

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 497 Paid Petition Circulators

SPONSOR(S): Dorworth and others

TIED BILLS: IDEN./SIM. BILLS:

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Governmental Affairs Policy Committee	9 Y, 3 N	McDonald	Williamson
2)	Civil Justice & Courts Policy Committee			
3)	Economic Development & Community Affairs Policy Council			
4)	Policy Council			
5)				

SUMMARY ANALYSIS

HB 497 addresses the process by which citizens may propose amendments to the state constitution, particularly the procedures involving signature-gathering by paid petition circulators. The bill requires paid petition circulators to satisfy certain requirements and to register with the Department of State (Department). The bill requires the Department to create a training program for prospective applicants for registration. The training program must provide applicants with an overview and explanation of state and federal laws pertaining to initiative petition gathering as well as applicable rules, regulations, and court rulings. The bill defines the term "initiative sponsor" and provides that the sponsor will be liable for civil penalties under s. 106.265, F.S., if the applicant for registration violates the provisions of the bill, or any rules adopted under the provisions of the bill.

The Department is required to adopt rules to include a registration fee necessary to cover its costs of registration, training, and regulation under the bill.

The bill has an indeterminate fiscal impact. See "Fiscal Comments."

The bill takes effect July 1, 2009.

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

Ballot Initiative Process¹

The Florida Constitution has more methods of amendment than any other state constitution.² Article XI of the Florida Constitution allows voters to approve state constitutional amendments proposed via the following methods:³

- Proposed by joint resolution passed by a three-fifths vote of each house of the legislature;
- Proposal by the Constitution Revision Commission;
- Proposal by the Taxation and Budget Reform Commission; or
- Proposal by the citizen initiative petition.

Florida adopted the citizen initiative process in 1968.⁴ Originally created to enable citizens to amend their constitution,⁵ the process has evolved into an expensive undertaking dominated by special interest groups that pay professional signature gatherers to collect petition signatures.⁶ Current Florida law does not address compensation for signature gatherers.

Procedure for Placing Initiative on Ballot

The procedure for placing an initiative on the ballot is provided in s. 100.371, F.S. To obtain ballot position:

- The sponsor of an amendment must register as a political committee pursuant to s. 106.03, F.S., and submit the text of the amendment with the form on which the signatures will be obtained;

¹ Information obtained from HB 7009 analysis by the House Policy and Budget Council, April 24, 2007.

² Representative Talbot "Sandy" D'Alemberte, *The Florida State Constitution - A Reference Guide*; cited in P.K. Jameson & Marsha Hosack, *Citizen Initiative in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues, and Statutory Initiative Alternatives*, 23 FLA. St. U. L. Rev. 417(1995)(hereinafter "Jameson & Hosack.")

³ Art. XI, s. 1, Fla. Const. (Legislature); Art. XI, s. 2, Fla. Const. (Revision Commission); Art. XI, s. 3, Fla. Const. (citizen initiative); Art. XI, s. 4, Fla. Const. (constitutional convention); Art. XI, s. 6, Fla. Const. (Taxation and Budget Reform Commission).

⁴ Art. XI, s. 3, Fla. Const.

⁵ The citizen initiative process often is referred to as 'direct democracy,' as opposed to the more traditional representative democracy. "Initiatives generally allow the public to bypass the Legislature and reserve direct lawmaking power in the voters of the state." Jameson & Hosack.

⁶ "Professional signature gatherers, carrying most or all of the nine [forms from rival signature-gathering firms], first ask people to sign the one paying the most." David S. Broder, "Collecting Signatures for a Price," *Washington Post*, April 12, 1998.

- The Secretary of State must approve the submitted form before signatures are obtained;
- After signatures are obtained, the Secretary of State must determine the total number of valid signatures and the distribution from congressional districts;
- The certification of ballot position must be completed by February 1 of the year the general election is held; and
- The Supreme Court must approve the validity of the proposal.

Signature Verification

The responsibility for signature verification belongs to supervisors of elections, pursuant to s. 99.097, F.S. This statute covers signatures gathered on behalf of a candidate seeking placement on a ballot and signatures gathered in support of ballot initiatives. For ballot initiatives, Art. XI, s. 3 of the Florida Constitution, requires "a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight percent of the votes cast in each of such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen."

