

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2872/1dinsRM
RJM:.....

In a recent email, you requested a provision granting the elections board authority to set parameters for the free media that a broadcaster may grant to a candidate under the tax credit. We assume you intend the rules to cover something other than a cap on the amount of the tax credit, which may be added to the bill after you here from the department of revenue. However, it is unclear what type of rules you intend to authorize the elections board to promulgate. Currently, the bill does not grant rule-making authority with regard to the tax credit.

In order to draft the requested provision, it would be helpful to have a few examples of specific aspects of the free media tax credit that you intend the rules to address. As you consider this issue, please note that you may want to avoid regulating the content of a candidate's message. Content-based restrictions on political speech are subject to strict scrutiny under the 1st Amendment and, if challenged, would be difficult to defend.

As we previously noted, there is a possibility that the 2-1 contribution cap gap in this bill may be challenged as unconstitutionally coercing candidates to accept public financing and, thereby, be bound by contribution and disbursement limits. The 1st Circuit U.S. Court of Appeals has held that a 2-1 cap gap is constitutional. See *Vote Choice, Inc. v. DiStefano*, 4 F. 3d 26, 38-39 (1st Cir. 1993). This case provides relatively strong support for the proposition that the 2-1 cap gap established by this bill is constitutional. However, because neither the U.S. Supreme Court nor the U.S. Court of Appeals with jurisdiction over Wisconsin has ruled on this issue, it is possible that the 2-1 cap gap could still be held unconstitutionally coercive.