DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–4193/1dn
RJM&JTK:jld:jf

December 19, 2001

Representative Pocan:

The North Carolina law upon which this draft was based has numerous drafting errors and inconsistencies. In many cases, we have fixed these errors and inconsistencies in producing this draft. The corrections often required us to exercise judgement as to what you probably intend. Please read this draft carefully to ensure that its requirements satisfy your intent. In particular, please note the following:

1. The North Carolina law requires any televised disclosures to be 32 scan lines in size. Federal law requires televised sponsor disclosures to be at least 4% of the vertical picture height. See 47 CFR 73.1212. Currently, analog television broadcasts use 525 scan lines, while HDTV broadcasts use between 720 and 1,080 scan lines. Although a 32–scan–line image constitutes at least 4% of the vertical picture height of an analog television broadcast, it does not constitute at least 4% of the vertical picture height of an HDTV broadcast. This draft uses the federal standard of 4% rather than the North Carolina standard of 32 scan lines, so that the draft remains consistent with the federal law as HDTV broadcasts become more prevalent. See proposed s. 11.30 (2m) (b) 2.

Also, the televised sponsor disclosure required under federal law must last at least 4 seconds. Do you want to include a similar requirement in this draft?

2. The North Carolina law requires certain radio disclosures to last at least 3 seconds. It was unclear, though, if this requirement means each required statement must last at least 3 seconds or if all required statements combined must last at least 3 seconds. This draft requires all statements combined to last at least 3 seconds. See proposed s. 11.30 (2m) (b) 3. Please let us know if you intend a different result.

3. We clarified that, if a candidate is required to make a disclosure on a television or radio advertisement, then the disclosure required of individuals generally does not apply. See proposed s. 11.30 (2m) (d) 4. and (e) 4. Please let us know if you do not intend to include this clarification.

4. As currently drafted, the name that a political party must use to satisfy the television or radio disclosure requirements must "include" the name of the political party as it will appear on the ballot. See proposed s. 11.30 (2m) (d) 2. and (e) 2. You may want to require, instead, that the name *be the same as* that which will appear on the ballot.

5. The North Carolina law requires a candidate for local office who brings an action for damages for violation of the television or radio disclosure requirements to file a notice of complaint with the local board of elections. Unlike North Carolina, Wisconsin generally does not have local boards of election. Thus, this draft requires these candidates to file the notice with the county clerk or board of election commissioners and to publish a notice of complaint in a newspaper of general circulation within the candidate's jurisdiction or district. See proposed s. 11.59 (1). Please let us know if these requirements are inconsistent with your intent.

6. Under the North Carolina law, a plaintiff in an action for damages must send a copy of a particular notice to a specified governmental official "within 5 days after the notice is returned to the possession of the plaintiff." It is unclear what this provision means. This bill instead requires the copy to be sent within 5 days after *the return receipt* is provided to the plaintiff. See proposed s. 11.59 (2). Please review this provision and let us know if you desire any changes.

7. The definition of "print media" under this draft includes "billboards" and "outdoor advertising facilities." See proposed s. 11.01 (17). It is unclear what outdoor advertising facilities are, although they may be the same as billboards. We have removed "outdoor advertising facilities" from the definition. Also, the definition of "print media" does not specifically include sample ballots, however, even though sample ballots in some cases are regulated as campaign advertisements under current law. Please let us know if you would like to make any change to the definition of "print media."

8. The North Carolina law provides that, with the exception of misrepresentation, certain information required to be disclosed in television or radio advertisements cannot be used as the basis for a criminal prosecution. This language is likely designed to eliminate the chilling effect that potential criminal penalties may have on campaign–related speech. However, this language is extremely broad and could potentially affect even a prosecution for disorderly conduct. This draft, instead, exempts these disclosure requirements from the criminal penalties provided under s. 11.61 (1) (c), stats. Please let us know if you prefer the North Carolina language instead.

9. North Carolina's s. 163.278.39 creates a Class I misdemeanor for misrepresentation of information disclosed in certain communications. We did not incorporate this provision because: a) it does not require any proof of criminal intent, which is generally required in a criminal statute; and b) there is an existing misdemeanor provided in s. 11.61 (1) (c), stats., that will automatically apply to intentional violations of all provisions of the requirements and prohibitions in this draft, except the radio and television advertisement disclosure requirements, violation of which this draft specifically exempts from the misdemeanor penalty (North Carolina provides that compliance with these requirements cannot be used as a basis for establishing criminal liability). Please let us know if this treatment is not in accord with your intent.

10. Several other provisions of current law are not incorporated into this draft and, thus, would be eliminated if this draft becomes law. Please review s. 11.30 (2) (d), (e), (g), (hm), and (i), stats., and let us know if you would like to preserve any of these

provisions. Also, please note that current law, with certain exceptions, requires disclosure with every communication that is paid for by or through a contribution, disbursement, or incurred obligation. This draft only applies if the communications are made in print media [as defined in proposed s. 11.01 (17)] or on television or radio. In this way, the draft is narrower in scope than the current disclosure law under s. 11.30 (2), stats. Please let us know if the scope of this draft is inconsistent with your intent.

11. This draft also raises three constitutional issues. First, by requiring certain persons to affirmatively state in their advertisements their position for or against a particular candidate or question presented at a referendum, the draft may compel speech in violation of the First Amendment. See *North Carolina Right to Life v. Leake*, 108 F. Supp. 2d 498 (E.D.N.C. 2000) (enjoining enforcement of a similar provision in North Carolina law). While compelled sponsorship disclosures are likely constitutional, see *FEC v. Public Citizen, Inc.*, 2001 U.S. App. LEXIS 21692 (11th Cir.) and *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 648 (6th Cir. 1997), cert. denied, 118 S. Ct. 162 (1997), the courts may be less willing to uphold a requirement that a person voice a particular opinion. However, please note that currently there is no court decision on this issue that is binding in Wisconsin. It is possible that, if presented with the issue, a court with jurisdiction over Wisconsin would uphold a requirement of this type.

Second, like our current disclosure law, this draft requires disclosures to be made in certain communications relating to referenda. Although the U.S. Supreme Court has not addressed the issue, at least one federal district court has held that disclosure requirements that apply to communications relating to referenda are invalid under the First Amendment. See *Yes for life Political Action Committee v. Webster*, 84 F. Supp. 2d 150 (D. ME 2000).

Finally, please note that many requirements under this draft are not uniform and, as a result, the requirements may violate the Equal Protection Clause. For example, the content of the televised disclosures required under this draft is not uniform. Compare proposed s. 11.30 (2m) (d) 5. to proposed s. 11.30 (2m) (d) 1. to 4. Also, the full–screen picture requirement under proposed s. 11.30 (2m) (d) 6. does not apply to persons required to disclose information under proposed s. 11.30 (2m) (d) 5. Furthermore, the content of the required radio disclosures is not uniform as compared with the content of the televised disclosure statements. Compare proposed s. 11.30 (2m) (d) 1. to 5. with proposed s. 11.30 (2m) (e) 1. to 5. It is unclear what the rational basis is for these differing treatments. If there is no rational basis, then these differing treatments would be susceptible to challenge under the Equal Protection Clause. You may want to treat these disclosures uniformly, except where it is rational to do otherwise (for example, it would be rational to specify image size in the context of televised disclosure statements but not radio disclosure statements).

Please feel free to contact us if you would like to discuss any of these items.

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