

Meeting of the Board

Tuesday, March 23, 2010 - 9:30 A.M.

Wednesday, March 24, 2010 – 8:30 A.M.

Agenda

Open Session

G.A.B. Conference Room

212 East Washington Avenue, Third Floor

Madison, Wisconsin

Tuesday, March 23, 2010

9:30 A.M.*

*The Board will convene in closed session at 4:00 p.m. on March 23rd and return to open session to consider any remaining open session items before reconvening in closed session.

A. Call to Order	<u>Page #</u>
B. Director’s Report of Appropriate Meeting Notice	
C. Approval of Minutes of Previous Meeting	3
1. January 14, 2010 Meeting – Open Session	
D. University of Wisconsin Department of Political Science Presentation on Evaluation of Wisconsin Election Data Collection Grant	
 <i>Break</i>	
E. Public Comment (Limit of 5 minutes per individual appearance)	
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G. Administrative Rules	
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3. Status Report on Pending Administrative Rules	59

The Government Accountability Board may conduct a roll call vote, a voice vote, or otherwise decide to approve, reject, or modify any item on this agenda.

H.	Review of Approval of Engineering Changes to Approved Electronic Voting Systems	<u>Page #</u> 65
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L.	Closed Session	
5.05 (6a) and 19.85 (1) (h)	The Board's deliberations on requests for advice under the ethics code, lobbying law, and campaign finance law shall be in closed session.	
19.85 (1) (g)	The Board may confer with legal counsel concerning litigation strategy.	
19.851	The Board's deliberations concerning investigations of any violation of the ethics code, lobbying law, and campaign finance law shall be in closed session.	
19.85 (1) (c)	The Board may consider performance evaluation data of a public employee over which it exercises responsibility.	

The Government Accountability Board has scheduled its next meeting for Monday, May 10, 2010 at the Government Accountability Board offices, 212 East Washington Avenue, Third Floor in Madison, Wisconsin beginning at 9:30 a.m.

The Government Accountability Board may conduct a roll call vote, a voice vote, or otherwise decide to approve, reject, or modify any item on this agenda.

State of Wisconsin\Government Accountability Board

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JUDGE WILLIAM EICH
Chair

KEVIN J. KENNEDY
Director and General Counsel

DRAFT

Not yet
approved by
the Board

Wisconsin Government Accountability Board

212 East Washington Avenue, Third Floor
Madison, Wisconsin
January 14, 2010
10 a.m.

Open Session Minutes

<u>Summary of Significant Actions Taken</u>	<u>Page</u>
A. Selected new Board Officers	1
B. Delegated Authority to Director and General Counsel	2
C. Conducted Legislative Panel on Early Voting Report	3
D. Approved an amended Ballot Access Report	4

Present: Judge Michael Brennan, Judge William Eich, Judge Gerald Nichol (by telephone), Judge Thomas Cane, Judge Thomas Barland (by telephone), and Judge Gordon Myse (by telephone).

Staff present: Kevin Kennedy, Jonathan Becker, Nathaniel E. Robinson, Shane Falk, Michael Haas, Barbara Hansen, Sharrie Hauge, Tommy Winkler, and Reid Magney

A. Call to Order

Chairperson Brennan called the meeting to order at 10:01 a.m.

B. Director's Report of Appropriate Meeting Notice

G.A.B. Director Kevin Kennedy informed the Board that proper notice was given for the meeting.

C. Selection of Board Officers

The selection of Board Officers was done by lot. Chair Brennan drew the name of Judge Eich to be G.A.B Chair for 2010, and then, as immediate Past Chair, transferred the gavel to Chair Eich. Chair Eich then drew the names of Judge Myse to be G.A.B. Vice Chair and Judge Barland to be G.A.B. Secretary for 2010.

D. Approval of Minutes of Previous Meetings

MOTION: Approve the minutes of the December 17, 2009 meeting of the Government Accountability Board. Moved by Judge Nichol, seconded by Judge Barland. Motion carried unanimously.

E. Delegation of Certain Authority to the Director and General Counsel

MOTION: Delegate certain provisions of the Board's authority to the Director and General Counsel as set out on page 17 of the G.A.B. meeting materials of January 14, 2010. Moved by Myse, seconded by Nichol. Motion carried unanimously.

G. Election Administration – Ballot Access Report

(This item was taken out of order.)

Elections Division Administrator Nathaniel E. Robinson and Lead Election Specialist Diane Lowe presented a summary of ballot access issues that arose related to the 2010 Spring Election.

1. Appeal of David Gallo
(Presented by Shane Falk)

Staff Attorney Shane Falk made a presentation to the Board about Mr. Gallo's appeal of the decision by the clerk of the Kenosha Unified School District No. 1 to deny him ballot access due to tardiness of his ballot access documents.

Mr. Gallo appeared in person and with his attorney, Mr. David Halbrooks. Mr. Gallo made a presentation to the Board regarding the case. Mr. Gallo said that he is a plumber and first-time candidate for public office. He said he relied on information provided by the school district in written form and on its website, which said the deadline for filing was 5 p.m., Wednesday, January 6. He said he did not see an earlier newspaper story, which said the deadline was January 5, but rather only saw a newspaper article on January 6, 2010 that prompted him to make an inquiry with the clerk regarding the filing deadline. He said he had all his paperwork completed by January 4, but it was not filed until approximately 11:30 a.m. on Wednesday, January 6, 2010. Attorney Halbrooks argued that this was clerk error and that Mr. Gallo should not be penalized as he justifiably relied upon the clerk. The school district admitted the error in printed materials and on the web; however, argued that Mr. Gallo could have deduced the actual due date from more general language on the back of the nomination papers and that he had notice from a newspaper article prior to January 5, 2010.

Discussion. The Board considered whether the clerk should be estopped from asserting the filing deadline in light of Mr. Gallo's justifiable reliance on the clerk error.

MOTION: To order the School Board Clerk of the Kenosha Unified School District No. 1 to certify David Gallo to the ballot for the Spring Election, and that if the addition of Mr. Gallo to the ballot creates the need to hold a primary,

one shall be held. Moved by Judge Myse, seconded by Judge Nichol. Motion carried unanimously.

2. Discussion of Paul Reilly matter
(Presented by Michael Haas)

Staff Attorney Michael Haas made a presentation to the Board about an issue involving the election for Court of Appeals Judge, District 2. One of the candidates included his title on the nomination papers (Judge Paul F. Reilly). Reilly, a circuit court judge, was advised of this irregularity by staff before the filing deadline, and chose not to submit additional signatures. No timely challenge was filed, but after the Board materials packet was distributed, staff received correspondence about the issue and there was news media coverage. Mr. Haas advised the Board that the prohibition of the use of titles on nomination papers is directory, and not mandatory.

Judge Reilly, appeared by telephone.

Judge Myse said that in circulating nomination papers with the title “judge” on them, Judge Reilly runs the risk of misrepresenting himself as an incumbent Court of Appeals Judge. He said it is proper for the Board to take no action, but cautioned that had there been an objection, it would be difficult not to sustain and reject the nomination papers containing the title.

The Board took no action on the matter.

F. Legislative Panel on Board Early Voting Report and Recommendation

Elections Division Administrator Nathaniel E. Robinson advised the Board that staff had endeavored to assemble a Legislative Panel of the Chairs and Ranking Members of the Senate and Assembly committees which consider legislation related to elections for a discussion of the Early Voting Report. Unfortunately, scheduling conflicts had arisen, preventing participation of a full panel. He introduced the Honorable Jeff Smith, Chair of the Assembly Committee on Elections and Campaign Reform.

Representative Smith said he appreciated the invitation to participate in a roundtable discussion with the Board. He and members of the Board discussed a wide range of issues related to the Early Voting Report and election administration in Wisconsin. He said that he and Senator Spencer Coggs, chair of the Senate Committee on Labor, Elections and Urban Affairs, would take the lead on sponsoring any legislation that comes out of the Early Voting Report.

G. Election Administration – Ballot Access Report (continued)

3. Appeal of John O’Boyle

Elections Division Administrator Nathaniel E. Robinson reported to the Board that John O’Boyle was initially not recommended for ballot status because his ballot access documents arrived late at G.A.B. offices. Mr. O’Boyle, appearing in person, explained that he sent his ballot access documents by Express Mail from Ellsworth, on January 4, 2010. He provided documentation indicating the

package was delivered to the agency's post office box at 11 a.m. on January 5, 2010. He argued that denying him ballot status would deny voters in his community the option of voting for him.

Administrator Robinson said staff revised its recommendation after verifying materials submitted by Mr. O'Boyle had arrived at the G.A.B. post office box in a timely manner.

Discussion. The Board expressed concern regarding the delivery process of mail from the agency post office box.

MOTION: To grant ballot status to John O'Boyle for the Pierce County Circuit Court Judge election. Moved by Judge Cane, seconded by Judge Barland. Motion carried.

4. Appeal of John Daggett
(Presented by Michael Haas)

Staff Counsel Michael Haas reported to the Board that John Daggett, a candidate for Winnebago County Supervisor, appealed the decision of the Winnebago County Clerk to deny him ballot status because of insufficient signatures. Mr. Daggett submitted nomination papers with 51 signatures, but two of the signers were successfully challenged because they live outside the district, which left him with 49 valid signatures. Mr. Daggett asked the Board to grant him ballot status because the nomination papers include his signature as the circulator of those papers, which would give him 50 signatures. Mr. Daggett did not sign the nomination papers other than as a circulator.

Mr. Daggett did not appear at the meeting to press his appeal or present additional evidence.

Mr. Haas said signatures can not be added to a petition after it has been filed. He said the question before the Board is whether the Winnebago County Clerk violated the law or abused her discretion in not allowing Mr. Daggett's name to appear on the ballot. He said staff's recommendation is to deny the appeal.

MOTION: To sustain the Winnebago County Clerk's decision to grant the challenge to John Daggett's nomination papers and to deny him ballot status because of an insufficient number of signatures. Moved by Judge Myse, seconded by Judge Cane. Motion carried unanimously.

5. Spring 2010 Election Ballot Status Report

MOTION: To approve the ballot status report, as amended to reflect the actions of the Board on ballot access issues. Moved by Judge Cane, seconded by Judge Brennan. Motion carried unanimously.

K. Director's Report

Kevin J. Kennedy informed the Board that the agency has been notified by the U.S. Election Assistance Commission that \$3.9 million in federal HAVA 2008-2009

Requirements Payments have been released to the State of Wisconsin. Additionally, \$1.2 million for Wisconsin has been appropriated for the 2010 federal budget.

L. Closed Session

Adjourn to closed session to consider written requests for advisory opinions and the investigation of possible violations of Wisconsin’s lobbying law, campaign finance law, and Code of Ethics for Public Officials and Employees; and confer with counsel concerning pending litigation.

MOTION: Move to closed session pursuant to §§5.05(6a), 19.85(1)(h), 19.851, 19.85(1)(g), and 19.85(1)(c), to consider written requests for advisory opinions and the investigation of possible violations of Wisconsin’s lobbying law, campaign finance law, and Code of Ethics for Public Officials and Employees; and confer with counsel concerning pending litigation and consider performance evaluation data of a public employee of the Board. Moved by Judge Cane, seconded by Judge Eich.

Roll call vote: Brennan:	Aye	Cane:	Aye
Eich:	Aye	Barland:	Aye
Myse:	Aye	Nichol:	Aye

Motion carried.

Hearing no objection, the Chairman called a recess at 11:55 a.m. The Board reconvened in closed session beginning at 12:05 p.m.

Summary of Significant Actions Taken in Closed Session:

- A. Litigation: Two pending matters considered.
- B. Investigations: One pending matter considered.

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The next meeting of the Government Accountability Board is scheduled for 9:30 a.m. Tuesday, March 23 and 9:00 a.m. Wednesday, March 24, at the G.A.B. offices, 212 East Washington Avenue, Madison, Wisconsin.

January 14, 2010 Government Accountability Board meeting minutes prepared by:

Reid Magney, Public Information Officer

January 19, 2010

January 14, 2010 Government Accountability Board meeting minutes certified by:

Judge Thomas Barland, Board Secretary

March 23, 2010

State of Wisconsin \ Government Accountability Board

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JUDGE WILLIAM EICH
Chairperson

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For the March 23-24, 2009 Meeting

TO: Members, Wisconsin Government Accountability Board

FROM: Kevin J. Kennedy
Director and General Counsel
Government Accountability Board

Prepared and Presented by:

Shane W. Falk, Staff Counsel

SUBJECT: Citizens United v. FEC: Implications and Action Items

Introduction:

Staff has been very busy digesting the Citizens United decision, reviewing its effect on Wisconsin statutes and the administrative code, providing comments to the Legislature regarding potential statutory changes, discussing enforcement issues with the Wisconsin Department of Justice, and reviewing and processing commentaries on the decision. In addition, staff has already fielded many calls from corporations wishing to make independent expenditures (disbursements) and seeking advice so as to comply with Wisconsin law in the context of Citizens United.

The Citizens United decision makes one thing absolutely clear: the United States Supreme Court has held prohibitions on corporate independent expenditures (disbursements) for political purposes violate the First Amendment of the U.S. Constitution and are facially unconstitutional.

