

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-2872/1dn  
JTK/RM/JK/MK:cs:jf

May 16, 2001

Representative Duff:

1. This draft now includes all items in your instructions, as well as our responses to your e-mails. Please let us know if there is anything we have omitted.
2. Per your e-mail of 5/1, this draft restores the new procedure for enforcement of the election laws in proposed s. 5.066, as well as all the changes concerning injunctive relief in s. 11.66, stats. However, it does not include the procedure under which the executive director may impose civil forfeitures, subject to review by the board. Under the draft, the authority of the executive director is limited to ordering compliance with the election laws. The existing procedure for imposing civil forfeitures is retained. Please let us know if this is not in accord with your intent.
3. The P/2 draft, in proposed s. 11.05 (7m), permitted nonresident registrants to use property or funds acquired prior to registration for the purpose of making contributions or disbursements if certain disclosures are made. The draft also, in its treatment of s. 11.05 (6), stats., exempted federal candidate committees and national political party committees from the prohibition against using property or funds acquired prior to registration to make contributions or disbursements. This draft deletes these proposed changes because they are inconsistent with s. 11.05 (6) (a), stats., [as affected by this draft] and proposed ss. 11.05 (6) (b) and 11.27 (1v), which permit committees and groups to make contributions and disbursements only if they are registered with the appropriate filing officer under state law or are registered with the federal election commission. To the extent that this draft relies upon federal law to provide disclosure of state and local campaign finance activity, it should be noted that committees and groups that are engaged solely in state or local activity are not subject to federal registration requirements and it is unknown to what extent federal reporting requirements will be enforced against such committees or groups.
4. Proposed s. 11.24 (1r) of this draft prohibits transfer of campaign funds by candidates for state office to candidates for local office, and vice versa. This subsection does not apply to contributions made by a candidate to another candidate directly from the candidate's personal property or funds. Please let us know if this is not in accord with your intent.
5. Proposed s. 11.51 of this draft now provides for public funding of campaigns for any county, city, village, or town offices by local option. Under the draft, a county or city

must condition its financing upon agreement by a candidate to accept statutory spending and self-contribution limits.

6. With regard to the tax credit for corporations that provide free media access to qualified candidates, this draft limits the credit to access granted to candidates who are bound by disbursement and contribution limits.

In a recent e-mail, 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 hear 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 First Amendment and, if challenged, would be difficult to defend.

7. Effective with the taxable year beginning on January 1, 2002, this draft repeals the checkoff procedure for funding the Wisconsin election campaign fund and replaces it with a procedure that allows individuals, committees, and other persons to make donations to the fund and that allows individuals to claim a tax credit of up to \$5 for donations they make to the fund on their individual income tax returns.

8. This bill requires the elections board to promulgate rules requiring free time on public broadcasting television stations and public access cable television channels. The board has the discretion to determine the amount of time. Also, the board's rules will have to address issues that aren't addressed in the bill, such as when the time must be provided. Is that okay, or do you want the bill to impose more detailed requirements? Also, you might consider imposing a deadline for the elections board to submit the proposed rules to the legislative council. In addition, depending on when the bill is enacted, you might want to require the elections board to promulgate emergency rules.

9. 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 First 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.

We also 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. 11.24 (1v), which restricts the acceptance of contributions made by certain nonresident contributors.
- (b) Proposed s. 11.24 (1w), which prohibits personal campaign committees from making contributions to certain federally-registered committees.
- (c) Proposed s. 11.26 (8), which imposes cumulative limitations upon contributions received from special interest ("political action") committees by legislative campaign committees.

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

Robert J. Marchant  
Legislative Attorney  
Phone: (608) 261-4454  
E-mail: robert.marchant@legis.state.wi.us

Joseph T. Kreye  
Legislative Attorney  
Phone: (608) 266-2263  
E-mail: joseph.kreye@legis.state.wi.us

Mark D. Kunkel  
Legislative Attorney  
Phone: (608) 266-0131  
E-mail: mark.kunkel@legis.state.wi.us