Requirements for Initiative Petition Circulators In Other States - NCSL Review

According to the National Conference of State Legislatures, of the 24 initiatives and referendum states surveyed regarding residency and age requirements Florida, Massachusetts, Oregon, and Washington do not have any requirements. Oregon, however, has now modified its requirements that were declared unconstitutional and has passed legislation with modifications included.⁷ Of the 24 states, Florida, Massachusetts, and Montana are the only states that do not have state laws specifically regarding prohibitions against unethical behavior by petition circulators.⁸ Additionally, Montana, Nebraska, North Dakota, Oregon, South Dakota, and Wyoming have laws which ban initiative sponsors from paying petition circulators per signature. These laws have been challenged in the courts with mixed results. The provisions of the laws in North Dakota and Oregon have been upheld by the U.S. 9th and 8th Circuit Courts, respectively. Similar provisions in the laws of Idaho, Maine, Mississippi, Ohio, and Washington were held unconstitutional by federal district courts. The U.S. 6th Circuit Court of Appeals upheld the Ohio ruling in March 2008.⁹

Background

Some of the changes proposed in HB 497 reflect suggestions by the Ballot Initiative Strategy Center (BISC), a non-profit organization based in Washington, D.C. According to the BISC web site "the organization is the nerve center for progressive ballot initiative campaigns across the country." Two notable BISC recommendations are¹⁰:

- **Circulators should be required to register with the Secretary of State, and the list of registrants should be accessible as public information.**
Because of the nature of the paid signature gathering industry, the field likely will always be fraught with mercenary or traveling petitioners. By requiring all signature gatherers to register with the Secretary of State, initiative watch dogs will be able to do multi-state research on petitioners. BISC recommends that, in addition to the information required in this bill, the Department should require disclosure of any arrests or convictions for sexual assaults or identity theft. These crimes are particularly sensitive to an unsuspecting public. It would be a service to voters to know that they are not providing their personal information to dangerous criminals or identity thieves.
- **Prevent people who have been convicted of certain crimes from circulating- convictions such as identity theft, sex offenses, other fraud.**

⁷ "Residency and Age Requirements Chart", Requirements for Initiative Petition Circulators, National Conference of State Legislatures, Updated May 28, 2008.

⁸ "Prohibitions against Unethical Behavior by Petition Circulators Chart", National Conference of State Legislatures, June 2007.

⁹ Banning Payment-per-Signature for Initiative Petition Circulators, National Conference of State Legislatures, Updated May 28, 2008.

¹⁰ Abusing Direct Democracy. Bad Actors in the Signature Gathering Process. Ballot Initiative Strategy Center, November 2007, pp. 10-11.

Even California prohibits felons who are currently on parole from circulating. In Florida, all felons, including those guilty of sex offenses, identity theft, and fraud convictions are permitted to collect. At the least, those offenses certainly are germane to whether a person should be permitted to gather voters' personal information. It is only possible to prevent these people from circulating if there is some form of registration in the state, so that officials are aware of who is petitioning. BISC recommends that states should establish a system of registering each petitioner with the Secretary of State, and collecting the information necessary to run criminal background checks.

Some of the changes proposed in HB 497 are similar to provisions contained in HB 2082 that passed the Oregon Legislature in 2007 with provisions taking effect in January 1, 2008. These provisions relate to required registration and training by the Secretary of State's office and the types of crimes that prevent a person from being a paid petition circulator.¹¹

Proposed Changes

Definitions

HB 497 creates s. 100.372, F.S., to provide for the following definitions:

- "Initiative sponsor" means either the political committee registered pursuant to s. 106.03, F.S., that has submitted the text of a proposed amendment to the Secretary of State or any person as defined in s. 106.011, F.S., who has contributed in excess of \$10,000 to the registered political committee.¹²
- "Petition circulator" means any person who, in the context of a direct face-to-face interaction, presents to another person for his or her possible signature an initiative petition form.
- "Paid petition circulator" means a petition circulator who receives any compensation or other valuable consideration as a direct or indirect consequence of the activities described in the paragraph above, other than for the reimbursement of legitimate out-of-pocket expenses incurred by the petition circulator in the ordinary course of these activities, as specified by Department rule.
- "Registrant" means a person who is registered with the Department as a paid petition circulator.

Prohibited Acts

HB 497 prohibits:

- A paid petition circulator from collecting petitions in Florida without first registering with the Department.
- Anyone from paying or providing other valuable consideration to a petition circulator who is not registered with the Department.
- A paid petition circulator from continuing to perform any duties permitted under the bill if any of the requirements for registration can no longer be satisfied.
- Registrants from circulating petition forms until the forms have been registered with the Department.