This Memorandum shall outline some of the more pressing implications of Citizens United and identify some action items for the Board's consideration.

Recommendations:

1. The Board should adopt a policy statement regarding the enforceability of the §11.38(1)(a)1., Wis. Stats., prohibition on corporate independent expenditures (disbursements) for political purposes. This policy statement should be communicated widely and to all District Attorneys, similar to last year's communication following the Swaffer decision finding §11.23, Wis. Stats., unconstitutional. This policy statement should also be coordinated with the Wisconsin Department of Justice.

2. The Board should request an Advisory Opinion from the Wisconsin Attorney General regarding the impact of Citizens United as to enforcement of ch. 11, Wis. Stats., specifically §11.38(1)(a)1., Wis. Stats.
3. The Board should adopt an interim policy regarding registration, disclosure and disclaimer procedures for a corporation, or association organized under ch. 185 or 193, Wis. Stats., wishing to make independent expenditures (disbursements) for a political purpose in Wisconsin.
4. The Board should promulgate emergency and permanent rules codifying a policy regarding registration, disclosure, and disclaimer requirements for a corporation, or association organized under ch. 185 or 193, Wis. Stats., wishing to make independent expenditures (disbursements) for a political purpose in Wisconsin.
5. The Board should direct staff to continue working with the Legislature to develop legislation to address the implications of Citizens United.

Implications and Action Items:

A. Section 11.38(1)(a)1., Wis. Stats.—Corporate Prohibition

A corporate prohibition on any contribution or disbursement, directly or indirectly, has been a part of Wisconsin statutes since at least 1905. Currently, §11.38(1)(a)1., Wis. Stats., provides:

No foreign or domestic corporation, or association organized under ch. 185 or 193, may make any contribution or disbursement, directly or indirectly, either independently or through any political party, committee, group, candidate or individual for any purpose other than to promote or defeat a referendum.

This current statute specifically prohibits corporate independent expenditures (disbursements) and is very similar to the Federal law that was declared facially unconstitutional in Citizens United. However, Citizens United did reaffirm the constitutionality of prohibitions on corporate contributions to political parties, committees, groups, candidates or individuals upon a compelling governmental interest that the potential for quid pro quo corruption distinguished direct contributions to candidates from independent expenditures.

The State of Wisconsin could be subject to §1983 claims by corporations that may assert political speech was chilled by §11.38, Wis. Stats. In addition to injunctive relief, plaintiffs in §1983 lawsuits may be awarded attorney fees, if successful. Minnesota has already been sued by the Chamber of Commerce for a statute that is similar to Wisconsin's. The Board need only look to last year's Swaffer decision to appreciate the potential consequences of a Court finding a statute unconstitutional. There, a Federal District Court ruled in part that §11.23, Wis. Stats., was unconstitutional as applied to the plaintiff, granted injunctive relief, and awarded \$70,000.00 in attorney fees. In addition, the State of Wisconsin is currently involved in two separate §1983 cases resulting from the adoption of 2009 Wisconsin Act 89, the Impartial Justice Act.

In the interim and until the Legislature revises §11.38, Wis. Stats., there are several actions that the Board can take to clarify enforcement policies. For example, in response to last year's Swaffer decision, the Board directed staff to prepare a policy statement regarding the enforcement risks resulting from §11.23, Wis. Stats., and associated with referenda groups. This policy statement was prepared with the cooperation and coordination of the Wisconsin

Department of Justice and was distributed to all District Attorneys. In addition, the Board directed staff to initiate legislative changes to appropriately address the ruling's effect on §11.23, Wis. Stats.

As yet another example, when the U.S. Supreme Court issued the MCFL decision in 1986 (long before the formation of the Government Accountability Board), no legislative action was taken to address the nonprofit corporate exemption from independent expenditure prohibitions. To this date, no legislative action has been taken. The former State Elections Board initially issued informal, then formal opinions carving out the exemption. This Board reaffirmed the formal opinions and directed staff to promulgate administrative rules to codify them. These rules are before the Board at this meeting and do include a specific statement that the §11.38, Wis. Stats., prohibition on corporate independent expenditures does not apply to qualifying MCFL corporations.

After consultation with Wisconsin Department of Justice representatives, an emphasis was placed on the independence of each District Attorney, who may exercise his or her own discretion in enforcement matters. There is a concern that a policy statement from the Board alone may not be sufficient to clarify enforcement policies. In addition, should the Legislature opt not to pass legislation to revise §11.38, Wis. Stats., there could be an ongoing need to clarify enforcement policies. Staff believes that a formal opinion from the Wisconsin Attorney General could only help to uniformly clarify enforcement policies. Assuming that the Legislature does not pass Legislation to revise §11.38, Wis. Stats., a formal opinion from the Wisconsin Attorney General should address the enforceability of §11.38, Wis. Stats.

The Board should note that there are currently companion bills in the Assembly and Senate, which, if passed, would revise §11.38, Wis. Stats., in such a way to address the Citizens United decision. These bills are Assembly Bill 812 and Senate Bill 540. Staff is uncertain whether these bills will move forward to enactment. In addition, Senate Bill 43 (substitute amendment) was passed by the Senate. This bill was originally tagged the "issue ad" bill. It has yet to be addressed in the Assembly, where the companion bill is Assembly Bill 63. Staff is aware that the Assembly may consider a substitute amendment to address the concerns raised by Citizens United; however, no such substitute amendment has been introduced and in early discussions it does not appear a revision to §11.38, Wis. Stats., would be included.

Staff recommends that the Board adopt a policy statement providing that it will not enforce §11.38(1)(a)(1), Wis. Stats., only as to corporate independent expenditures (disbursements) for political purposes. Such a policy statement should be made in coordination and cooperation with the Wisconsin Department of Justice. In addition, staff recommends that the Board make a request for an Advisory Opinion from the Wisconsin Department of Justice to include an explanation of the enforceability of §11.38(1)(a)1., Wis. Stats.

B. Interim Policy for Corporate Registration, Reporting and Disclaimers

Until such time as the Legislature passes legislation, or the Board adopts emergency or permanent rules, corporations and other organizations will likely need direction to comply with Wisconsin law, while making independent expenditures (disbursements.) Staff has already received numerous calls from corporations wishing to receive advice and direction. Staff recommends that the Board adopt the following interim policy to provide direction on registration, reporting and disclaimers for corporate independent expenditures (disbursements):

The Board is moving forward with promulgation of administrative rules interpreting and applying campaign finance laws to corporate independent expenditures.

The Board adopted this interim policy at its March 23-24 meeting, which shall apply until emergency and/or permanent rules are promulgated.

- (1) A corporation, or association organized under ch. 185 or 193, Wis. Stats., may voluntarily register, establish a separate segregated depository account, name a treasurer and send this information to the G.A.B. on a GAB 1 that the G.A.B. will hold as a pending filing until such time as emergency and/or permanent rules are promulgated.
- (2) A corporation, or association organized under ch. 185 or 193, Wis. Stats., may voluntarily execute and file with the G.A.B. an oath for independent expenses.
- (3) A corporation, or association organized under ch. 185 or 193, Wis. Stats., may voluntarily track received contributions (if any are earmarked for independent expenditures by the contributor) and expenditures, then it may voluntarily report those contributions and expenditures at the times required by §§11.12(6) and 11.20, Wis. Stats.
- (4) The corporation, or association organized under ch. 185 or 193, Wis. Stats., shall comply with §11.30(1); (2)(a) and (d), Wis. Stats., and include an attribution identifying the organization paying for any communication, arising out of independent expenditures on behalf of or in opposition to candidates, with the following words: “Paid for by” followed by the name of the organization and the name of the treasurer or other authorized agent of the organization followed by “Not authorized by any candidate or candidate’s agent or committee.”

Staff shall instruct any corporation, or association organized under ch. 185 or 193, Wis. Stats., that, while the G.A.B. will retain the information they provide, that information should be provided on paper or by e-mail and will not be entered into the Campaign Finance Information System until emergency and/or permanent rules are promulgated.

C. Emergency and Permanent Administrative Rules

Until such time as the Legislature passes legislation that not only addresses permission for corporations to make independent expenditures (disbursements), but also provides more prescribed methods for registration, reporting and disclaimers, staff opines that the Board has rule-making authority to interpret the current statutes to accomplish the same prescribed procedures. The Board should promulgate emergency and permanent rules codifying a policy regarding registration, disclosure, and disclaimer requirements for a corporation, or association

organized under ch. 185 or 193, Wis. Stats., wishing to make independent expenditures (disbursements) for a political purpose in Wisconsin. Such rules could closely resemble the proposed GAB 1.90, which is also before the Board at this meeting. For instance, language similar to the following may be sufficient:

Corporations or associations organized under ch. 185 or 193, Wis. Stats.

- (1) In this section:
 - (a) "Contribution" has the meaning given in s. 11.01(6), Stats.
 - (b) "Disbursement" has the meaning given in s. 11.01(7), Stats.
 - (c) "Filing officer" has the meaning given in s. 11.01(8), Stats.
 - (d) "Incurred obligation" has the meaning given in s. 11.01(11), Stats.
- (2) The prohibition on corporate independent expenditures in s. 11.38, Stats., shall not apply to corporations, or associations organized under ch. 185 or 193, Wis. Stats.
- (3) A corporation, or association organized under ch. 185 or 193, Wis. Stats., that accepts contributions or makes disbursements exceeding \$25 in aggregate during a calendar year shall file a registration statement with the appropriate filing officer and comply with the requirements of s. 11.05(3), Stats.
- (4) A corporation, or association organized under ch. 185 or 193, Wis. Stats., making independent disbursements shall file the oath for independent disbursements required by s. 11.06(7), Stats. A corporation, or association organized under ch. 185 or 193, Wis. Stats., may not make a contribution to any candidate or committee.
- (5) A corporation, or association organized under ch. 185 or 193, Wis. Stats., shall file reports at the times required by ss. 11.12(6) and 11.20, Stats., and include all independent disbursements made, contributions received and made that are earmarked for independent disbursements, obligations incurred, and as follows:

A report of independent disbursements required by s. 11.06(1)(j), Stats.

Information as otherwise required by ss. 11.06(1)(a), (b), (f), (g), (h), (i), (k), and (L), Stats.

A corporation, or association organized under ch. 185 or 193, Wis. Stats., making independent disbursements aggregating more than \$20 later than 15 days prior to a primary or election file the special report of late disbursement required by s. 11.12(6), Stats.
- (6) A corporation, or association organized under ch. 185 or 193, Wis. Stats., shall comply with the requirements of §11.30(1); (2)(a) and (d), Wis. Stats., and include an attribution identifying the organization paying for any communication, arising out of independent expenditures on behalf of or in opposition to

candidates, with the following words: “Paid for by” followed by the name of the organization and the name of the treasurer or other authorized agent of the organization followed by “Not authorized by any candidate or candidate’s agent or committee.”

D. Legislative Recommendation

A member of the Legislature and Legislative Council requested input from staff regarding potential legislation to address Citizens United. In response to these requests, staff worked very diligently to prepare some initial recommendations for distribution to the Legislature in the wake of Citizens United. Following this Memorandum is a proposal that was circulated to some members of the Legislature, Legislative Council, and the Legislative Reference Bureau.

The Board should note that staff feels strongly that Citizens United has opened the door to regulation of more issue-type ads, through a grass roots lobbying provision that requires registration, reporting and disclaimers. The U.S. Supreme Court stressed the importance of the electorate’s right to know and specifically did not limit disclosure and disclaimer requirements to express advocacy or the functional equivalent of express advocacy.

Proposed Motions:

1. **MOTION:** Adopt a policy statement providing that the Government Accountability Board will not enforce the §11.38(1)(a)1., Wis. Stats., prohibition on corporate independent expenditures (disbursements) for political purposes. This policy statement shall be made widely public and distributed to all District Attorneys, in coordination and cooperation with the Wisconsin Department of Justice.
2. **MOTION:** Staff is directed to request an Advisory Opinion from the Wisconsin Attorney General regarding the impact of Citizens United as to enforcement of ch. 11, Wis. Stats., specifically §11.38(1)(a)1., Wis. Stats.
3. **MOTION:** Adopt staff’s interim policy regarding registration, disclosure and disclaimer procedures for a corporation, or association organized under ch. 185 or 193, Wis. Stats., wishing to make independent expenditures (disbursements) for a political purpose in Wisconsin.
4. **MOTION:** Staff shall prepare, for consideration at May 2010 Board meeting, proposed emergency and permanent rules codifying a policy regarding registration, disclosure and disclaimer procedures for a corporation, or association organized under ch. 185 or 193, Wis. Stats., wishing to make independent expenditures (disbursements) for a political purpose in Wisconsin.
5. **MOTION:** Staff shall continue working with the Legislature to develop legislation to address the implications of Citizens United.

Amend Section 9. of SS1 to SB 43 to read:

11.01 (16) (b) 2. A communication which is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate, other than a communication that is exempt from reporting under s. 11.29. A communication is susceptible of no other reasonable interpretation if it is made during the period beginning on the 60th day preceding a general, special, or spring election and ending on the date of that election or during the period beginning on the 30th day preceding a primary election and that includes a reference to or depiction of a clearly identified candidate and:

- i. Refers to the personal qualities, character, or fitness of that candidate;
- ii. Supports or condemns that candidate's position or stance on issues; or
- iii. Supports or condemns that candidate's public record.

