DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–1551/1dn
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January 18, 2001

Senator George:

In putting together this draft, we made several minor clarifications or policy judgments of which you should be aware. If the draft does not reflect your intent in any of the following cases, please let us know, and we will revise it accordingly:

1. Concerning proposed ss. 11.501 and 11.502, this draft alters the instructions so that the certification and qualifying contributions are submitted under proposed s. 11.501, rather than proposed s. 11.502, prior to any primary election. Under the draft, within seven days after the date of any primary, a candidate must reapply for a public financing benefit for the election. The second application need not contain any list of qualifying contributions. Under proposed s. 11.51 (4), per the instructions, if there is no primary election, the public financing benefit becomes available before the date that the primary would be held, if a primary were required.

2. This draft deletes proposed s. 11.505 and part of proposed s. 11.51 (1), relating to agreements by candidates to comply with requirements, because we believe this is covered by proposed ss. 11.502 (1) and 11.503 (1) and the definition of "campaign," which is referenced in proposed s. 11.501 (2).

3. In the proposed revision of s. 11.51 (3) [11.51 (4) in this draft], we have substituted reference to the "Friday after the 2nd Tuesday in January" rather than three days after the deadline for filing nomination papers because if there is a successful challenge to the papers of a candidate, the candidate would never be certified to have his or her name appear on the ballot. Normally, a challenge is resolved within seven days after the nomination paper filing deadline, which occurs on the first Tuesday in January, or the next day if Tuesday is January 1.

4. The instructions provided, and this draft specifies, in proposed s. 11.51 (4), that the elections board must determine a candidate's eligibility for a public financing benefit at the spring election no later than two business days after the date of the spring primary. To harmonize with this change, this draft provides that a candidate must apply for a public financing benefit under proposed s. 11.503 (1) no later than the *day after* the primary, instead of the seventh day after the primary, as formerly provided. This procedure allows no time to sort out a close primary election result. A candidate may apply without knowing whether he or she has won the primary, but the board may not be able to act until it is certain of the primary result.

5. In proposed s. 11.51 (6), we have substituted the term "intentionally" for "knowingly and willfully" because the term "intentionally" is defined in s. 11.01 (12), stats. Also, we have provided that any requirement to return public moneys shall be commensurate with the severity, rather than the scope, of the offense because that is the current standard for determining whether to settle proposed civil forfeiture actions under s. 5.05 (1) (c), stats. We think the effect of this language is similar to the language in the instructions and is more consistent with current provisions.

6. Concerning proposed s. 11.512, relating to reports by nonparticipating candidates, because the 60–day periods preceding the spring primary and the spring election, during which reporting frequency increases, overlap, this draft increases the reporting frequency to 60 days before the date that the spring primary is held, or the date that the spring primary would be held if a primary were required to be held, and continues that reporting frequency through the date of the spring election.

7. The treatment by this draft of proposed s. 11.512 (2), relating to additional public financing benefits, attempts to address two issues that were not addressed in the instructions by providing that: a) the additional amount is based upon the total contributions received *or* the total disbursements made by the nonparticipating candidate, whichever amount is greater; and b) the maximum amount of the additional benefit is keyed to the amount of the public financing benefit for the primary, if the excess contributions are received or excess disbursements are made on or before the date that the primary is held or would be held if a primary were required, or for the election, if the contributions are received or the disbursements are made after that date.

8. Concerning the disclaimer that is required in communications by nonparticipating candidates under proposed s. 11.522 (2), the instructions did not specify whether to delete the second sentence or to delete the entire disclaimer. This draft deletes only the second sentence so the disclaimer reads "This communication is paid for with money raised from private sources."

9. Because, under the instructions, the definition of "independent disbursement" is changed to sweep beyond what is currently considered a "disbursement" under s. 11.01 (7), stats., we are no longer able to use this term. We have used, instead, the term "independent expenditure." Concerning the language in the instructions to the effect that a non–independent disbursement is considered a contribution to the candidate who benefits from the disbursement, this is not specifically reflected in the draft because it reflects current law for all candidates. See section 11.06 (4) (d) and 11.12 (1) (a), stats.

10. Because this draft restores all language relating to lines of credit and the fair election debit card from the original 1999 SB–181, it also restores the prohibited act in proposed s. 11.518 (2), relating to making disbursements by means other than through use of the fair election debit card, with certain exceptions.

11. Concerning the need for a definition of "person," the L.R.B. does not include definitions of this term in drafts because we use the standard definition in s. 990.01 (26), stats., and the legally accepted definition of the term, which includes both natural persons (individuals) and unnatural persons.

12. For this draft, we have included two appropriations for administration but have specified "$–0–" for expenditure in fiscal years 2001–02 and 2002–03. When you know the dollar amounts that you need to include in the proposal, contact us and we will either redraft the proposal or draft an amendment, whichever is appropriate. In considering this issue, please be aware that the executive budget bill, if enacted after this bill, may eliminate any funding for these appropriations.

In addition, we would like to briefly note the following legal issues:

1. 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 that 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. 11.501 (10) and 11.513, which require reporting by persons that make certain communications during certain periods containing a reference to a candidate for the office of justice, appears to extend beyond the boundaries that the court permitted in 1976. As a result, its enforceability 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*, 168F. 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*.

2. In *McIntyre v. Ohio Elections Commission*, 115 S.Ct. 1151 (1995), the U.S. Supreme Court found unconstitutional, under the First Amendment, a statute that prohibited publication or distribution of any material designed to promote the nomination or election of a candidate or the adoption or defeat of any issue or to influence the voters at any election without identification of the name and address of the person who publishes or distributes the material. The court, however, indicated that a state's interest in preventing fraud might justify a more limited disclosure requirement (115 S.Ct. at 1522). Further, the court indicated that it still approved of requirements to disclose independent expenditures, which it upheld in *Buckley v. Valeo*, et. al., 96 S.Ct. 612, 661–662 (1976), (*McIntyre*, 115 S.Ct. at 1523). In view of this opinion, the constitutionality of disclosure statutes such as proposed s. 11.522, relating to labeling of certain political communications by candidates for the office of justice of the supreme court who fail to qualify for a public financing benefit, is not clear at this point. We will have to await further decisions from the court before we know the exact limits of a state's ability to regulate in this field.

3. Proposed ss. 11.512 (2) and 11.513 (3), which increase the public financing benefit available to a candidate for the office of justice when independent expenditures are made against the candidate or for his or her opponents, or when the candidate's

opponents make disbursements exceeding a specified level, may result in an abridgement of the First Amendment rights of the persons making the expenditures or disbursements. Although relevant case law has developed regarding this issue in the federal courts of appeal, there is no consensus among these courts on this issue. Due to the unsettled nature of the law in this area, it is not possible to predict how a court would rule if proposed s. 11.512 (2) or 11.513 (3) were challenged.

4. Proposed s. 11.512 (1), which imposes additional reporting requirements upon candidates for the office of justice of the supreme court who fail to qualify for a public financing benefit, may raise an equal protection issue under the 14th Amendment to the U.S. Constitution.

If you need further information or would like to make any changes based on the above information, please let us know.

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