Drafter's Note
from the
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1. Under this bill, candidates for the office of governor and lieutenant governor are potentially bound by the same disbursement limitation, which applies to the primary and election campaigns combined. Under current law, these candidates may run separately in the primary election and a candidate for one office but not the other office, or the candidates of one party but not the other party, may be opposed in the primary election. You may wish to consider separate treatment of disbursement limitations for those offices in the primary election. See, for example, proposed SECTIONS 64 and 65 of SB–113.

2. Concerning proposed s. 11.05 (14), relating to bogus "issue" advertising, 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). This proposal 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. In this connection, see also *North Carolina Right to Life Inc. v. Bartlett*, 67 U.S.L.W. 4148 (U.S.C.A., 4th Cir., 1999), in which the court voided North Carolina's attempt to regulate issue advocacy as inconsistent with *Buckley.* I know that the McCain–Feingold language has been looked at by respected constitutional scholars who convincingly argue that it passes constitutional muster; however, current state law is specifically molded to fit within the confines of the *Buckley* decision, whereas this language casts aside that decision and takes the stance that another mold should be acceptable. There is also another issue with this language in that under the Fifth, Sixth and Fourteenth amendments, the state has the burden of proof in prosecutions. To the extent that this provision operates to shift that burden to the defendant under certain circumstances, it may be difficult to enforce.

3. 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.

4. 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.

5. 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) (c), which imposes a waiting period of up to 21 days before certain disbursements may be made or obligations to make disbursements may be incurred.

(b) Proposed s. 11.12 (7) and (8), which impose additional reporting requirements upon candidates who decline to accept public grants.

(c) Proposed s. 11.24 (1s), which prohibits certain candidates and their personal campaign committees from accepting contributions from special interest ("political action") committees within 30 days of an election in which the candidates participate.

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

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