DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBs0029/1dn
JTK:wlj:md

March 27, 2009

Representative Smith:

This draft makes some changes to AB−63 that may affect the probability that a court would find an inconsistency between the draft and the holding of the U.S. Supreme Court in *F.E.C. v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652 (2007), which permitted prohibition of corporate mass communications only when they are express advocacy or its functional equivalent. One change is to provide that a communication qualifies as a permissible corporate mass communication only if it does not support or oppose a candidate's record on an issue. This requirement does not appear in the Court's core test set forth on p. 2667 of that opinion but rather is based upon a response to the dissent in footnote 6 and does not appear in the corresponding test adopted by the F.E.C. in 11 C.F. R. 114.15. I think this requirement may be a fair reading of the decision, but it is not free from doubt. Another change is to specifically require registration and reporting and to ban corporate mass communications whenever a mass communication refers to a judicial office and either focuses on and takes a position for or against a judicial candidate's position on an issue or takes a position on that judicial candidate's character, qualifications, or fitness for office. Because this requirement does not set forth a window when it is operative and sets forth a separate rule for judicial races, it does not parallel the core test that received the approval of the Court as interpreted by the F.E.C., and it will affect the probability that a court may distinguish the draft's test for determining the functional equivalent of express advocacy from the Court's approved test.

If you would like to discuss this or any related matters further, please let me know.

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