Create a new section 11.39 **Independent expenditures by corporations and cooperatives.** (1) Notwithstanding any other provision of law, any corporation or association organized under ch. 185 or 193 may make a disbursement to advocate the election or defeat of any clearly identified candidate or candidates in any election or for a communication referred to in s. 11.01 (16) (b) 2 in accordance with this section. Every corporation and cooperative which desires to make disbursements during any calendar year in excess of \$25, which are to be used to advocate the election or defeat of any clearly identified candidate or candidates in any election or for a communication referred to in s. 11.01 (16) (b) 2. shall designate a depository account. All disbursements which are to be used to advocate the election or defeat of any clearly identified candidate or candidates in any election or for a communication referred to in s. 11.01 (16) (b) 2. shall be made through the depository account. The corporation shall appoint a treasurer and register with the board.

(2) The statement of registration shall include:

- (a) The name, street address, and mailing address of the corporation.
- (b) The name and mailing address of the treasurer and any other custodian of books and accounts of the separate segregated fund.
- (c) The name, mailing address, and position of the principal officers of the corporation.
- (d) The name, street address, mailing address, and account number of the depository account.

The statement shall be signed by an individual authorized to do so by the corporation or association. The appropriate filing officer shall be notified of any change to the registration information within 10 days of the change under s. 11.05 (5).

(3) Each registrant shall make full reports, upon a form prescribed by the board and signed by the fund treasurer, of all disbursements made and obligations incurred for a political purpose. Each report shall contain information covering the period since the last date covered on the previous report and include an itemized statement of every disbursement or incurred obligation exceeding \$20 in amount or value, together with the name and address of the person to whom the disbursement was made or obligation incurred, the date and specific purpose for which the disbursement was made or

obligation incurred, and the name and office of the candidate for whose election or defeat the disbursement was made or obligation incurred.

(4) Each registrant shall make full reports, upon a form prescribed by the board and signed by the fund treasurer, of all contributions received specifically for a political purpose. Each registrant formed for the express purpose of promoting political ideas, and which does not engage in business activities, shall make full reports of all contributions received. Each report shall contain the information required by s. 11.06 where applicable.

Amend 11.02 (Filing officer) to include and each corporation or association subject to s. 11.39.

Amend 11.055 (1) and (2) (Filing fees) to include a reference to a corporation or association required to register under 11.39 (1).

Amend 11.06 (1) (Financial report information) to read “Except as provided in ... and 11.39 (4), each registrant under s. 11.05 and 11.39 . . .”

Amend 11.06 (1) (j) to replace ~~committee~~ with registrant

Amend 11.06 (2) to replace ~~committee or group~~ with registrant.

Amend 11.06 (7) (oath of independent expenditure) to replace ~~committee~~ with registrant.

Amend 11.12 (1) (a) to read: “by or through an individual, committee registered under s. 11.05, or corporation or association registered under s. 11.39 . . .””.

Amend 11.12 (6) (24 hour reporting) to read:

11.12 (6) Every individual or registrant who or which makes a disbursement or incurs an obligation of \$500 or more within 60 days of any election, to be used to advocate the election or defeat of any clearly identified candidate or candidates or for a communication referred to in s. 11.01 (16) (b) 2. shall, within 24 hours of such disbursement or obligation, inform the appropriate filing officer of the information required under s. 11.06 (1) in such manner as the board may prescribe. The information shall also be included in the treasurer’s or individual’s next report.

Amend 11.20 (3) (c) and (d) (Filing requirements) to add corporation or association organized under ch. 185 or 193.

Amend 11.20 (4) and (4m) to to add corporation or association organized under ch. 185 or 193.

Amend 11.21 (16) (electronic filing) to read: “Require each registrant for whom the board serves as filing officer and who or which accepts contributions or makes disbursements in a total amount or value of \$20,000 or more . . .”.

Amend 11.26 (4) (\$10,000 limit) to add after s. 11.05: “or to a corporation or association organized under ch. 185 or 193 and subject to a registration requirement under s. 11.39”.

Amend 11.30 (2) (b) and (d) to add corporation or association organized under ch. 185 or 193.

Delete section 12. of SS1 to SB43, since it is unconstitutional.

Create 13.62 (6m) to read:

13.62 **(6g)** “Grass roots lobbying” means paid advertising and any other activities conducted for the purpose of urging members of the general public to attempt to influence legislative or administrative action.

Create 13.682 to read:

13.682 **Grass roots lobbying.** (1) Any person, not a principal, who makes expenditures or incurs obligations in an aggregate amount exceeding \$500 in a calendar year for the purpose of engaging in grass roots lobbying shall, within 10 days after exceeding \$500, cause to be filed with the board a registration statement specifying the person’s name, address, the general areas of legislative and administrative action which the person is attempting to influence, the names of any agencies in which the person seeks to influence administrative action, and information sufficient to the nature and interest of the person. Such registration shall expire on December 31 of each even-numbered year.

(2) No later than the end of the 15th day after the date on which a person required to register under this section makes an expenditure or incurs an obligation for grass roots lobbying, the person shall report to the board, in such manner as the board may prescribe, each legislative proposal, budget bill subject, other legislative topic, and proposed administrative rule that is the subject of the grass roots lobbying.

(3) The source of every printed advertisement, billboard, handbill, television, radio, or other electronic advertisement or communication which constitutes grass roots lobbying shall clearly appear thereon. Every such communication shall be identified by the words “Paid for by” followed by the name of the person making the payment, incurring the obligation, or assuming responsibility for the communication.

(4) Every person that is registered under this section shall, on or before July 31 and January 31, file with the board, in such manner as the board may prescribe, an expense statement covering the preceding reporting period. The statement shall contain the aggregate expenditures made and obligations incurred for the person’s grass roots lobbying effort for each legislative proposal, budget bill subject, other legislative topic, and proposed administrative rule that was the subject of the person’s grass roots lobbying.

Amend 13.75 (fees) to add 13.75 (6) Filing a registration statement under s. 13.682, \$375.

State of Wisconsin \ Government Accountability Board

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JUDGE WILLIAM EICH
Chairperson

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For the March 23-24, 2010 Meeting

TO: Members, Wisconsin Government Accountability Board

FROM: Kevin J. Kennedy
Director and General Counsel
Government Accountability Board

Prepared and Presented by:

Shane W. Falk, Staff Counsel

SUBJECT: Citizens United v. FEC, 558 U.S. ___, No. 08-205, *slip opinion* (1/21/2010)

Introduction:

This Memorandum shall present a summary of the U.S. Supreme Court's recent decision, Citizens United v. FEC.

Factual Background and Procedural Posture of Citizens United:

Background Facts:

Citizens United is a nonprofit corporation.¹ Citizens United's annual budget is about \$12 million. Most of its funds are from donations by individuals; however, it also accepts a small portion of its funds from for-profit corporations.²

Citizens United has a political action committee (hereafter "PAC") called Citizens United Political Victory Fund, which by its own account is "one of the most active conservative PACs in America."³ In addition, Citizens United's PAC contained millions of dollars in assets.⁴

In January 2008, Citizens United released a film entitled *Hillary: The Movie* (hereafter *Hillary*,) which was a 90-minute documentary about then-Senator Hillary Clinton who was a candidate in the Democratic Party's 2008 Presidential primary elections. *Hillary* mentions Senator Clinton by name and depicts interviews of people, mostly critical of Senator Clinton. *Hillary* was released in theaters and DVD, but Citizens United wanted to increase distribution

¹ Citizens United, Kennedy J., majority opinion, at p. 2.

² Id.

³ Id., Stevens J., dissenting, at p. 27.

⁴ Id., Stevens J., dissenting, at p. 1.

by also releasing it through video-on-demand via cable providers. A cable company offered to pay \$1.2 million to make *Hillary* available on its video-on-demand channel free of charge. Citizens United agreed to pay for the video-on-demand and promote it. Citizens United produced two 10-second ads and one 30-second ad for *Hillary*, which included a short pejorative statement about Senator Clinton followed by the name of the movie and the movie's Website address.⁵

Despite having a PAC that could have funded *Hillary*, Citizens United used general treasury monies to fund the movie and ads promoting it.⁶

Procedural Posture:

In December 2007, Citizens United brought an action in the U.S. District Court for the District of Columbia and sought declaratory and injunctive relief against the FEC, arguing: (1) 2 U.S.C. §441b was unconstitutional as applied to *Hillary*; and (2) the Bipartisan Campaign Reform Act's (hereafter "BCRA") disclaimer and disclosure requirements, BCRA §§201 and 311, are unconstitutional as applied to *Hillary* and to the three ads for the movie.⁷

2 U.S.C. §441b provides, in general, a prohibition of corporate and union use of general treasury funds to make contributions or expenditures in connection with any election to any political federal office. Violation of this prohibition subjects the offender to civil or criminal penalties under 2 U.S.C. §437g.

Section 201 of BCRA is found at 2 U.S.C. §434(f) and provides the registration and reporting requirements for disclosure of electioneering communications.

Section 311 of BCRA is found at 2 U.S.C. §441d and provides the disclaimer requirements for disbursements for an electioneering communication.

As framed by the U.S. Supreme Court, the District Court denied Citizens United's motion for a preliminary injunction and granted the FEC's motion for summary judgment, holding that §441b was facially constitutional under *McConnell* and that §441b was constitutional as applied to *Hillary*. In addition, the District Court upheld the disclaimer and disclosure requirements.⁸

Interestingly, Citizens United had expressly abandoned the facial constitutional challenge to §441b at the District Court level and the parties stipulated to the dismissal of that claim.⁹ In its jurisdictional statement to the U.S. Supreme Court, Citizens United properly advised the Court that it was raising only "an as-applied challenged to the constitutionality of" §441b.¹⁰

Despite the U.S. Supreme Court's prior decisions declaring that it is "only in the most exceptional cases" that we will consider issues outside the questions presented,¹¹ the U.S. Supreme Court noted probable jurisdiction and allowed reargument with supplemental briefing

⁵ *Citizens United*, Kennedy J., majority opinion, at pp. 2-3.

⁶ *Id.*, Stevens J., dissenting at p. 1.

⁷ *Id.* at p. 4.

⁸ *Id.* at pp. 4-5.

⁹ *Citizens United*, Stevens J., dissenting, at p. 4-5.

¹⁰ *Id.* at p. 5.

¹¹ *Id.* at p. 6.

after the Court requested whether it should overrule either or both Austin and the part of McConnell, which addresses the facial validity of 2 U.S.C. §441b.¹²

In dissent, Justice Stevens noted that the appellant had not asserted an exceptional circumstance justifying the review of the facial constitutional challenge and that the majority opinion did not even mention one. Furthermore, Justice Stevens notes that setting the case for reargument was a constructive step, but it did not cure this fundamental problem. Finally, Justice Stevens states: “Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.”¹³

Background Statutes and Regulations:

The following was the state of federal law prior to the Citizens United decision.

Pre-BCRA, corporations and unions were prohibited from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections. 2 U.S.C. §441b (2000 ed.)

BCRA §203 amended §441b to prohibit any “electioneering communication” as well. 2 U.S.C. §441(b)(2) (2006 ed.) An electioneering communication is defined as “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and is made within 30 days of a primary or 60 days of a general election. 2 U.S.C. §434(f)(3)(A). The Federal Election Commission’s (hereafter “FEC”) regulations further define an electioneering communication as a communication that is “publicly distributed.” 11 CFR §100.29(a)(2) (2009). “In the case of a candidate for nomination for President, “publicly distributed” means that the communication can be received by 50,000 or more persons in a State where a primary election is being held within 30 days. 11 CFR §100.29(b)(3)(ii).

Corporations and unions were barred from using their general treasury funds for express advocacy or electioneering communications. Both corporations and unions were allowed to establish a “separate segregated fund” known as a PAC for these purposes. The moneys received by the segregated funds were limited to donations from stockholders and employees of the corporation or, in the case of unions, members of the union. 2 U.S.C. §441b(b)(2).¹⁴

Holdings and Supporting Findings:

I. The constitutional question whether §441b applies to *Hillary* cannot be resolved on other narrower or as applied grounds without chilling political speech and, therefore, the Court rules that §441b is facially unconstitutional due to §441b’s restrictions on corporate independent expenditures. Such restrictions are invalid and cannot be applied to *Hillary*. Austin¹⁵ is overruled, as is the part of McConnell¹⁶ that upheld the extension of §441b’s restrictions to independent corporate expenditures.

A. Narrower and as applied grounds do not resolve the question.

¹² Citizens United, Kennedy J., majority opinion, at p. 5.

¹³ Citizens United, Stevens J., dissenting, at p. 6.

¹⁴ Id., Kennedy J., majority opinion, at pp. 3-4.

¹⁵ Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).

¹⁶ McConnell v. FEC, 540 U.S. 93 (2003).

