DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–0617/1dn
JTK:kg:rs

December 18, 2002

Senator Ellis:

1. 2001 SB–104 was heavily amended in committee and again on the floor of the senate. The amendments adopted on the floor were not oriented in the same direction philosophically as the committee version. The result was a system of matching grants that had the potential to provide double matches. This draft further changes that system so that contributions are not reportable until received, disbursements and expenditures are not reportable until made, and obligations are not reportable until incurred. The matching triggers in proposed s. 11.50 (9) (b), (ba), and (bb) of this draft attempt to ensure that there will be no double matches. Please review these triggers to ensure that they effect your intent.

2. Senator Kanavas has raised the issue that the provisions of this draft for matching certain independent expenditures for mass communications do not adequately address the contingency where a communication relates to more than one candidate, so that a multiple match might result from a single communication. One could well argue that even if a communication contains a reference to several candidates each of them may need to respond by utilizing an amount equivalent to the full amount expended for the original communication. If, however, you would nevertheless like to treat this issue differently, please let me know.

3. This draft provides funding for one additional campaign finance investigator position and one additional auditor position at the Elections Board. Because the biennial budget act repeals and recreates the appropriation schedule under s. 20.005 (3), stats., if the bill resulting from this draft becomes law before enactment of the budget act and the budget act does not include the funding provided in this draft, the effect will be to eliminate the funding provided in this draft. To preserve the funding of these positions, you may wish to seek inclusion of the funding in the biennial budget bill.

4. 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 (16) (a) 3. and 11.12 (6) (c), 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, an office to be filled at that election, or a political party, 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.*

I also want to note briefly that a few of the provisions of this draft are innovative, and I do not yet have, to my 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 I do not have specific guidance at this time are:

(a) Proposed s. 11.12 (8), which requires candidates who do not accept public grants to file special reports that are not required of candidates who accept public grants.

(b) Proposed s. 11.26 (8m), 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.* 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 s. 11.50 (9) (b), (ba), and (bb) which provides public grants to qualifying candidates to match contributions received by independent committees and certain independent disbursements and other expenditures and disbursements exceeding the disbursement limitations by candidates who do not accept public grants. 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. 11.50 (9) (b), (ba), or (bb) were challenged.

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

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