DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

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July 3, 2002

This draft attempts to reflect the intent of your July 2, 2002, proposal. As you review the draft, please note the issues listed below.

1. Proposed s. 11.24 (4), which relates to a restriction upon contributions to incumbent partisan elective state officials during certain periods, and proposed s. 11.385, which relates to a restriction upon contributions made or received by incumbent legislators in conjunction with certain fund–raising social events during certain periods, are not drafted in cognizance of one another. In some cases, activity that would be permitted under one of the provisions is prohibited by the other provision. We do not see this as creating a conflict because the effect of one provision is not negated by the failure of the other provision to reflect its full breadth. However, you may wish to review whether the scope of these provisions is consistent with your intent. In addition, with respect to proposed s. 11.385:

a. The language does not prohibit making contributions in conjunction with nonsocial fund–raising events such as auctions.

b. In recent years, some special sessions have extended for more than a year, although meeting days have been infrequent. The effect of this practice may be to prohibit contributions from being made during interim periods when the legislature is not actually meeting in regular, special, or extraordinary session. If the legislature recesses a special or extraordinary session to a date on or after the date of the next floorperiod, you may wish to consider permitting contributions to be made.

c. In proposed s. 11.385 (3) and (4), you may wish to consider making the exemptions available to a member after any primary is held only if the member wins the primary.

d. There is some overlap between proposed s. 11.385 (3) and (4). Subsection (3) applies only if an event is held within the jurisdiction or district served by the office for which the member is a candidate, while sub. (4) does not contain this limitation but applies only if the member is a candidate for an office other than member of the house in which the member serves.

2. The instructions specified that only a candidate who has an opponent who received at least 6% of the vote cast for the office that the candidate seeks at the primary election should qualify for a grant. Because there is not necessarily any spring primary election or any primary in a special election unless the number of candidates who qualify for

ballot placement is sufficient to require that a primary be held, this draft, in s. 11.50 (2) (b) 3., stats., applies this qualification only to candidates at the general election.

3. Concerning the treatment of s. 11.50 (2) (h), stats., which specifies the deadline for withdrawing an application for a grant from the Wisconsin election campaign fund, you requested that we fix this date as the filing deadline for the preprimary report (the eighth day before the primary). In nonpartisan elections and partisan special elections, there is no primary unless the number of candidates who qualify to have their names appear on the ballot warrants that a primary be held. For nonpartisan elections, therefore, this draft provides that the deadline for withdrawal is *the day that the primary would be held, if a primary were required*, and for partisan special elections, because there is no window of time provided to hold the primary, this draft provides that the deadline for withdrawal is *the 35th day before the special election*. Please let us know if you would like to see this treated differently.

4. Under *Buckley v. Valeo, et al.*, 96 S. Ct. 612 (1976), we cannot require a candidate to accept self–contribution limits except by voluntary agreement. Currently, however, under s. 11.50 (2) (a), stats., a candidate who accepts a grant must agree to abide by *all* contribution limits. Currently, under s. 11.31 (2m), stats., a candidate who files an affidavit accepting disbursement and contribution limits agrees to abide by *all* contribution limits. Consistently with this policy, we recommend that the reference to s. 11.26 (10) in proposed s. 11.31 (2m) (b) (affidavit of adherence to limits) be made consistent with the corresponding reference in proposed s. 11.26 (2m) (a) by deleting the reference to sub. (10). In this regard, we would also correct the text of s. 11.50 (2) (i), stats., to substitute a reference to s. 11.26 (10) for the reference to s. 11.26, stats. Alternatively, we could change current law to require candidates who accept grants or who voluntarily accept limits only to agree to accept *self–contribution* limits. In any event, the draft needs to be made consistent on this point.