Section 441b does cover *Hillary* because it qualifies as an “electioneering communication.” The statute cannot be saved by finding that *Hillary* was not “publicly distributed” or interpreting FEC regulations to require a “plausible likelihood that the communication will be viewed by 50,000 or more potential voters.” In addition to the costs and burdens of litigation, such findings or interpretations would require a calculation as to the number of people a particular communication is likely to reach with an inaccurate estimate subjecting the speaker to criminal sanctions.

Hillary is equivalent to express advocacy because it meets the objective functional equivalent test from FEC v. WRTL, 551 U.S. ____ (2007): “a court should find that [a communication] is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President. The movie’s consistent emphasis is on the relevance of historical events to Senator Clinton’s candidacy for President.

The Court must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker. The contention that §441b should be invalidated as applied to movies shown through video-on-demand would raise substantial questions as to the courts’ own lawful authority to begin saying what means of speech should be preferred or disfavored.

The Court declines to adopt an interpretation of statutes that requires intricate case-by-case determinations to verify whether political speech is banned, especially if the Court is convinced that, in the end, this corporation has a constitutional right to speak on this subject. The Court declined *Citizens United*’s request to carve out an exception to §441b’s expenditure ban for nonprofit corporate political speech funded overwhelmingly by individuals (allowing de minimis for-profit corporate funding.) In effect, this interpretation would allow for-profit corporate general treasury funds to be spent for independent expenditures. *Citizens United* does not qualify for the MCFL exemption¹⁷ because some funds used to make the movie were donations from for-profit corporations, which would require the Court to revise MCFL. The Court would have to sever §441b(c)(6) and ignore the plain text of §441b(c)(2).

B. The Court must, in an exercise of its judicial responsibility, consider §441b’s facial validity so as to prevent a prolonged substantial, nationwide chilling effect caused by §441b’s corporate expenditure ban.

The Court cannot resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment. It is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument with broader implications. Here, the lack of a valid basis for an alternative ruling requires full consideration of the continuing effect of the speech suppression upheld in Austin.

¹⁷ FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986)(MCFL): The Court found unconstitutional §441b’s restrictions on corporate expenditures as applied to nonprofit corporations that were formed for the sole purpose of promoting political ideas, did not engage in business activities, and did not accept contributions from for-profit corporations or labor unions.

Citizens United has not waived its facial constitutional challenge to §441b. Even if a party could waive a facial challenge while preserving an as-applied challenge, that would not prevent the Court from reconsidering Austin or addressing the facial validity of §441b because this issue was passed upon by the District Court, when it acknowledged that a ruling on a facial challenge would require overruling McConnell and only the Supreme Court can overrule its decisions.

Citizens United has claimed that the FEC violated its First Amendment rights to free speech and an argument to overrule Austin is merely a new argument to support what has been a consistent claim.

The distinction between facial and as-applied challenges goes to the breadth of the remedy employed by the Court and parties cannot enter into a stipulation that prevents the Court from considering certain remedies, if those remedies are necessary to resolve a claim.

Consideration of the facial validity of §441b is further supported by the following reasons:

- ii. The Government's litigating position causes uncertainty, when it holds out the possibility of ruling for Citizens United on a narrow ground yet refrains from adopting that position.
- iii. Substantial time would be required to bring clarity to the application of the statutory provision on these points in order to avoid any chilling effect caused by some improper interpretation.
- iv. Given the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid criminal liability or the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak—these onerous restrictions function as the equivalent of prior restraint.

C. Austin is overruled and thus provides no basis for allowing the Government to limit corporate independent expenditures. The part of McConnell that upheld the extension of §441b's restrictions to independent corporate expenditures is also overruled. The §441b restrictions are invalid and cannot be applied to *Hillary*.

The Court noted that §441b makes it a felony for all corporations—including nonprofit advocacy corporations—either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election.

Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by the corporation can still speak because the PAC is a separate association from the corporation. The PAC exemption does not allow corporations to speak. Even if a PAC could somehow allow a corporation to speak—and it does not—the option to form a PAC does not alleviate First Amendment problems because administration of PACs are too burdensome and expensive.¹⁸ PACs have to comply with these regulations just to

¹⁸ Citing: McConnell, 540 U.S. at 330-333, Kennedy J., dissenting. Here the Citizens United court adopts Justice Kennedy's dissent from McConnell and notes all the administrative requirements for PACs: expensive to administer and subject to extensive regulations; appoint treasurer; forward donations to treasurer promptly; keep detailed records of identities of

speak. PACs, furthermore, must exist before they can speak and given these onerous restrictions, a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign.

Section 441b's prohibition on corporate independent expenditures is thus a ban on speech as a "restriction on the amount of money a person or group can spend on political communication during a campaign." This statute "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of audience reached."¹⁹

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people and the right of citizens to inquire, to hear, to speak and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office."

Laws that burden political speech are "subject to strict scrutiny," which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest."²⁰ The Court turns to WRTL for a sufficient framework for protecting the relevant First Amendment interests in this case.

Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers.²¹ As instruments of censor, these categories are interrelated: speech restrictions based on the identify of the speaker are all too often simply a means to control content.

Apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

Corporate independent expenditures would not interfere with governmental functions. It is inherent in the nature of political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes. At least before Austin, the Court had not allowed the exclusion of a class of speakers from the general public dialogue.

contributors; preserve receipts for 3 years; file registration statement and report changes within 10 days; detailed monthly reports filed with FEC regarding amount of cash on hand, total amount of receipts detailed by 10 different categories, identification of PAC and candidate committees making contributions, identification of persons making loans in an aggregate amount over \$200, total amount of all disbursements detailed by 12 different categories, names of committees to whom expenditures aggregating over \$200 have been made, total sum of all contributions, total sum of all operating expenses, total sum of all outstanding debts and obligations, and the settlement terms of retirement of any debt or obligation.

¹⁹ Citing: Buckley v. Valeo, 424 U.S.1, 19 (1976)(per curiam).

²⁰ Citing: WRTL, 551 U.S., at 464, Roberts C.J., opinion.

²¹ Citing: First National Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978).

1. We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers.

The Court acknowledged a footnote in Bellotti citing numerous cases in which it affirms it has recognized that First Amendment protections extend to corporations.

This protection has been extended by explicit holdings to the context of political speech and under the rationale of these precedents, political speech does not lose First Amendment protection “simply because its source is a corporation.” Corporations and other associations, like individuals, contribute to the “discussion, debate, and the dissemination of information and ideas” that the First Amendment seeks to foster. The Court has rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because the associations are not “natural persons.” The Court relies heavily on Bellotti for these propositions.

2. In Buckley, the Court upheld limits on direct contributions to candidates upon a compelling governmental interest that the potential for quid pro quo corruption distinguished direct contributions to candidates from independent expenditures.

Buckley did uphold limits on direct contributions to candidates, recognizing a “sufficient important” governmental interest in the “prevention of corruption and the appearance of corruption.” The Court was concerned that large contributions could be given “to secure a political quid pro quo.”

In Buckley, the Court addressed challenges to an independent expenditure ban that applied to individuals as well as corporations and labor unions, but specifically decided only the issue of individual independent expenditures. With respect to individual independent expenditures, the Court emphasized that “the independent expenditure ceiling . . . fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process” because “the absence of prearrangement and coordination . . . alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.” The Buckley Court did not consider the ban on corporate and union independent expenditures; however, had it been challenged in the wake of Buckley, it could not have been squared with the reasoning and analysis of that precedent.

Less than two years after Buckley, Bellotti reaffirmed the First Amendment principle that the Government cannot restrict political speech based on the speaker’s corporate identity, when the Court struck down a state-law prohibition on corporate independent expenditures related to referenda issues. In Bellotti, the Court found no support in the First Amendment, or in the decisions of the Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a

corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property. Holding a corporation to such a test amounts to an impermissible legislative prohibition of speech based upon the identity of the interests that spokesmen may represent in public debate over controversial issues. In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address the public issue.

While Bellotti did not address the constitutionality of a ban on corporate independent expenditures to support candidates (rather only referendum speech,) it would have been unconstitutional under Bellotti's central principle: the First Amendment does not allow political speech restrictions based on a speaker's corporate identity.

3. Austin upheld a direct restriction on the independent expenditure of funds for political speech for the first time in the Court's history upon a new governmental interest: antidistortion. The Court overrules Austin, rejects the antidistortion interest as a basis to limit political speech, and returns to the principle established in Buckley and Bellotti that the Government may not suppress political speech on the basis of the speaker's corporate identity. The independent expenditure restrictions of §441b do not meet a compelling interest of stemming corruption.

In Austin, the Court identified a new governmental interest in limiting political speech: an antidistortion interest. Austin found a compelling governmental interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."

The Government also argued two other compelling interests support Austin's holding that corporate independent expenditure restrictions are constitutional: 1) an anticorruption interest and 2) a share-holder protection interest.

In rejecting the antidistortion interest, the Court noted that the First Amendment prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech. Application of the antidistortion rationale would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form. Political speech is "indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The antidistortion rationale was a means to prevent corporations from obtaining "an unfair advantage in the political marketplace" by using "resources amassed in the economic marketplace." But Buckley rejected the premise that the Government has an interest "in equalizing the relative ability of individuals and groups to influence the outcome of

elections.” The First Amendment’s protections do not depend on the speaker’s “financial ability to engage in public discussion.”²²

The fact that state law grants corporations special advantages (limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets) does not suffice to allow laws prohibiting speech. The State cannot exact as the price of those special advantages the forfeiture of First Amendment rights. It is irrelevant for purposes of the First Amendment that corporate funds may “have little or no correlation to the public’s support for the corporation’s political ideas” because all speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker’s ideas.

Austin interferes with the “open marketplace” of ideas protected by the First Amendment. It permits the Government to ban the political speech of millions of associations of citizens. This censorship is vast in its reach as it muffles the voices that best represent the most significant segments of the economy. As a result, the electorate has been deprived of information, knowledge, and opinion vital to its function. The Government prevents corporate voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests. Factions should be checked by permitting them all to speak and by entrusting the people to judge what is true and what is false.

While lobbying and other corporate communications regularly take place, the speech that §441b forbids is public and all can judge its content and purpose. The First Amendment confirms the freedom to think for ourselves.

Likewise, an anticorruption rationale fails to save §441b. When Buckley examined an expenditure ban, it found “that the governmental interest in preventing corruption and the appearance of corruption [was] inadequate to justify the [ban] on independent expenditures.” While the Buckley Court sustained the limits on direct contributions in order to ensure against the reality or appearance of corruption, it did not extend this rationale to independent expenditures and the Court does not do so here.

Independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption. When Buckley identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to

²² The Court noted that it reaffirmed these conclusions when it invalidated the BCRA provision that increased the cap on contributions to one candidate, if the opponent made certain expenditures from personal funds. Davis v. FEC, 554 U.S. ___, (2008). There the Court held that leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election and the Constitution confers upon voters, not Congress, the power to choose its elected representatives. It is dangerous for Congress to use the election laws to influence voters’ choices.

quid pro quo corruption. That fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt. Reliance on a “generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle. Ingratiation and access are not corruption. The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate and the fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestion that the electorate will refuse “to take part in democratic governance” because of additional political speech made by a corporation or any other speaker.”²³

Finally, the share-holder protection interest (protecting dissenting shareholders from being compelled to fund corporate political speech) is rejected. The First Amendment does not give Government the power or authority to restrict a corporation’s political speech because a single shareholder may object. There is little evidence of abuse that cannot be corrected by shareholders “through the procedures of corporate democracy.”

The Court specifically noted that it did not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process as is found in 2 U.S.C. §441e (contribution and expenditure ban applied to “foreign nationals.”) Section 441b is not limited to corporations or associations that were created in foreign countries or funded predominately by foreign shareholders, so §441b would be overbroad even if the Court assumed, *arguendo*, that the Government has a compelling interest in limiting foreign influence over our political process.

- II. The disclosure and disclaimer requirements of 2 U.S.C. §§434(f) and 441d (respectively) may burden the ability to speak, but they “impose no ceiling on campaign-related activities” or “prevent anyone from speaking” so they are justified by a governmental interest in providing “the electorate with information” about election-related spending sources. Furthermore, the disclosure requirements of 2 U.S.C. §434(f) need not be confined to speech that is the functional equivalent of express advocacy under WRTL’s test for restrictions on independent expenditures.

Under 2 U.S.C. §441d(d)(2), televised electioneering communications funded by anyone other than a candidate must include a disclaimer that “_____ is responsible for the content of this advertising.” The required statement must be made in a “clearly spoken manner,” and displayed on the screen in a “clearly readable

²³ At page 45 of Justice Kennedy’s majority opinion, the Court does acknowledge that if elected officials succumb to improper influences from independent expenditures and if they put expediency before principle, then surely there is a cause for concern. The Court noted that it must give weight to attempts by Congress to seek to dispel either the appearance or reality of these influences, but remedies enacted by law must comply with the First Amendment. “. . .It is our law and our tradition that more speech, not less, is the governing rule.” An outright ban on corporate political speech during the critical preelection period is not a permissible remedy.

manner” for at least four seconds. Under 2 U.S.C. §441d(a)(3), it must also state that the communication “is not authorized by any candidate or candidate’s committee” and it must display the name and address (or Web site address) of the person or group that funded the advertisement.

