campaigning, although it may be addressed through administrative rule. In addition, the state law includes general language similar to the federal definition of "communications" that could

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<sup>1</sup> See s. 106.143, F.S.

<sup>2</sup> See s. 106.011(13), F.S., and s. 2, ch. 2004-252, L.O.F.

<sup>3</sup> Information provided by Jennie Drage Bowser, Senior Fellow, Legislative Management Program, NCSL, March 15, 2010.

Information is on file with the House Governmental Affairs Policy Committee.

reasonably be applied to Internet communications which then triggers certain registration, disclosure, and required disclosure/attribution requirements.<sup>4</sup>

- Sixteen states specifically provide for Internet communications in their campaign finance laws. The state law includes reference to electronic media such as Web sites or e-mail in the definition of "political communication," "political advertisement," "campaign material," etc. The inclusion triggers attribution requirements and, in some cases, registration and disclosure requirements that are subject to dollar amount thresholds.<sup>5</sup>
- Three states provide for a specific exemption from registration, disclosure, and attribution requirements for Internet communications.<sup>6</sup>

The Government Accountability Board of the State of Wisconsin is in the process of reviewing and making recommendations regarding its state elections laws as those laws relate to Internet attributions of political communications. The Board is reviewing social networking sites as well as other aspects of the Internet to determine how the laws might be changed.<sup>7</sup>

In addition to Wisconsin and California, NCSL staff reports that Texas also is reviewing its campaign laws relating to Internet regulation.

### Federal Election Commission Rules

In 2006, the Federal Election Commission (FEC) adopted rules establishing that paid advertisements on the Internet were included in the definition of "public communication" and, therefore, subject to regulation including the requirement to include attributions in those communications. This revised definition of "public communication" includes paid political advertisements placed on another's website, but does not encompass any other form of Internet communication.<sup>8</sup>

The FEC rules identify several exceptions to the disclaimer requirement. In situations where a disclaimer notice cannot be conveniently printed, the notice is not required. This affects items such as pens, bumper stickers, campaign pins, campaign buttons, and similar small items. A disclaimer is not required for communications using skywriting, clothing, water towers, or other forms of advertising where it would be impracticable to display the disclaimer notice.<sup>9</sup> Additionally, in its Advisory Opinion 2002-09, the Commission concluded that the wireless telephone screens used for "SMS technology places similar limits on the length of a political advertisement as those that exist with bumper stickers." Short Message Service (SMS) uses were then excluded from the disclaimer requirement.<sup>10</sup>

### **Effect of Proposed Changes**

The bill provides a shorter disclaimer for candidate political advertisements that are paid for by the candidate, similar to that which is used by candidates for Federal office.

The bill also provides for additional exceptions to the disclaimer requirements for messages or political advertising via Internet websites, text messages, or other technologies if it is:

- Placed as a paid link on an Internet website, is no more than 200 characters in length, and directs the user to a website that complies with disclaimer requirements.

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<sup>4</sup> States in this category include Arizona, Idaho, Minnesota, Missouri, Nevada, New Jersey, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, West Virginia, Wisconsin, and Wyoming.

<sup>5</sup> Any electronic media: Alabama, Kansas, Maryland, Nebraska, New Mexico; Internet and e-mail: Connecticut and Ohio; Internet or Internet website: Alaska, Florida, Illinois, Iowa, Maine, Montana, New Hampshire, Texas; Mass e-mails: Vermont.

<sup>6</sup> California, Hawaii, and Washington. The State of California is reviewing its current Internet laws to determine what, if any, revisions need to be made because of new technology. The report will be completed this summer with action being taken on the report during the next legislative session of their Legislature.

<sup>7</sup> Internet Attributions of Political Communications and Use of Computers, State of Wisconsin Government Accountability Board, prepared by Shane W. Falk, Staff Counsel, October 5, 2009.

<sup>8</sup> 11 CFR s. 100.26. The FEC clarified that the placement of an advertisement for a fee on another person's website includes all potential forms of advertising, such as banner advertisements, streaming video, pop-up advertisements, and directed search results.

<sup>9</sup> 11 CFR s. 110.11(f).

<sup>10</sup> Advisory Opinion 2002-09, Federal Election Commission, p. 4.

- Placed as a graphic or picture link on an Internet website that directs the user to another website in compliance with disclaimer requirements; however, the link must contain the required disclaimer which makes up at least 5 percent of the total link and cannot be illegible or concealed.
- Placed at no cost on an Internet website where there is no cost to post content for public users.
- Placed or distributed on an unpaid profile or account available free to the public or on a social networking website, provided the source of the message or advertisement is clear from the content or format of the message or advertisement.
- Distributed as a text message or SMS, provided the message is no more than 200 characters in length or requires the recipient to sign up or opt in to receive the message.
- Connected with or included in any software application or accompanying function, if the user signs up, opts in, downloads, or accesses the application from a website that is in compliance with the disclaimer requirements.
- Sent by a third party user from or through a campaign or committee website that is in compliance with the disclaimer requirements.
- Contained in or distributed through any other technology-related item, service, or device for which compliance with the disclaimer requirement is not reasonably practical.

**B. SECTION DIRECTORY:**

**Section 1** provides a short title.

**Section 2** amends s. 106.143, F.S., providing a shorter disclaimer for candidate political advertisements; providing exceptions for disclaimer requirements on certain messages or political advertisements.

**Section 3** provides an effective date of July 1, 2010.

## **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:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

This bill is exempt from the mandate requirements because it is amending the election laws.

##### 2. Other:

Under section 5 of the Voting Rights Act, new legislation that implements a voting change including but not limited to a change in the manner of voting, change in candidacy requirements and qualifications, change in the composition of the electorate that may vote for a candidate, or change affecting the creation or abolition of an elective office, is subject to preclearance by the U.S. Department of Justice. The preclearance review is to determine if the change has a discriminatory purpose or effect that denies or abridges the right to vote on account of race, color or membership in a language minority group in a covered jurisdiction. Florida has five covered jurisdictions subject to preclearance: Collier, Hardee, Hendry, Hillsborough, and Monroe. If the Attorney General objects to the voting change, the legislation is unenforceable.

#### B. RULE-MAKING AUTHORITY:

None.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

The Department of State noted that the new paragraph (d) in s. 106.143(1), F.S., creates two internal inconsistencies with other subsections of s. 106.143, F.S.:

- The language conflicts with subsection (2) which requires that the political party designation always be included in a partisan political advertisement.
- The new language would apparently have no effect on subsection (4) of s. 106.143, F.S. The second sentence of that subsection states "Such political advertisement must expressly state that the content of the advertisement was approved by the candidate and must state who paid for the advertisement." Therefore, for example, a political advertisement on behalf of a candidate by his or her supporters or party would always have to state the candidate approved the advertisement and that the supporters or party paid for it.<sup>11</sup>

### IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

Not applicable.

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<sup>11</sup> Analysis of HB 869, Department of State, p. 2. (on file with the Governmental Affairs Policy Committee)