

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1930/1dn
JTK:wlj:rs

February 3, 2009

Representative Dexter:

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 (F.E.C.A.) 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 permissible reportable activity. The result of this conclusion is that if corporations are prohibited from making reportable contributions or disbursements, a corporation is not able to pay directly for a mass communication of this type. However, in *F.E.C. v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652 (2007), the U.S. Supreme Court, at p. 2667, modified its decision in *McConnell* by holding that a corporation could not be prohibited from making a communication unless the communication was the functional equivalent of express advocacy. In that case the court found that a proposed communication, which involved a popular appeal to contact legislators regarding a legislative issue and that mentioned the name of a candidate at an election within 30 days of that election, was not, by itself, the functional equivalent of express advocacy. The U.S. Supreme Court did not, however, address F.E.C.A.'s disclosure requirements in that decision. In *Citizens United v. F.E.C.A.*, 530 F.Supp. 274 (U.S.D.C., D.C., 2008), however, at p. 281, the U.S. District Court reaffirmed those requirements. It is still possible that the U.S. Supreme Court may review the *Citizens United* decision. The proposed treatment of s. 11.01 (16) (b) by this draft attempts to address the publication issue by permitting certain communications that are not the functional equivalent of express advocacy, as defined in the draft, to be made by any person without reporting and without the communications being considered contributions and disbursements, notwithstanding this state's prohibition on corporate contributions and disbursements, while retaining the disclosure requirements for other purposes in proposed s. 11.01 (16) (a) 3. Whether this approach will be successful, and whether the precise language of this draft will accomplish the intended goal, remains to be decided once the U.S. Supreme Court gives us more guidance.

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