Under 2 U.S.C. §434(f)(1), any person who spends more than \$10,000.00 on electioneering communications within a calendar year must file a disclosure statement with the FEC. Under 2 U.S.C. §434(f)(2), that statement must identify the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors.

Disclaimer and disclosure requirements may burden the ability to speak, but they “impose no ceiling on campaign-related activities”²⁴ and “do not prevent anyone from speaking.”²⁵

In both Buckley and McConnell, the Court has subjected these requirements to “exacting scrutiny,” which requires a “substantial relation” between the disclosure requirement and a “sufficiently important” governmental interest. In Buckley, the Court explained that disclosure could be justified based on a governmental interest in “providing the electorate with information” about the sources of election-related spending. The McConnell Court applied this interest in rejecting facial challenges to both the disclosure and disclaimer requirements of 2 U.S.C. §§434(f) and 441d (respectively.) The McConnell Court relied on evidence in the record that independent groups were running election-related advertisements “while hiding behind dubious and misleading names.” The McConnell Court, therefore, upheld disclosure and disclaimer requirements on the ground that they would help citizens “make informed choices in the political market place.” As applied challenges are available if a group could show a “reasonable probability” that disclosure of its contributors’ names “will subject them to threats, harassment, or reprisals from either Government officials or private parties.”

Citizens United’s 30-second ad and two 10-second ads to promote *Hillary* do not exempt these communications from disclosure and disclaimer requirements of 2 U.S.C. §§434(f) and 441d (respectively,) despite the fact that a communication that proposes a “commercial transaction” is exempt from 2 U.S.C. §441b’s restrictions on corporate or union funding of electioneering communications.

The Court refused to find that the governmental interest in providing information to the electorate did not justify requiring disclaimers for the commercial advertisements because the ads fell within the definition of “electioneering communication” due to references to then-Senator Clinton by name and pejorative references to her candidacy. The Court emphasized that the required disclaimers “provide the electorate with information” and “insure that the voters are fully informed” about the person or group who is speaking. At the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party.

The Court refused to confine the disclosure requirements to speech that is the functional equivalent of express advocacy. The principal opinion in WRTL limited 2 U.S.C. §441b’s restrictions on independent expenditures to express advocacy and its functional equivalent; however, that distinction cannot be forced upon disclosure

²⁴ Citing: Buckley, 424 U.S. at 64.

²⁵ Citing: McConnell, 540 U.S. at 201.

requirements. Disclosure is a less restrictive alternative to more comprehensive regulations of speech. In Buckley, the Court upheld a disclosure requirement for independent expenditures, even though it invalidated a provision that imposed a ceiling on those expenditures. In McConnell, three Justices who would have found §441b unconstitutional nonetheless voted to uphold the disclosure and disclaimer requirements. The Court noted that it has upheld the registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself. Even though the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election.

Citizens United has offered no evidence that its members may face threats, harassment, or reprisals if their names were disclosed, so an as applied constitutional challenge also fails.

With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits and citizens can see whether elected officials are "in the pocket of so-called moneyed interests." The First Amendment protects political speech and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

For these same above reasons, the Court also upheld the application of the disclaimer and disclosure requirements to the movie *Hillary*.

Brief Analysis

I. In general.

Briefly put, the current Supreme Court ruled (by a 5-4 decision) that bans on corporate and union independent expenditures were facially unconstitutional. To do so, the current Court had to overrule Austin and determine that there is no compelling state interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." The Court did not make a distinction between natural persons and corporations, which the Court referred to as "associations of citizens." Apparently, the only valid compelling interest remaining that may justify some speech restrictions is quid pro quo corruption and the Court believed there was no evidence of that with respect to independent expenditures. The Court did leave open the possibility to apply a quid pro quo corruption rationale to limits on independent expenditures, if evidence is produced that elected officials are succumbing to improper influences from independent expenditures and that the elected officials are putting expediency before principle.

While this is a dramatic departure from 100 years of legislative prohibitions on corporate and union direct and independent expenditures on elections (Federally, The Tillman Act in 1907 prohibited corporate campaign spending and Wisconsin has had such a law since 1905,) the majority does point out that 26 states do not have such restrictions on corporate and union "speech" and the Government did not claim that these expenditures have corrupted the political processes in those states. However, the problem for the majority is that, as Justice Stevens puts it, the Court asked itself the facial constitutional question and since it had been dismissed at the

District Court level, there was no record similar to the 100,000 pages fully evidencing the corruption rationale for the McConnell Court.

The majority clearly re-affirmed the compelling interest to prevent quid pro quo corruption and Buckley's holding that limits on direct contributions to candidates and committees by corporations and unions remain constitutional.

In emphasizing that more speech, not less, is “the rule” and that the First Amendment confirms the freedom to think for ourselves (entrusting the listeners to judge what is true and what is false for themselves,) the Court boxed themselves in with respect disclaimer and disclosure requirements and seems to have opened that door wide for regulation. The Court clearly upheld the constitutionality of disclaimer and disclosure requirements. In fact, the Court went as far as to reject a requirement that disclaimer and disclosure requirements could only be applied if the speech was express advocacy or the functional equivalent of express advocacy. This appears to open all issue advocacy to disclaimer and disclosure requirements.

However, the Court retained the right for persons and corporations making independent expenditures to raise as-applied constitutional challenges to the disclaimer and disclosure requirements, if there is a potential that contributors face threats, harassment, or reprisal. The Court's decision on disclaimers and disclosures was 8-1, with Justice Thomas being the only dissent. Justice Thomas would have found these requirements unconstitutional as well, writing that Congress may not abridge the “right to anonymous speech” based on the “simple interest in providing voters with additional relevant information.”²⁶ Justice Thomas points factually to a case in federal court in the Eastern District of California involving Proposition 8 (proposition regarding marriage rights,) where a group supporting the restriction of rights for gays and lesbians is fighting disclosure of its contributors who are facing threats, harassment, or reprisals.

II. Justice Stevens' Dissent

Justice Stevens' dissent can be summarized as follows and in his own words:

In the end, the Court's rejection of Austin and McConnell comes down to nothing more than its disagreement with their results. Virtually every one of its arguments was made and rejected in those cases, and the majority opinion is essentially an amalgamation of resuscitated dissents. The only relevant thing that has changed since Austin and McConnell is the composition of this Court.

Today's decision is backwards in many senses. It elevates the majority's agenda over the litigants' submissions, facial attacks over as-applied claims, broad constitutional theories over narrow statutory grounds, individual dissenting opinions over precedential holdings, assertion over tradition, absolutism over empiricism, rhetoric over reality.

Justice Stevens' dissent sets forth an extensive discussion of other more narrow grounds upon which to decide Citizens United. Justice Stevens' dissent also questions the judicial activism of the majority with respect to the scope of the case and stare decisis principles in the context of over 100 years of legislative restrictions on corporate and union political campaign spending

²⁶ Relying on McIntyre v. Ohio Election's Commission, 514 U.S. 334 (1995); however, this case dealt with local referenda spending and not large scale independent expenditures advocating the election or defeat of a candidate.

from their own treasuries. Justice Stevens was concerned that the majority placed so much emphasis on statutory exceptions for media corporations in determining that the corporate ban was too selective to be constitutional, when there is an entirely separate provision of the First Amendment that guarantees “free press” and constitutionally justifies the exception.

In footnote 12, Justice Stevens expresses a concern that the majority never used a multinational corporation in its hypotheticals. This is a real concern because in making the points that a corporation is merely an “association of citizens” and that there still may be a compelling interest for the Government to continue to prohibit contributions and expenditures by foreign nationals, the majority loses its argument that the case law should provide clear direction on the interpretation of the First Amendment. Consider the fact that shareholders may not be U.S. citizens, or Justice Stevens’ concern of a multinational corporation that is primarily based in another country. If the majority would uphold bans on campaign spending by foreign nationals, it follows that corporations that are not fully associations of “U.S. citizens” may still be prohibited from campaign spending. As an alternative, if the majority holds firm to its conviction that you may not differentiate First Amendment rights by “speaker,” then it follows that the legislative bans on campaign spending by foreign nationals are also unconstitutional.

Justice Stevens also has an interesting analysis of the Framers’ original intent of the First Amendment in the context of corporations and scolds Justice Scalia’s concurrence as having read out the “Free Press Clause” of the First Amendment, which clearly drew an explicit distinction between “speakers.” In refuting that there is no distinction between corporations and natural persons, Justice Stevens points out that corporations have no consciences, no beliefs, no feelings, no thoughts and no desires. Furthermore, corporations are not themselves members of “We the People” by whom and for whom our Constitution was established. Corporate speech is derivative speech, speech by proxy, and in the realm of campaign spending is the “furthest from the core of political expression.” Bans on corporate speech may affect the way in which individuals disseminate certain messages through the corporate form, but it does not prevent anyone from speaking in his or her own voice.

Justice Stevens also identifies some additional interests justifying the distinction between corporations and others, such as to safeguard the integrity, competitiveness and democratic responsiveness of the electoral process. A corporation must engage in the electoral process with the aim “to enhance the profitability of the company, no matter how persuasive the arguments for a broader or conflicting set of priorities.” In the real world, corporate domination of the airwaves prior to an election may decrease the average listener’s exposure to relevant viewpoints, and it may diminish the citizens’ willingness and capacity to participate in the democratic process. Limits on corporate campaign spending could facilitate First Amendment values by preserving some breathing room around the electoral “marketplace” of ideas, in which the actual people of this Nation determine how they will govern themselves. While there are concerns with any effort to balance the First Amendment rights of speakers against the First Amendment rights of listeners, when the speakers are not real people and when the appeal to “First Amendment principles” depends almost entirely on the listener’s perspective, it becomes necessary to consider how listeners will actually be affected.

In discussing the merits of the antidistortion rationale, Justice Stevens said, “The majority declares by fiat that the appearance of undue influence by high-spending corporations ‘will not cause the electorate to lose faith in our democracy.’” Justice Stevens points to McConnell which shows that the electorate has indicated otherwise, both in opinion polls and in the laws its representatives have passed, which should have left the majority no basis for elevating their own optimism into a tenet of constitutional law.

Justice Stevens identified that the majority's opinion runs afoul of the compelling interest recognized in Caperton v. A.T. Massey Coal Co., 556 U.S. ____ (2009), where the Court accepted the premise that, at least in some circumstances, independent expenditures on candidate elections will raise an intolerable specter of quid pro quo corruption. There, the Court noted that the difficulties of inquiring into actual bias simply underscored the need for objective rules—rules which will perforce turn on the appearance of bias rather than its actual existence. In Caperton, there was no evidence that a bribe or criminal influence was involved, but the Court was moved by the belief that the candidate-Justice would nevertheless feel a debt of gratitude to the independent spender for his extraordinary efforts to get the Justice elected. Justice Stevens pointed out that the majority thought the premise so intuitive that it repeatedly referred to the independent expenditures as “contributions” to the candidate-Justice, even though 99.97% of the expenditures were independent and only .03% were truly direct contributions to the candidate.

Finally, Justice Stevens discusses the concern to protect the rights of shareholders from a kind of coerced speech: electioneering expenditures that do not reflect their support. Shareholders who disagree with the corporation's electoral message may find their financial investments being used to undermine their political convictions and many shareholders are so by virtue of mutual funds, pensions, etc. that cannot be easily divested or changed. The PAC mechanism, by contrast, helps assure that those who pay for an electioneering communication actually support its content and that managers do not use general treasuries to advance personal agendas. The majority relies too heavily on corporate democracy, but many corporate lawyers will tell you that “these rights are so limited as to be almost nonexistent,” given the internal authority wielded by boards and managers and the expansive protections afforded by the business judgment rule. In footnote 76, Justice Stevens does point out that legislatures remain free in their incorporation and tax laws to condition the types of activities in which corporations may engage, including electioneering activity, on specific disclosure requirements or on prior express approval by shareholders or members.

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JUDGE WILLIAM EICH
Chairperson

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For the March 23-24, 2010 Meeting

TO: Members, Wisconsin Government Accountability Board

FROM: Kevin J. Kennedy
Director and General Counsel
Government Accountability Board

Prepared and Presented by:

Shane W. Falk, Staff Counsel

SUBJECT: Promulgation of Rule GAB 1.28, Regarding Definition of "Political Purpose"

Introduction and Recommendation:

At the direction of the Board and also upon request from the Legislature, staff recalled Clearinghouse Rule 09-013 regarding revisions to GAB 1.28, Wis. Adm. Code, from the two Legislative Committees charged with reviewing authority of the rule (Senate Committee on Labor, Elections, and Urban Affairs and Assembly Committee on Elections and Campaign Reform.) The Board had expressed a desire to receive and review the U.S. Supreme Court decision, Citizens United v. FEC, before continuing the promulgation of the rule so as to incorporate any necessary revisions due to the decision. This recall request was completed on July 1, 2009, when the Chief Clerks of the Assembly and Senate returned the Legislative Report to the Government Accountability Board, thus relinquishing the Legislature's jurisdiction over the rule and returning jurisdiction to the Board.

Pursuant to §227.19(4)(b)3m., Wis. Stats., the Board is within its statutory authority to resubmit the rule to the Legislature and continue the rule promulgation process, with or without modifications to the rule.

