DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–2872/4dn
JTK&RJM:cjs:ch

February 19, 2002

Representative Duff:

1. Please note that the definition of "communication" in proposed s. 11.01 (4m) specifically includes a "mass mailing" as defined in proposed s. 11.01 (13). This feature was not included in SB–115 but you specifically instructed us to include it in the previous draft, so we retained it. Let us know if you want to exclude mass mailings from this definition.

2. Please note that, in order not to require overlapping and duplicative reporting, the definition of "independent expenditure" in proposed s. 11.01 (11m) does not include anything that is currently reportable as a disbursement, even if the disbursement is made independently of a candidate. This means that the additional disbursements and contributions that may be made under proposed s. 11.31 (3r) are not triggered by any activity that is currently reportable as a disbursement. If you intend otherwise, we will need to amend the draft to make proposed s. 11.31 (3r) applicable, in addition, to conventional disbursements made independently of a candidate.

3. Also in this connection, s. 11.06 (2), stats., currently exempts individuals other than candidates and committees or groups not organized primarily for political purposes from reporting requirements if they make disbursements or incur obligations for a purpose other than making a contribution or express advocacy. This exemption tracks the bounds of disclosure requirements that are currently enforceable under *Buckley v. Valeo et al.*, 96 S.Ct. 612, 663–664 (1976). You may therefore wish to create a corresponding exemption under proposed s. 11.065 for individuals, committees, and groups who are exempt from reporting under s. 11.06 (2), stats. Alternatively, you could limit the current exemption under s. 11.06 (2), stats., so that an individual, committee, or group that makes either independent expenditures as defined in proposed s. 11.01 (11m) or independent disbursements for the same purpose under current law would be subject to reporting requirements under proposed s. 11.065. However, because the latter approach extends beyond what is currently permitted in *Buckley* at pp. 663–664, we would not recommend it.

4. Under proposed s. 11.06 (1) (cm), which creates a reporting mechanism for candidates who wish to take advantage of the opportunity to use certain contributions to make additional disbursements in response to independent ("issue advocacy") expenditures for mass communications or disbursements made by opposing

candidates exceeding the applicable level or limit, this draft permits a candidate to identify contributions or parts thereof *previously received* for use in making the additional disbursements authorized by the draft. This seemed necessary to us to permit a prompt response. Please let us know if you intend differently.

5. Under current law, s. 11.26 (8) (a) and (b), stats., which are the PAC–to–party contribution limits, apply to a political party as defined in s. 5.02 (13), stats., which includes "a state committee... and all county, congressional, legislative, local and other affiliated committees authorized to operate under the same name". Since we believe the current language satisfies your intent and this draft preserves the coverage of these provisions, we did not change their applicability. This treatment is the same as was provided in AB–726.

6. Recently, Senator Kanavas raised the issue that the provisions in SB–104 for matching certain independent expenditures for mass communications did not adequately address the contingency where a communication related to more than one candidate, so that a multiple match might be possible. This draft does not include an analogous matching provision, although it does provide, in proposed s. 11.31 (3r), certain concessions to candidates who are adversely affected by certain independent expenditures. One could well argue that even if a communication contained a reference to several candidates, each of them may need to respond utilizing an amount equivalent to the full amount expended for the original communication, so that there is no problem with this draft that corresponds to the potential multiple match in SB–104. If, however, you would nevertheless like to treat this issue differently, please let us know.

7. In s. 71.10 (3) (a), stats., which relates to the income tax checkoff, we believe that the reference to individuals who are entitled to a refund needs to be deleted in order to effect your intent because this would encompass individuals who have no tax liability and would therefore receive no credit. We have therefore incorporated that change in this draft. Marc Shovers, who drafted this originally, is not in the office at this time so we will be following up to ensure that this language, as changed, is complete and correct. We will let you know if we determine that something more is needed.

8. 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, 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*.

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