The bill states an initiative sponsor is responsible for the actions of the paid petition circulator and will be liable for civil penalties under s. 106.265, F.S., if the paid petition circulator violates any provisions of s. 100.372, F.S., or any rules adopted to implement the section.¹³

The bill's provisions presumably would be enforced by county supervisors of elections (supervisors) who would have to determine if a petition circulator had registered with the Department and satisfied all the requirements. It appears that some type of database would have to be developed by the

¹¹ "Changes to Oregon Initiative, Referendum and Recall Laws", Office of the Secretary of State, State of Oregon, August 2, 2007.

¹² "Person" in s. 106.011, F.S., means "an individual or a corporation, association, firm, partnership, joint venture, joint stock company, club, organization, estate, trust, business trust, syndicate, or other combination of individuals having collective capacity. The term includes a political party, political committee, or committee of continuous existence."

¹³ The penalties under s. 106.265, F.S., refer to violations of chapters 106 or 104, F.S. The section provides for a fine of up to \$1,000 per count.

Department to register and track paid petition circulators. This information would then have to be made available to supervisors.

Registration Requirements for Paid Petition Circulators

A person cannot engage in the activities as a paid petition circulator nor be registered with the Department as a paid petition circulator unless the person:

- Has registered with the Department as prescribed in law and rule, including completion of training;
- Is a legal resident of this state for purposes of s. 97.041(1)(a)3., F.S.;
- Certifies under penalty of perjury that he or she has not been convicted of a criminal offense in Florida or any other state or under federal law involving fraud, deceit, forgery, perjury, or identity theft within 5 years preceding the date of application; and
- Does not receive compensation based upon the number of initiative petition signatures obtained.

The bill provides that if a person no longer satisfies one or more of the above requirements, the registration is immediately rendered invalid by operation of law, the person is required to immediately notify the Department, and the person is required to immediately cease all petition gathering activities.

The bill does not specifically address how the Department might verify a person's registration information or whether it is required to do so. The Department could simply treat verification as a ministerial duty and accept each person's registration information as being true and accurate. Alternatively, the Department might conduct a background check of each applicant. It is expected that the registration requirements will be "self-policing" in that firms employing paid petition circulators and opponents of initiatives will be checking for compliance with the bill's requirements; especially, since the sponsor is liable for imposition of civil penalties for actions or inactions of the paid petition gatherer.

The bill imposes a number of registration requirements on paid petition circulators. An applicant is required to provide the following information to the Department:

- His or her full name and any assumed name;
- The residential street address of the applicant;
- An example of the applicant's signature;
- Identification of the initiative petitions that the applicant will be circulating;
- Three 2-inch by 2-inch passport-style photographs of the applicant;
- The name, street address, and telephone number of the person or entity from which the person will receive compensation as a direct or indirect consequence of his or her activities;
- A signed statement acknowledging having read and understanding certain state and federal laws;
- Evidence that the applicant has completed the required training;
- Any other information required by Department rule; and
- A statement signed by an authorized representative of an initiative sponsor for each petition for which the applicant will gather signatures that the sponsor will be liable for civil penalties for any applicant violations.

As a condition of registration, the registrant must notify the Department of any change in the information submitted within one business day after the change.

Petition Form

The bill requires that the petition form circulated by the registrant:

- Be registered with the Department.
- Include the paid petition circulator's registration number.

Verification Requirements

The bill provides that petitions may not be verified by the supervisor, and may not be counted toward the number of valid signatures required for ballot placement if such signature was not gathered in full compliance with the new s. 100.372, F.S.

Any signature gathered on a previously approved initiative petition form that is submitted for verification before October 1, 2009, may be verified and counted if otherwise valid. However, any initiative petition form submitted for verification on or after that date may be verified and counted only if it complies with new s. 100.372, F.S.

B. SECTION DIRECTORY:

Section 1. Creates s. 100.372, F.S., requiring training, registration and regulation of paid petition circulators; providing for civil liability of initiative sponsors under specified circumstances.

Section 2. Provides that any signature gathered on a previously approved initiative petition form that is submitted for verification before October 1, 2009, may be verified and counted if otherwise valid; requires that any initiative petition form submitted for verification on or after that date must comply with new requirements specified in this bill in order to be verified and counted.

Section 3. Provides for severability.

Section 4. Provides an effective date of July 1, 2009.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill provides for the creation of a fee by administrative rule to be charged to those registering as paid petition circulators to offset the cost of training, registration, and regulation. Fees collected must be deposited in the Grants and Donations Trust Fund of the Department of State.