Staff recommends that the Board resubmit the proposed rule to the Legislature in its recalled form, but with some modifications to the analysis of the rule. See attached revised rule analysis, revisions in **bold** font. Staff opines that Citizens United v. FEC does not affect the substance of the text of the rule, but some reference to the case should be noted in the analysis nonetheless. While Citizens United v. FEC reaffirmed FEC v. WRTL which was the basis for the proposed rule, Citizens United did permit corporate independent expenditures.

Staff also recommends that the Board authorize final promulgation of the rule.

Background:

Following the public hearing for GAB 1.28 on March 30, 2009, the Government Accountability Board re-affirmed the final draft of the rule and directed the staff to continue forward with rule-making procedures.

Rule-making procedures required the submission of a Notice and Legislative Report to the Chief Clerks of both the Senate and Assembly. This was completed on April 29, 2009. By operation of §227.19(2), Wis. Stats., the Chief Clerks were required to refer the Notice and Legislative Report to the required standing committees. This process was completed in the Senate on May 4, 2009 (Committee on Labor, Elections, and Urban Affairs, Chair Sen. Spencer Coggs) and in the Assembly on May 7, 2009 (Committee on Elections and Campaign Finance Reform, Chair Rep. Jeff Smith.)

By operation of §227.19(4)(b)1., Wis. Stats., each respective committee had 30 days to complete its review of the proposed GAB 1.28. Pursuant to the same statute, on May 8, 2009, Sen. Coggs requested a meeting with G.A.B. staff, which extended the Senate Committee's review of the rule another 30 days to July 3, 2009. On May 12, 2009, Rep. Smith requested a meeting with G.A.B. staff, which extended the Assembly Committee's review of the rule another 30 days to July 6, 2009.

On March 30, 2009, the Government Accountability Board expressed a concern regarding the potential impact of Citizens United v. FEC on the rule and directed staff to delay publication and final promulgation of the rule until the Board had an opportunity to review the U.S. Supreme Court's decision. The Legislative Committees expressed similar concerns during their review of the rule. On June 22, 2009, the Board directed staff to recall the rule so as to preserve jurisdiction for further consideration following the release of Citizens United v. FEC. Staff recalled the rule on June 25, 2009 and the Legislative Committees returned the rule to the Government Accountability Board on July 1, 2009.

Current Status:

Should the Board direct staff to resubmit the rule to the Legislature, the Chief Clerks for each house of the Legislature will have 10 business days from receipt to refer the rule to the relevant standing committees. The committees will likely again be the Senate Committee on Labor, Elections, and Urban Affairs and the Assembly Committee on Elections and Campaign Reform. Upon referral from the Chief Clerks, these committees will then have 30 days to review the rule, pursuant to §227.19(4)(b)3m., Wis. Stats.

Either or both committees may object to the rule. If an objection is made, the rule shall be referred to the Joint Committee for Review of Administrative Rules, pursuant to §227.19(5), Wis. Stats., where another 30 day review period ensues. If the Joint Committee for Review of Administrative Rules concurs in an objection, it shall introduce a bill in each house to support the objection, pursuant to §227.19(5)(e), Wis. Stats.

Analysis:

The long awaited decision from the U.S. Supreme Court, Citizens United v. FEC, 558 U.S. ___, No. 08-205, *slip opinion* (January 21, 2010), did not affect the holding of FEC v. WRTL, 551 U.S. 449 (2007), which was the legal basis for the substantive portions of revisions to GAB 1.28. In deciding Citizens United, the U.S. Supreme Court could have revisited and modified the holding of WRTL. This is not what the U.S. Supreme Court did in Citizens United. Rather, the Court specifically relied upon the WRTL decision to hold that the *Hillary*

movie, and the ads promoting the movie, were the “functional equivalent” of express advocacy and therefore subject to the 2 U.S.C. §441b prohibitions on corporate “electioneering communications.” In short, the Court applied the WRTL holding: “the functional-equivalent test is objective: ‘a court should find that [a communication] is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.’” Citizens United at p. 7, *slip opinion*. The Court specifically held that under this test, *Hillary* and the ads promoting it, are equivalent to express advocacy. Id. at pp. 7 and 52.

In analyzing the objective “functional-equivalent test,” the Court noted that *Hillary*, the movie, was in essence a feature-length negative advertisement that urged viewers to vote against Senator Clinton for President. “In light of historical footage, interviews with persons critical of her, and voiceover narration, the film would be understood by most viewers as an extended criticism of Senator Clinton’s character and her fitness for the office of the Presidency.” Id. at 7-8. The Court went further and explained:

The narrative may contain more suggestions and arguments than facts, but there is little doubt that the thesis of the film is that she is unfit for the Presidency. The movie concentrates on alleged wrongdoing during the Clinton administration, Senator Clinton’s qualifications and fitness for office, and policies the commentators predict she would pursue if elected President. It calls Senator Clinton “Machiavellian,” App. 64a, and asks whether she is “the most qualified to hit the ground running if elected President,” *id.*, at 88a. The narrator reminds viewers that “Americans have never been keen on dynasties” and that “a vote for Hillary is a vote to continue 20 years of a Bush or a Clinton in the White House,” *id.*, at 143a-144a.

Citizens United argues that *Hillary* is just “a documentary film that examines certain historical events.” Brief for Appellant 35. We disagree. The movie’s consistent emphasis is on the relevance of these events to Senator Clinton’s candidacy for President. The narrator begins by asking “could [Senator Clinton] become the first female President in the history of the United States?” App. 35a. And the narrator reiterates the movie’s message in his closing line: “Finally, before America decides on our next president, voters should need no reminders of . . . what’s at stake—the well being and prosperity of our nation.” *Id.*, at 144a-145a. Citizens United at p. 8, *slip opinion*.

The Court confirmed the District Court’s finding, there is no reasonable interpretation of *Hillary* other than an appeal to vote against Senator Clinton. “Under the standard stated in McConnell and as further elaborated in WRTL, the film qualifies as the functional equivalent of express advocacy.” Id. at p. 8.

The Court also found that the one 30-second and two 10-second ads to promote *Hillary* fell within the definition of an “electioneering communication.” Id. at p. 52. The ads referred to then-Senator Clinton by name shortly before a primary and contained pejorative references to her candidacy. Id.

The U.S. Supreme Court’s holding and rationale from Citizens United reaffirms the WRTL “functional-equivalent test.” Currently, §11.01(16)(a), Wis. Stats., defines acts which are done for “political purposes,” and that definition includes, but is not limited to, express advocacy. The current version of GAB §1.28(2)(c), Wis. Adm. Code, identifies “magic words” qualifying a communication as express advocacy, but also provides that the “functional equivalents” do so as well. Further clarification of this statute and administrative code provision is warranted, in

the context of the U.S. Supreme Court's holdings in WRTL and Citizens United. The proposed rule GAB 1.28 and the revised analysis section appropriately codify the "functional-equivalent test." Promulgation of the proposed rule GAB 1.28 will provide clarity for any person, group, committee or organization wishing to make communications for a political purpose.

Proposed Motions:

MOTIONS:

1. Approve revisions to GAB 1.28 in the rule analysis section and reaffirm the text of the rule.
2. Pursuant to §227.19(4)(b)3m., staff shall resubmit GAB 1.28 to the Legislature with the amended rule analysis.
3. Staff shall continue all other steps necessary to complete promulgation of GAB 1.28.

ORDER OF THE GOVERNMENT ACCOUNTABILITY BOARD
CR 09-013

The Wisconsin Government Accountability Board proposes an order to amend s. GAB 1.28, Wis. Adm. Code, relating to the definition of the term “political purpose.”

ANALYSIS PREPARED BY GOVERNMENT ACCOUNTABILITY BOARD:

1. Statute Interpreted: s.11.01(16), Stats.
2. Statutory Authority: ss. 5.05(1)(f) and 227.11(2)(a), Stats.
3. Explanation of agency authority: Under the existing statute, s. 11.01(16), Stats., an act is for “political purposes” when by its nature, intent or manner it directly or indirectly influences or tends to influence voting at an election. Such an act includes support or opposition to a person’s present or future candidacy. Further, s. 11.01(16)(a)1., Stats., provides that acts which are for “political purposes” include but are not limited to the making of a communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate. The existing rule, s. GAB 1.28(2)(c), provides that the campaign finance regulations under ch. 11 of the Wisconsin Statutes apply to making a communication that contains one or more specific words “or their functional equivalents” with reference to a clearly identified candidate that expressly advocates the election or defeat of that candidate and that unambiguously relates to the campaign of that candidate.

Under the existing statute, s. 11.01(16)(a)1., Stats., and rule, s. GAB 1.28(2)(c), individuals and organizations that do not spend money to expressly advocate the election or defeat of a clearly identified candidate, or to advocate a vote “Yes” or vote “No” at a referendum, are not subject to campaign finance regulation under ch.11 of the Wisconsin Statutes. The term “expressly advocate” initially was limited to so-called “magic words” or their verbal equivalents. The Wisconsin Supreme Court, in *Wisconsin Manufacturers & Commerce (WMC) v. State Elections Board*, 227 Wis.2d 650 (1999), has opined that if the Government Accountability Board’s predecessor, the Elections Board, wished to adopt a more inclusive interpretation of the term “express advocacy,” it could do so by way of a rule. The Wisconsin Court of Appeals, in *Wisconsin Coalition for Voter Participation, Inc. v. State Elections Board*, 231 Wis.2d 670 (Wis. Ct. App. 1999), further opined:

And while, as plaintiffs point out, “express advocacy” on behalf of a candidate is one part of the statutory definition of “political purpose,” it is not the only part. Under s. 11.01(16), Stats., for example, an act is also done for a political purpose if it is undertaken “for the purpose of influencing the election . . . of any individual.

* * *

Contrary to plaintiffs’ assertions, then, the term “political purposes” is not restricted by the cases, the statutes or the code to acts of express advocacy. It encompasses many acts undertaken to influence a candidate’s election—including making contributions to an election campaign.

The United States Supreme Court, in *McConnell et al. v. Federal Election Commission (FEC) et al.*, 540 U.S. 93 (2003), in a December 10, 2003 opinion, has said that Congress and state legislatures may regulate political speech that is not limited to “express advocacy.” Specifically, the *McConnell* Court upheld, as facially constitutional, broader federal regulations of communications that (1) refer to a clearly identified candidate; (2) are made within 60 days before a general election or 30 days before a primary election; and (3) are targeted to the relevant electorate. The *McConnell* Court further opined:

Nor are we persuaded, independent of our precedents, that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy. That notion cannot be squared with our longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad Indeed, the unmistakable lesson from the record in this litigation . . . is that *Buckley’s* magic-words requirement is functionally meaningless Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election.

In *Federal Election Comm’n. v. Wisconsin Right To Life, Inc. (WRTL II)*, 550 U.S. 549 (2007), a United States Supreme Court case, Chief Justice Roberts writing for the majority, opined that an ad is the functional equivalent of express advocacy, if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate, i.e. mentions an election, candidacy, political party, or challenger; takes a position on a candidate’s character, qualifications, or fitness for office; condemns a candidate’s record on a particular issue.

In *Citizens United v. FEC*, 558 U.S. ___, No. 08-205, pp. 7-8, slip opinion (January 21, 2010), the Court applied the *McConnell* and *WRTLII* holdings and stated: “the functional-equivalent test is objective: ‘a court should find that [a communication] is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate’.”

The revised rule will more clearly specify those communications that may not reach the level of “magic words” express advocacy, yet are subject to regulation because they are the functional equivalent to express advocacy, for “political

purposes,” and susceptible of no other reasonable interpretation other than as an appeal to vote for or against a specific candidate.

4. Related statute(s) or rule(s): s. 11.01(16), Stats., and s. GAB 1.28, Wis. Adm. Code.
5. Plain language analysis: The revised rule will subject to regulation communications that are “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” The revised rule will subject communications meeting this criteria to the applicable campaign finance regulations and requirements of ch. 11, Stats. **The scope of regulation will be subject to the United States Supreme Court Decision, *Citizens United vs. FEC* (No. 08-205) permitting the use of corporate and union general treasury funds for independent expenditures.**
6. Summary of, and comparison with, existing or proposed federal regulations: The United States Supreme Court upheld regulation of political communications called “electioneering communications” in its December 10, 2003 decision: *McConnell et al. v. Federal Election Commission, et al.* (No.02-1674), its June 25, 2007 decision of: *Federal Election Commission (FEC) v. Wisconsin Right to Life, Inc. (WRTL II)*, (No.06-969and 970), **and pursuant to its January 21, 2010 decision of: *Citizens United vs. FEC* (No. 08-205).**

The *McConnell* decision is a review of relatively recent federal legislation – The Bipartisan Campaign Reform Act of 2002 (BCRA) – amending, principally, the Federal Election Campaign Act of 1971 (as amended). A substantial portion of the *McConnell* Court’s decision upholds provisions of BCRA that establish a new form of regulated political communication – “electioneering communications” – and that subject that form of communication to disclosure requirements as well as to other limitations, such as the prohibition of corporate and labor disbursements for electioneering communications in BCRA ss. 201, 203. BCRA generally defines an “electioneering communication” as a broadcast, cable, or satellite advertisement that “refers” to a clearly identified federal candidate, is made within 60 days of a general election or 30 days of a primary and if for House or Senate elections, is targeted to the relevant electorate.

