DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–2225/1dn
JTK:cmh:jf

March 15, 1999

1. Because under this draft the disbursement limitations, grant amounts, qualifying amounts for public grants, aggregate committee contribution limitations and 24–hour reporting thresholds all interrelate and they are all expressed in dollar amounts, this draft subjects all these dollar amounts to a cost of living escalator. See proposed ss. 11.12 (7) (c), 11.26 (9a), 11.31 (9) and 11.50 (9a). Please let me know if this is not in accord with your intent.

2. This draft exempts from the proposed tax on lobbying expenditures local governments and religious, charitable and educational organizations that are exempt from the federal income tax. These organizations must limit their lobbying activity in order to maintain their tax exempt status. Please let us know if you would like to see this tax applied differently.

3. You requested that the elections board be permitted to delegate to its executive director the power to sue for injunctive relief to enforce the campaign finance law. In reviewing the current law, I found that this is currently authorized under s. 5.05 (1) (d) and (e), stats. This draft, therefore, does not treat this matter.

4. In accordance with current law, the limitation contained in the instructions upon aggregate individual and conduit contributions by candidates who accept grants does not appear in this draft because the amount of this limitation is the residual amount that results from application of disbursement limitations and other contribution limitations and receipt of public funding.

5. Currently, ch. 11., stats., generally requires disclosure of financial activity by individuals and committees seeking to influence the election or defeat of candidates for state or local office [see ss. 11.01 (6), (7), (11) and (16), 11.05 and 11.06, stats.], unless a disbursement is made or obligation incurred by an individual other than a candidate or by a committee which is not organized primarily for political purposes, the disbursement is not a contribution as defined in the law and the disbursement is not made to expressly advocate the election or defeat of a clearly identified candidate [see s. 11.06 (2), stats.]. This language pretty closely tracks the holding of the U.S. Supreme Court in *Buckley v. Valeo, et al.*, 96 S. Ct. 612, 656–664 (1976), which prescribes the boundaries of disclosure that may be constitutionally enforced (except as those requirements affect certain minor parties and independent candidates). Proposed s. 11.01 (16) (a) 3., which requires registration and reporting by individuals who or committees, that make certain communications within 60 days of an election

containing the reference to a candidate at that election, an office to be filled at that election or political party, appears to extend beyond the boundaries which the court permitted in 1976. As a result, its enforceability at the current time appears to rest upon a shift by the court in its stance on this issue.

6. Proposed s. 11.50 (9) (b) and (ba), which increase the public grants payable to certain candidates when independent disbursements are made against them or their opponents, or when their opponents raise more than a specified level of contributions from certain sources, and proposed s. 11.31 (3p), which increases disbursement limitations by an amount equal to any grant received under proposed s. 11.50 (9) (b) or (ba), may result in an abridgement of the First Amendment rights of the persons making the disbursements or contributions. See *Day v. Holahan*, 34 F.3d 1356 (8th Cir., 1994), in which a Minnesota law that included provisions similar to proposed s. 11.31 (3p) was voided. While this case expressly involved only independent expenditures, since this case and other federal cases hold that the making of a contribution is a protected First Amendment right, the same issue could be raised in the context of contributions. It should be noted that there are there are viable arguments to be made on both sides of this issue, this case is not binding in Wisconsin because it did not arise in the circuit that includes Wisconsin and the U.S. Supreme Court has not yet spoken on this issue.

7. Proposed s. 11.61, which permits a court to nullify an election if certain violations of the campaign finance law are sufficient to have affected the election result, raises legal issues that make it difficult to predict how it will be applied. In *State ex rel. La Follette v. Kohler*, 200 Wis. 518 (1930), the Wisconsin Supreme Court held that the legislature has the power to void the election of a candidate who procured his nomination by illegal means. However, this case did not apply to a legislative candidate. In the case of a legislative candidate, the result might be affected by article IV, section 7, of the Wisconsin Constitution, which makes each house the judge of the elections, returns and qualifications of its members. Additionally, under this draft, violations that result in nullification of a candidate's election may be committed by persons other than the candidate. Also, if a candidate takes office and must be removed, it is generally held that where a constitution prescribes methodology for removal of officeholders (as does the Wisconsin Constitution), that methodology is exclusive. See 67 C.J.S. Officers s. 120, p. 486.

8. The tax on lobbying expenditures under proposed subch. XIII of ch. 77 is innovative and has not, to my knowledge, been ruled upon by the courts. Because this tax may be viewed as burdening speech, it may be subject to attack. In *Georgia State AFL–CIO v. Georgia Ethics Commission*, C. A. No. 1:94–cv–103–MHS (U.S.D.C., N.D. Ga., 1995), the court invalidated lobbying registration fees that it viewed as excessive under the First and Fourteenth Amendments to the U.S. Constitution. However, this case was never published and was not appealed. Presumably the answer to this type of attack is that this tax is on business activity rather than speech, like reasonable contribution limitations that have been approved, any burden imposed by the tax on the right to lobby is minimal and the alternative of unpaid citizen lobbying activity is not taxed and remains open.

9. I also want to note briefly that a few of the provisions of this draft are innovative, and we do not yet have, to my knowledge, specific guidance from the federal courts concerning the enforceability of provisions of these types. It is well possible that a court may find a rational basis for these provisions that would permit them to be upheld. However, because of the concerns expressed by the U.S. Supreme Court in *Buckley v. Valeo, et al.*, 96 S. Ct. 612 (1976), and certain other cases that attempts to regulate campaign financing activities may, in some instances, impermissibly intrude upon freedom of speech or association, or equal protection guarantees, it is possible that enforceability problems with these provisions may occur. In particular, those provisions concerning which we do not have specific guidance at this time are:

(a) Proposed s. 11.12 (6) (b) and (c), which impose a waiting period of up to 21 days before certain contributions may be transferred or accepted or before certain disbursements may be made or obligations to make disbursements may be incurred.

(b) Proposed s. 11.12 (7), which imposes additional reporting requirements upon candidates who decline to accept disbursement and contribution limitations and restrictions.

(c) Proposed s. 11.24 (1t), which prohibits certain candidates and their personal campaign committees from accepting contributions within 10 days of an election in which the candidates participate.

Jeffery T. Kuesel
Managing Attorney
Phone: (608) 266–6778