

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

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January 28, 2008

Senator Kreitlow:

1. Proposed s. 11.01 (16) (a) 3. of this draft would extend this state's campaign finance reporting system to include reporting of certain mass communications occurring within a specified proximity to an election regardless of whether they would be reportable currently. In *McConnell v. F.E.C.*, 124 S.Ct. 619 (2003), at pp. 696-697, the U.S. Supreme Court sanctioned analogous provisions in the Federal Election Campaign Act in the face of a First Amendment challenge because the reporting was considered to be the functional equivalent of express advocacy, which, since *Buckley v. Valeo, et al.* 96 S.Ct. 612 (1976), has been judicially sanctioned as reportable activity. However, in *F.E.C. v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652 (2007), the U.S. Supreme Court, at p. 2667, adopted such a narrow view of the functional equivalent of express advocacy as to in effect overrule the *McConnell* decision in all but the narrowest of circumstances. Both the *McConnell* and the *Wisconsin Right to Life* decisions were 5 to 4 decisions. The *Wisconsin Right to Life* case specifically relates to a publication issue rather than a reporting issue. Proposed s. 11.38 (2m) of this draft attempts to address the publication issue by permitting corporations and cooperatives to make expenditures for certain election-related communications if they are reported. How the *Wisconsin Right to Life* case will be applied to the disclosure issue and how it will be applied to the noncorporate context remains to be decided.

2. You may wish to reflect on proposed s. 11.05 (3) (s) of the draft, which requires a new registrant to disclose any mass communication, as defined in proposed s. 11.01 (16) (a) 3. of the draft, that the registrant made prior to registration at the time that the registrant registers and how this provision should apply to a corporation or cooperative that registers after the day that the act resulting from this draft becomes law.

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