In addition, the Federal Election Commission (FEC) promulgated regulations further implementing BCRA (generally 11 CFR Parts 100-114) and made revisions incorporating the *WRTL II* decision by the United States Supreme Court (generally 11 CFR Parts 104, 114.) The FEC regulates “electioneering communications.”

7. Comparison with rules in adjacent states:

Illinois has a rule requiring a nonprofit organization to file financial reports with the State Board of Elections if it: 1) is not a labor union; 2) has not established a

political committee; and 3) accepts or spends more than \$5,000 in any 12-month period in the aggregate:

- A) supporting or opposing candidates for public office or questions of public policy that are to appear on a ballot at an election; and/or
- B) for electioneering communications.

In addition, the same rule mandates all the same election reports of contributions and expenditures in the same manner as political committees, and the nonprofit organizations are subject to the same civil penalties for failure to file or delinquent filing. (See Illinois Administrative Code, Title 26, Chapter 1, Part 100, s. 100.130).

Iowa prohibits direct or indirect corporate contributions to committees or to expressly advocate for a vote. (s. 68A.503(1), Iowa Stats.) Iowa does allow corporations to use their funds to encourage registration of voters and participation in the political process or to publicize public issues, but provided that no part of those contributions are used to expressly advocate the nomination, election, or defeat of any candidate for public office. (s. 68A.503(4), Iowa Stats.) Iowa does not have any additional rules further defining indirect corporate contributions or expressly advocating for a vote.

Michigan prohibits corporate and labor contributions for political purposes (s. 169.254, Mich. Stats.) and requires registration and reporting for any independent expenditures of \$100.01 or more (s. 169.251, Mich. Stats.) Michigan does not have any additional rules defining political purposes.

Minnesota statutes prohibit direct and indirect corporate contributions and independent expenditures to promote or defeat the candidacy of an individual. (s. 211B.15(Subds. 2 and 3), Minn. Stats.) A violation of this statute could subject the corporation to a \$40,000.00 penalty and forfeiture of the right to do business in Minnesota. A person violating this statute could receive a \$20,000.00 penalty and up to 5 years in prison. Minnesota does not have any additional rules defining indirect influence on voting. (s. 211B15 (Subds. 6 and 7), Minn. Stats.)

8. Summary of factual data and analytical methodologies: Adoption of the rule was primarily predicated on federal and state statutes, regulations, and case law. Additional factual data was considered at several Government Accountability Board public meetings, specifically the expenditures on television advertisements, and the actual transcripts for the same, as aired during a recent Wisconsin Supreme Court race.
9. Analysis and supporting documentation used to determine effect on small businesses: The rule will have no effect on small business, nor any economic impact.
10. Effect on small business: The creation of this rule does not affect business.

11. Agency contact person: Shane W. Falk, Staff Counsel, Government Accountability Board, 212 E. Washington Avenue, 3rd Floor, P.O. Box 7984, Madison, Wisconsin 53707-7984; Phone 266-2094; Shane.Falk@wisconsin.gov

FISCAL ESTIMATE: The creation of this rule has no fiscal effect.

INITIAL REGULATORY FLEXIBILITY ANALYSIS: The creation of this rule does not affect business.

TEXT OF PROPOSED RULE:

SECTION 1. GAB 1.28 is amended to read:

GAB 1.28 Scope of regulated activity; election of candidates.

(1) Definitions. As used in this rule:

(a) “Political committee” means every committee which is formed primarily to influence elections or which is under the control of a candidate.

(b) “Communication” means any printed advertisement, billboard, handbill, sample ballot, television or radio advertisement, telephone call, e-mail, internet posting, and any other form of communication that may be utilized for a political purpose.

(c) “Contributions for political purposes” means contributions made to 1) a candidate, or 2) a political committee or 3) an individual who makes contributions to a candidate or political committee or incurs obligations or makes disbursements for ~~the purpose of expressly advocating the election or defeat of an identified candidate~~ political purposes.

(2) Individuals other than candidates and ~~committees~~ persons other than political committees are subject to the applicable ~~disclosure related and recordkeeping related~~ requirements of ch. 11, Stats., ~~only~~ when they:

(a) Make contributions or disbursements for political purposes, or

(b) Make contributions to any person at the request or with the authorization of a candidate or political committee, or

(c) Make a communication ~~containing~~ for a political purpose.

(3) A communication is for a “political purpose” if either of the following applies:

(a) The communication contains terms such as the following or their functional equivalents with reference to a clearly identified candidate that expressly advocates the election or defeat of that candidate and that unambiguously relates to the campaign of that candidate:

1. "Vote for;"
2. "Elect;"
3. "Support;"
4. "Cast your ballot for;"
5. "Smith for Assembly;"
6. "Vote against;"
7. "Defeat;" or
8. "Reject."

(b) The communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. A communication is susceptible of no other reasonable interpretation if it is made during the period beginning on the 60th day preceding a general, special, or spring election and ending on the date of that election or during the period beginning on the 30th day preceding a primary election and ending on the date of that election and that includes a reference to or depiction of a clearly identified candidate and:

1. Refers to the personal qualities, character, or fitness of that candidate;
2. Supports or condemns that candidate's position or stance on issues; or
3. Supports or condemns that candidate's public record.

~~(3)~~(4) Consistent with s. 11.05 (2), Stats., nothing in sub. (1) ~~or~~ (2), or (3) should be construed as requiring registration and reporting, under ss. 11.05 and 11.06, Stats., of an individual whose only activity is the making of contributions.

SECTION 2. EFFECTIVE DATE.

This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.(22)(intro), Stats.

Dated March 23, 2010

KEVIN J. KENNEDY
Government Accountability Board
Director and General Counsel

State of Wisconsin \ Government Accountability Board

212 East Washington Avenue, 3rd Floor
Post Office Box 7984
Madison, WI 53707-7984
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<http://gab.wi.gov>



JUDGE WILLIAM EICH
Chairperson

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For the March 23-24, 2009 Meeting

TO: Members, Wisconsin Government Accountability Board

FROM: Kevin J. Kennedy
Director and General Counsel
Government Accountability Board

Prepared and Presented by:

Shane W. Falk, Staff Counsel

SUBJECT: Promulgation and Creation of ch. GAB §1.90, Wis. Adm. Code

Introduction and Recommendation:

The promulgation and creation of GAB 1.90 was last before the Board at the December 17, 2009 meeting. The proposed creation of GAB 1.90 would codify four informal opinions of the Board regarding corporations that qualify for exemption from Wisconsin's §11.38, Stats., prohibition on corporate expenditures pursuant to the U.S. Supreme Court case entitled *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)*, 479 U.S. 238 (1986). The Federal Election Commission codified *MCFL* into rules long ago. The four informal opinions relied upon in Wisconsin are lengthy and likely cumbersome to use in practice. The codification of *MCFL* into ch. GAB §1.90, Wis. Adm. Code, will provide clarity to corporations wishing to qualify for the exemption from Wisconsin's §11.38, Stats., prohibition on corporate expenditures.

Public comments by Attorney Mike Wittenwyler raised two concerns regarding the proposed rule: 1) the effect of the pending U.S. Supreme Court decision *Citizens United v. FEC* and 2) the scope of campaign finance reporting required by the proposed rule. See also attached, Letter from Attorney Wittenwyler dated December 17, 2009. Attorney Wittenwyler was concerned that the *Citizens United* decision may have a direct impact on the continued need for a proposed rule. The Board agreed and directed staff to review the decision when it was released and return to the Board with a proposed rule addressing any issues raised by *Citizens United* and Attorney Wittenwyler's concerns regarding the scope of the proposed rule's campaign finance reporting requirements. The Board did, however, approve the Statement of Scope for the proposed rule.

Staff opines that *Citizens United v. FEC* does not affect the substance of or the need for the text of the rule, but some reference to the case should be noted in the analysis nonetheless. In effect, the U.S. Supreme Court has now issued two decisions permitting certain corporate political expenditures. *Citizens United* stands for the proposition that certain political

expenditures by for-profit corporations are permitted and *MCFL* continues to stand for the proposition that certain political expenditures by non-profit corporations are permitted. Currently, Wisconsin statutes have not codified these Supreme Court opinions.

Attached to this Memorandum are the revised proposed Notice of Proposed Order Adopting Rule, Notice of Submittal to Legislative Council Clearinghouse, and Notice of Hearing. The Analysis section of the Notice of Proposed Order provides more details on the proposed rule. The codification and formal recognition of MCFL corporations will require staff to revise the registration statement, Form GAB-1, to include MCFL corporations as an option for registration. This is necessary because *MCFL* does not classify MCFL corporations as political committees, which is the closest option for registration type on the current Form GAB-1.

Approval of the attached rulemaking documents will allow staff to proceed forward with promulgation of the rules necessary to create ch. GAB §1.90, Wis. Adm. Code, and keep things moving between Board meetings.

Background and Analysis:

Wisconsin statutes currently provide that all corporations are prohibited from making contributions or disbursements for a political purpose other than to support or oppose a referendum. §11.38, Stats.

However, in *FEC v. MCFL*, 479 U.S. 238 (1986), the Supreme Court held that the federal statute prohibiting corporate political contributions and disbursements was unconstitutional as applied to a nonprofit corporation's independent disbursements. This decision created a class of corporations, commonly referred to as MCFLs, that were exempt from prohibitions on corporate independent disbursements. To qualify for this exemption the corporation must meet the following requirements:

[I]t was formed for the express purpose of promoting political ideas, and cannot engage in business activities. . . . [I]t has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. . . . [It] was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities.

Id. at 264.

MCFL organizations are still required to file the same campaign finance disclosure reports as other entities making independent disbursements. *Id.* at 263.

In *Citizens United*, the U.S. Supreme Court considered, and rejected application of *MCFL* to the facts before the Court. *Citizens United* asked the Supreme Court to expand the *MCFL* holding and carve out an exemption to the 2 U.S.C. §441b expenditure ban for nonprofit corporate political speech funded overwhelmingly by individuals. *Citizens United*, p. 10 (No. 08-205), *slip opinion* (January 21, 2010). The Court found that *Citizens United* did not qualify for the *MCFL* exemption because some funds used to make the *Hillary* movie were donations from for-profit corporations. *Id.* In finding that *Citizens United* did not qualify for the *MCFL* exemption, the Court noted that the *MCFL* exemption only applies to nonprofit corporations that were formed for the sole purpose of promoting political ideas, did not engage in business activities, and did not accept contributions from for-profit corporations or labor unions. *Id.*

The Court went on to decide *Citizens United* on separate grounds distinct from the standards laid out in the prior *MCFL* decision. Staff opines that this then has left in place the *MCFL*

exemption and standards. This brings the Board full circle to the initial need to codify the MCFL requirements so as to provide clarity and direction for certain nonprofit corporations wishing to make political expenditures in Wisconsin.

Furthermore, in *Citizens United* the U.S. Supreme Court seemingly strengthened the rationale for disclosure and disclaimer requirements. The Court noted that disclosure and disclaimer requirements may burden the ability to speak, but they “impose no ceiling on campaign-related activities and do not prevent anyone from speaking.” *Citizens United* at p. 51 (citing *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) and *McConnell v. FEC*, 540 U.S. 93, 201 (2003)). The Court reaffirmed *Buckley’s* rationale that disclosure could be justified based on a governmental interest in “providing the electorate with information” about the sources of election-related spending. *Id.* The Court also reaffirmed *McConnell’s* rationale that disclosure and disclaimer requirements could also be justified based on a governmental interest to help citizens “make informed choices in the political marketplace.” *Id.* at pp. 51-52. Furthermore, the Court emphasized that disclaimers “provide the electorate with information” and “insure that the voters are fully informed” about the person or group who is speaking. *Id.* at pp. 52-53 (citing *McConnell* at 196 and *Buckley* at 76.)

Proposed s. GAB 1.90, as revised following *Citizens United*, codifies the reporting requirements for MCFL organizations as set forth in four informal opinions of the Board.

Proposed Motions:

1. **MOTION:** Pursuant to §§5.05(1)(f), 227.11(2)(a), 227.14(4m), 227.15(1), and 227.16-17, Wis. Stats., the Board formally approves the attached Notice of Proposed Order Adopting Rule, Notice of Submittal to Legislative Council Clearinghouse, and Notice of Hearing for the creation of ch. GAB §1.90, Wis. Adm. Code, and directs staff to proceed with promulgation of the rules.
2. **MOTION:** Staff shall take all other steps necessary to complete promulgation of the rules creating ch. GAB §1.90, Wis. Adm. Code.
3. **MOTION:** Staff shall revise Form GAB-1, as necessary, to include MCFL corporations as an option for registration.
4. **MOTION:** Formally withdraw the four informal MCFL opinions upon publication and official effective date of ch. GAB §1.90.