2. Expenditures:

See "Fiscal Comments."

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See "Fiscal Comments."

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate. The bill requires the paid petition circulator to provide the Department of State with two passport style photos in order to register. The bill also requires the Department to adopt in its rules a registration fee to cover the costs of training, registration, and regulation related to paid petition circulators. At this time, neither the anticipated total cost of the requirements of the Department is known or the number of applicants who would be subject to the requirements.

D. FISCAL COMMENTS:

The Department of State states the costs related to the bill are indeterminate at this time. The Department, however, will incur costs related to providing a training program, for the registration of

individuals as paid petition circulators, and for regulation of the activities related to paid petition circulators. According to the Department, there is a possible need for an FTE to develop and administer the registration program.¹⁴

According to the Department of State's analysis of HB 497, the Department will incur significant litigation costs in defending likely constitutional challenges to the bill if it becomes law.¹⁵

Supervisors of election would be required to use staff time to verify that paid petition circulators meet the requirements of the law before verifying each petition. It is not know how much time would be involved or cost to the supervisors of election.¹⁶

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require a county or municipality to spend funds or take an action requiring expenditures; reduce the authority that counties and municipalities had as of February 1, 1989, to raise revenues in the aggregate; or reduce the percentage of a state tax shared in the aggregate with counties and municipalities as of February 1, 1989.

2. Other:

If the intent of the provision of the bill requiring that the paid petition circulator "be a legal resident of this state for purposes of s. 97.041(1)(a)3." is to require the registrant to be a registered voter in Florida, then the requirement is likely unconstitutional based upon the U.S. Supreme Court's decision in *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 119 S.Ct. 636. The Supreme Court ruled that requiring the initiative petition circulators to be registered voters imposed burden on political expression that the State of Colorado failed to justify and therefore the statute violated the First Amendment free speech guarantee.

The requirement for the paid petition circulator to carry evidence of registration on his or her person may be challenged as unconstitutional under *Buckley* as well. The Court found that requiring initiative petition circulators to wear badges inhibits communication with voters about proposed political change, and is not warranted by the state interests and violated the First Amendment free speech guarantee. The question is whether just carrying the badge on your person would be challenged since the paid petition circulator does carry other documents with the petitioner's registration number.

The ban on petition circulators being paid based upon the number of petition signatures obtained also raises constitutional questions. This was discussed earlier in the body of the analysis. There have been two federal circuits that have upheld similar provisions. There have been federal district courts in four states that have held such provisions to be unconstitutional.

Currently, in Florida, the First District Court of Appeal decision in *Florida Home Democracy, Inc. PAC and Lesley G. Blackner v. Kurt S. Browning*, 980 So2nd 547, is before the Florida Supreme Court. The First District Court of Appeal opinion stated:

...the legislation and implementing rules here are unconstitutional because they do not ensure ballot integrity. They do not serve to confirm compliance with constitutionally-specified requirements for submission of proposed amendment through the initiative process, as did the legislation and rules involved in Firestone.

¹⁴ Department of State analysis of HB 497, dated February 16, 2009, p. 2.

¹⁵ *Ibid.*, p. 3.

¹⁶ Analysis of HB 903, prepared by the Ethics and Elections Committee, March 20, 2008.

The First District Court of Appeal stated:

When advocates for the legislation involved in Smith made similar arguments, the Florida Supreme Court responded by observing that modification of the initiative process through measures which are not necessary to ballot integrity must be accomplished through amendment of article XI of the constitution. The modification that would have been afforded by the legislation held unconstitutional in Smith later became a part of the state constitution through the constitutional amendment process. See Art. XI, sec 5(c), Fla. Const. The constitutional amendment process is likewise the proper method for any imposition of the modifications proposed by the legislation and rules involved in this case.

Depending upon how the Supreme Court rules, the implications on current and future legislation pertaining to initiative petitions will be impacted.

B. RULE-MAKING AUTHORITY:

The bill requires the Department of State to adopt rules to administer the newly created s. 100.372, F.S., including adoption of a fee to cover the Department's costs of registration, training, and regulation.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The civil penalty provision, s. 106.265, F.S, referenced in the bill, is limited to violations of Chapters 106 and 104, F.S. Since the language for the violation in HB 497 is contained in the newly created s. 100.372, F.S., there is a question as to whether the new section needs to be referenced in s. 106.265, F.S.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

None.