DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–4780/1dn
JTK/RJM:kg:pg

January 28, 2002

1. Concerning proposed s. 11.19 (6), you may wish to exempt candidates for partisan office at a special election that is called concurrently with the spring election from the prohibition on retention of certain campaign moneys after December 31 of even–numbered years.

2. In adjusting the percentage qualifier for grant applicants, we noted that a sentence in s. 11.50 (2) (b) 5., stats., was inadvertently stricken in a previous draft and carried into this draft. This sentence relates to the first $100 of a contribution of more than $100 being counted towards the qualifier. Because this appeared to us to be a mistake, this draft restores that sentence.

3. 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 ss. 11.01 (4m) and (11m) and 11.065, which require registration and reporting by individuals who or committees that make certain mass communications within specified periods preceding an election containing a reference to a candidate at that election, an office to be filled at that election, or a political party, appear to extend beyond the boundaries which the court permitted in 1976. As a result, the enforceability of these provisions 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*, 168 F. 3d 705 (4th Cir. 1999), cert. denied, 120 S. Ct. 1156 (2000), in which the court voided North Carolina's attempt to regulate issue advocacy as inconsistent with *Buckley*.

We want to note briefly that a few of the provisions of this draft are innovative, and we do not yet have, to our knowledge, specific guidance from the U.S. Supreme Court 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 upon 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 (8), which requires candidates who do not accept public grants to file special reports that are not required of candidates who accept public grants.

(b) Proposed s. 11.50 (9) (b), (ba), and (bb) which provides public grants to qualifying candidates to match certain independent disbursements and other expenditures and disbursements exceeding the disbursement limitations by candidates who do not accept public grants. Although relevant case law has developed regarding this issue in the federal courts of appeal, there is no consensus among these courts on this issue. Due to the unsettled nature of the law in this area, it is not possible to predict how a court would rule if proposed s. 11.50 (9) (b), (ba), or (bb) were challenged.

(c) Proposed s. 11.26 (8m), which prohibits committees from making contributions to certain other committees. Although the U.S. Supreme Court has not ruled on the enforceability of a provision of this type, the court has indicated some willingness to permit limits on contributions beyond those specifically approved in *Buckley v. Valeo*. See *California Med. Assn. v. FEC*, 453 U.S. 182, 193–99 (1981) ($5,000 limitation on individual–to–PAC contributions is a reasonable method of preventing individuals from evading limits on direct campaign contributions).

If you need further information or would like to make any changes based on the above information, please let us know.

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