5. Concerning proposed SECTION 9132 (4v), which directs the attorney general (or, if he fails to do so within 60 days after the bill resulting from this draft becomes law, the joint committee on legislative organization) to commence a declaratory action seeking a determination that certain provisions of this proposal are constitutional, may not be effective in view of the position of the Wisconsin Supreme Court that, generally, the court will not permit a claim for declaratory relief to be asserted unless there is a justiciable controversy. Under this requirement, "...a controversy is not a proper subject for declaratory relief unless it: (1) involves a claim or right on the part of the plaintiff which is asserted against one who has an interest in contesting it; (2) is between two persons whose interests are adverse; (3) involves a legally protectable interest in the person seeking declaratory relief; and (4) is ripe for judicial determination. These prerequisites to the maintenance of a declaratory judgment action are designed to insure that a bona fide controversy exists and that the court, in resolving the questions raised, will not be acting in merely an advisory capacity. *Lister v. Board of Regents*, 72 Wis. 2d. 282, 306 (1976). The court has also stated that it generally will not entertain constitutional questions brought by a party who is not directly affected by the facts presented to the court in an actual case or controversy. *Schmidt v. Local Affairs and Development Dept.*, 38 Wis. 2d 46, 61–62 (1968). There are exceptions to this rule where issues are of great public importance; the

constitutionality of a statute is involved; the situation is likely to recur and guidance to the trial courts is essential, the court should address the situation to avoid uncertainty, or the question evades review because it cannot be decided in time to have a practical effect upon the parties. *In the Matter of G.S.*, 118 Wis. 2d 803, 805 (1984). Nevertheless, when the court has made an exception, there have generally been an actual set of facts with interested parties before the court, even though the particular case may have been moot. This might not be the situation in this instance.

In addition, this type of provision may not be effective because: 1) the attorney general and the legislators who constitute JCLO enjoy certain constitutional prerogatives, and there is some doubt as to whether these officers may be forced to file suit if they are not willing to do so; 2) someone else may file suit first, perhaps in federal court, and the state could be a defendant in that suit; and 3) a favorable ruling by the Wisconsin Supreme Court might not settle the matter if federal constitutional issues are involved. In any event, you may want to provide an exception from the requirement to file suit if a private party has already filed a suit raising all of the relevant issues and the state is a party to that suit.

On the last occasion that the legislature requested the attorney general to file a declaratory judgement action, the attorney general declined to do so and issued a statement explaining his reasons. You may wish to provide that, if the attorney general fails to file the action within 60 days of the effective date *or declines to do so before that time*, JCLO shall retain counsel to file the suit. This will avoid having to await the expiration of the 60–day period if it is apparent that the attorney general will not proceed.

6. Per your instructions, this draft directs the Elections Board to include a proposal for implementation of a statewide voter registration system, based upon a study that must include at least 13 specified components, in its 2003–05 biennial budget request. Under s. 16.42 (1), stats., this request is due on *September 15, 2002*. The study is to be completed by the first day of the 10th month after publication of the act resulting from this draft. That date is likely to be *May 1, 2003*. In recent years, the biennial budget act has not generally become law before August of the odd–numbered year. Because the system must be operational by September of 2004, this time schedule would give the Elections Board and local governments about one year to implement the system. This timing may be challenging. You may wish to seek input from the board and local government organizations regarding this time schedule.

7. 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), (11m), and (16) (a) 3. and the treatment of s. 11.06 (2), stats., which together require registration and reporting by individuals or committees that make certain mass communications within specified periods preceding an election containing a reference to or depiction of a candidate at that election and proposed s. 11.12 (6) (c), which requires pre–reporting of certain independent disbursements and mass communications, appear to extend beyond the boundaries which the court permitted in 1976 and, as a result, their enforceability 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. den.*, 120 S. Ct. 1156 (2000). Proposed s. 11.12 (6) (c) also may constitute an unconstitutional prior restraint on the exercise of protected free speech rights. To support these provisions, it would be necessary for the state to demonstrate a compelling state interest.

8. 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*, 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.

a. Proposed s. 11.26 (1), (1m), (2), and (2m), which allow individuals and committees to make double the amount of contributions to candidates who participate in the Wisconsin Election Campaign Fund. There is a possibility that this 2–1 contribution cap gap, in combination with the other incentives under the bill for participating in the Wisconsin Election Campaign Fund, 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 some 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, and because the 2–1 cap gap must be viewed in combination with the other incentives established in the bill, it is possible that the 2–1 cap gap could still be held unconstitutionally coercive.

b. Proposed s. 11.26 (8r), 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*, 424 U.S. 1. 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).

c. Proposed ss. 11.26 (9) (a) 1., 2., and 3. and 11.31 (3p), which, among other things, allow candidates to raise and spend additional funds in order to permit them to respond to certain independent disbursements.

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