

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1556/P1dn
MPG:nwn:jf

March 29, 2011

Jonathan Hoechst and Brian Quinn:

Please review this draft carefully to ensure that it is consistent with your intent. Also, please see the notes, including questions, imbedded in the draft.

As we discussed, you should run this draft by the capital finance office.

The draft, in part, creates a new appropriation under s. 20.195 (1) (g) in the draft for the administration of the on Wisconsin fund. The Wisconsin Constitution, under article VIII, sections 4, 7 (2) (a), and 10, provides that public debt may be incurred only for certain purposes, primarily certain kinds of capital projects, and none of those purposes authorizes a venture capital investment program for the stimulation of start-up businesses in the state. However, those restrictions do not apply to authorities. Also, while it is impossible to predict how a court will rule in a given case, based on current case law, the new appropriation should not create a debt of the state because it does not create an absolute legal obligation on the part of the state to pay the debts of the Wisconsin Venture Capital Authority (the authority). *See State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 427-29, 208 N.W.2d 780 (Wis. 1973). Instead, the draft explicitly states that the authority's debt is not a debt of the state, and the authority cannot create a debt of the state. The courts tend to honor those kinds of legislative statements. *See, e.g., Nusbaum*, 59 Wis. 2d at 428-32.

While the draft does not create a legal obligation on the part of the state with respect to the authority's debts, we could, if you choose, include a "moral obligation pledge" that the legislature recognizes a moral obligation to pay the authority's debts should the authority fail to do so. While investors tend to look with favor on that kind of pledge, the Wisconsin Supreme Court has held that a moral obligation pledge does not create a legally enforceable debt of the state. *See id.; Wisconsin Solid Waste Recycling Authority v. Earl*, 70 Wis. 2d 464, 482, 235 N.W.2d 648 (Wis. 1975) (construing *Nusbaum*). Please let us know if you would like to include such a pledge.

Finally, while we do not usually include statements of legislative intent, purpose, or findings in the statutes, an exception to that general rule applies when there may be some question regarding the public purpose doctrine. Specifically, the courts have held that it is a fundamental constitutional requirement that the state's appropriations must be for a public purpose. *See Libertarian Party of Wisconsin v. State*, 199 Wis. 2d 790, 809-10, 546 N.W. 2d 424 (Wis. 1996). Because it is possible that some may

question whether the authority's investment in venture capital firms serves a public purpose, we have included a statement that the legislature finds the on Wisconsin fund is necessary and serves a public purpose. That kind of statement is also generally honored by the courts. *See Libertarian Party of Wisconsin v. State*, 199 Wis. 2d at 810.

Please let us know if you have any questions.

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