December 17, 2009

VIA HAND DELIVERY

Wisconsin Government Accountability Board
212 East Washington Avenue, 3rd Floor
Madison, WI 53703

Proposed GAB § 1.90 / MCFL Organizations

Gentlemen:

We write today as attorneys who regularly work with MCFL organizations active in Wisconsin and in response to the memorandum and materials distributed to the members of the Wisconsin Government Accountability Board (the “G.A.B.”) for today’s meeting.

The materials outline the creation of a new Wisconsin Administrative Code provision, GAB § 1.90, to address certain corporations that qualify for exemption from the prohibition on corporate expenditures under Wis. Stat. § 11.38. The exemptions are pursuant to the U.S. Supreme Court’s decision in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) and the organizations that qualify for the exemptions are commonly referred to as “MCFL organizations.”

We appreciate that the Board seeks to provide clarity to the regulated community by codifying the four informal opinions by the former Elections Board. However, as currently drafted, the proposed rule would impose unconstitutional reporting requirements for these MCFL organizations. Moreover, any rule involving MCFL organizations and independent expenditures paid for by corporations is likely to be affected by the U.S. Supreme Court’s holding in *Citizens United v. FEC*. Accordingly, we encourage the G.A.B. to reconsider both the scope and timing of this proposed rule.

MCFL ORGANIZATIONS

The U.S. Supreme Court has held (and the Federal Election Commission (“FEC”) has codified in 11 C.F.R. § 114.10) that certain qualified nonprofit corporations can directly sponsor independent expenditures (communications by third-parties to the general public expressly advocating for a candidate’s election or defeat). An organization that qualifies for this exemption (a “Qualified Non-Profit” or “MCFL organization”) is a tax-exempt section 501(c)(4) advocacy organization that accepts no corporate or union treasury funds, is not affiliated with

any corporation or union, and whose exclusive purpose is ideological. In Wisconsin, these organizations are generally incorporated as nonstock corporations under Chapter 181 of the Wisconsin Statutes. Unlike labor organizations and other corporations, an MCFL organization can directly spend its funds on independent expenditures, without establishing a political action committee (“PAC”).

The purpose of MCFL status is to give ideological “social welfare” or “advocacy” organizations that are incorporated the ability to avoid the campaign finance law restrictions that apply to corporations organized for economic gain. Specifically, because resources available to an MCFL organization are a function of its success in the *ideological* marketplace (as opposed to the *economic* marketplace), the U.S. Supreme Court found it unnecessary to require MCFL organizations to finance their independent expenditure communications through a PAC. Such an obligation, according to the U.S. Supreme Court, would impose a substantial burden on the First Amendment rights of many small nonprofit corporations by making their efforts to engage in protected political activities “a severely demanding task.” *See FEC v. MCFL*, 479 U.S. 238.

CONSTITUTIONAL RESTRICTIONS ON MCFL REPORTING REQUIREMENTS

Along with concluding that MCFL organizations may spend corporate money directly on independent expenditures, the Court also concluded that MCFL organizations need only report the information necessary to monitor the organization’s independent expenditure activity and receipt of earmarked contributions for these activities, and that it was unconstitutional to impose the more rigorous reporting requirements that apply to PACs. *Id.*

As your materials note, the FEC codified *MCFL* at 11 C.F.R. § 114.10. This regulation enumerates five requirements for qualifying for the MCFL exemption and specifies the reporting requirements for MCFL organizations under federal campaign finance laws. The Federal rules make clear that MCFL organizations that make independent expenditures are required to report information about the expenditures and information about donors who make contributions specifically earmarked for any independent expenditures. However, no other contributions to an MCFL organization or information about the organization’s other activities are subject to public disclosure in the same manner that a PAC is subject to reporting requirements.

The Elections Board (as well as this Board through the affirmation process) has similarly concluded that MCFL organizations are not considered political committees for purposes Chapter 11 of the Wisconsin Statutes. In its informal opinions, the Elections Board consistently recognized that MCFL organizations are required to: 1) register with the appropriate filing officer; 2) report all funds spent on independent expenditures; and, 3) only to report contributions to it that have been earmarked for independent expenditures. *See “Non-Resident MCFL Organizations,” Letter to Mike Wittenwyler from Wisconsin Elections Board legal counsel, George Dunst* (Sept. 13, 2006), affirmed as a formal opinion by the G.A.B. on Aug. 27,

2008. The Board's position espoused in these advisory opinions is consistent with the constitutional requirements as set forth in *MCFL* and codified in the federal regulations.

CONSTITUTIONAL PROBLEMS WITH THE PROPOSED RULE

Proposed GAB § 1.90 ignores that an MCFL organization is exempt from the extensive disclosure obligations imposed on Wisconsin PACs. The proposed GAB § 1.90 would require an MCFL organization to disclose all contributions (\$20+) received by the MCFL organization and all disbursements (\$20+) made by the MCFL organization. *See* proposed GAB § 1.90(5) and (6).

Accordingly, as currently drafted, the proposed rule would impose on MCFL organizations the same reporting requirements that apply to PACs in Wisconsin, unconstitutionally requiring disclosure of all contributions \$20 and over to an MCFL organization, regardless of whether the contribution has been earmarked for political activity. The proposed rule would also unconstitutionally require disclosure of all expenditures \$20 and over by an MCFL organization, regardless of the purpose of the expenditure.

Because an MCFL organization's principal purpose cannot be campaign activity, proposed GAB § 1.90 would require MCFL organizations to report a significant amount of financial activity completely unrelated to campaigns or elections. Such a requirement far exceeds any legitimate interest the G.A.B. has in monitoring the activity of these organizations. *MCFL*, 479 U.S. at 262 ("The state interest in disclosure [] can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the Act.").

CONCLUSION

The reporting requirements imposed by proposed GAB § 1.90 are nearly identical to the reporting requirements deemed unconstitutional in *MCFL*. We respectfully request that the Board revise proposed GAB § 1.90, taking into consideration *MCFL*, the FEC's existing rules, and the G.A.B.'s own advisory opinions to avoid imposing unconstitutional requirements on MCFL organizations. Moreover, we would request that the G.A.B. delay any action on such a rule until after the U.S. Supreme Court's decision in *Citizens United* is issued in 2010 as it is likely to have a direct affect on independent expenditures and activities of MCFL organizations.

GODFREY & KAHN, S.C.



Mike B. Wittenwyler
Rebecca Kathryn Mason

Government Accountability Board
MCFL Corporations, GAB 1.90
CR 09-

On March ____, 2010, the Government Accountability Board submitted a proposed rule-making order to the Wisconsin Legislative Council Rules Clearinghouse.

Analysis

The proposed order will codify four informal opinions of the Board adopting the U.S. Supreme Court decision in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (“*MCFL*”), which exempts corporations meeting certain requirements from the statutory prohibition on corporations making independent disbursements. The proposed rule will specify the requirements corporations must meet and enumerate the provisions of reporting statutes that apply to qualifying corporations.

Agency Procedure for Promulgation

A public hearing will be scheduled at a later time. The Government Accountability Board is primarily responsible for preparing the proposed rule.

Contact Information

Shane W. Falk, Staff Counsel
Government Accountability Board
212 E. Washington Avenue, 3rd Floor
P.O. Box 7984, Madison, Wisconsin 53707-7984
Phone 266-2094; Shane.Falk@wisconsin.gov

Proposed Rule
Government Accountability Board
MCFL Corporations, GAB 1.90

The Government Accountability Board proposes an order to create s. GAB 1.90, Wis. Adm. Code, relating to MCFL corporations.

ANALYSIS PREPARED BY GOVERNMENT ACCOUNTABILITY BOARD:

1. Statute Interpreted: s. 11.38, Stats.
2. Statutory Authority: ss. 5.05(1)(f) and 227.11(2)(a), Stats.
3. Explanation of agency authority: Under the current statute, s. 11.38, Stats., all corporations are prohibited from making contributions or disbursements for a political purpose other than to support or oppose a referendum.

In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* (“MCFL”), 479 U.S. 238 (1986), however, the Supreme Court held that the federal statute prohibiting corporate political contributions and disbursements was unconstitutional as applied to a nonprofit corporation’s independent disbursements. This decision created a class of corporations, commonly referred to as MCFLs, that were exempt from prohibitions on corporate independent disbursements. To qualify for this exemption the corporation must meet the following requirements:

[I]t was formed for the express purpose of promoting political ideas, and cannot engage in business activities. . . . [I]t has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. . . . [I]t was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities.

Id. at 264.

MCFL organizations are still required to file the same campaign finance disclosure reports as other entities making independent disbursements. *Id.* at 263. Proposed s. GAB 1.90 codifies the reporting requirements for MCFL organizations as set forth in four informal opinions of the Board.

MCFL was not altered by a subsequent U.S. Supreme Court decision on January 21, 2010, *Citizens United v. FEC*, 558 U.S. ____, (No. 08-205); however, disclosure and disclaimer requirements were strengthened.

4. Related statute(s) or rule(s): s. 11.06, 11.12(6), 11.20, and 11.38 Stats.

5. Plain language analysis: The proposed order will codify four informal opinions of the Board adopting the U.S. Supreme Court decision in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (“*MCFL*”), which exempts corporations meeting certain requirements from the statutory prohibition on corporations making independent disbursements. The proposed rule will specify the requirements corporations must meet and enumerate the provisions of reporting statutes that apply to qualifying corporations.
6. Summary of, and comparison with, existing or proposed federal regulations: At the federal level, the FEC has codified the *MCFL* decision at 11 CFR 114.10. The federal rule lists the requirements to qualify for the *MCFL* exemption and requires corporations wishing to take advantage of the exemption to file a letter or form certifying that they meet all of the requirements. The regulation also specifies with which provisions of federal campaign finance laws *MCFL* corporations are required to comply.
7. Comparison with rules in adjacent states:

Illinois allows corporations to make contributions to candidates and independent disbursements.

Iowa regulations define a class of entities known as political corporations. The definition of “political corporations” is substantively identical to the elements that the Supreme Court held justified the exemption in the *MCFL* case. Iowa Admin. Code 351-4.50(68A). Political corporations are exempted from the Iowa statute’s prohibition on corporations making independent disbursements. *Id.* Corporations wishing to take advantage of the exception must submit a letter certifying that they meet the requirements to be considered a political corporation. *Id.*

Michigan regulations define a class of entities known as qualified nonprofit corporations. The definition of “qualified nonprofit corporations” is substantively identical to the elements that the Supreme Court held justified the exemption in the *MCFL* case. Mich. Admin. Code 169.39b(3). Corporations meeting the definition are exempted from the Michigan statute’s prohibition on independent disbursements during the last 45 days before an election. *Id.*

Minnesota regulations also create an exemption for certain nonprofit corporations. To qualify for the exemption, the nonprofit corporation must meet three criteria that are substantively identical to the elements that the Supreme Court held justified the exemption in the *MCFL* case; however, Minnesota regulations go further than required by the *MCFL* decision exempting qualifying corporations from the prohibition on both corporate contributions and disbursements. Minn. Stat. 211B.15 subd. 15.

8. Summary of factual data and analytical methodologies: Adoption of the rule was predicated on state statutes and federal case law.
9. Analysis and supporting documentation used to determine effect on small businesses: The rule will have no effect on small business, nor any economic impact.
10. Effect on small business: The creation of this rule does not affect business.
11. Agency contact person: Shane W. Falk, Staff Counsel, Government Accountability Board, 212 E. Washington Avenue, 3rd Floor, P.O. Box 7984, Madison, Wisconsin 53707-7984; Phone 266-2094; Shane.Falk@wisconsin.gov
12. Place where comments are to be submitted and deadline for submission: Government Accountability Board, 212 E. Washington Avenue, 3rd Floor, P.O. Box 7984, Madison, Wisconsin 53707-7984, no later than April 30, 2010.

FISCAL ESTIMATE: The creation of this rule has no fiscal effect.

INITIAL REGULATORY FLEXIBILITY ANALYSIS: The creation of this rule does not affect business.

TEXT OF PROPOSED RULE:

SECTION 1. GAB 1.90 is created to read:

1.90 MCFL Corporations

- (1) In this section:
 - (a) "Contribution" has the meaning given in s. 11.01(6), Stats.
 - (b) "Disbursement" has the meaning given in s. 11.01(7), Stats.
 - (c) "Filing officer" has the meaning given in s. 11.01(8), Stats.
 - (d) "Incurred obligation" has the meaning given in s. 11.01(11), Stats.
 - (e) (i) "Business activities" includes but is not limited to:
 - (A) Any provision of goods or services that results in income to the corporation; and
 - (B) Advertising or promotional activities which results in income to the corporation, other than in the form of membership dues or donations.

- (ii) “Business activities” does not include fundraising activities that are expressly described as requests for donations that may be used for political purposes, such as supporting or opposing candidates.
- (f) "MCFL corporation" means a corporation that meets all of the following requirements:
- (i) The corporation was formed only for the express purpose of promoting political ideas and does not engage in business activities.
 - (ii) The corporation has no shareholders or other persons with a claim on its assets or earnings.
 - (iii) The corporation was not established by a business corporation or a labor union and does not accept contributions from such entities.
 - (iv) The corporation's major purpose is not campaign activity.
 - (v) The corporation has filed a letter with its filing officer certifying that it meets the requirements of this paragraph.
- (2) The prohibition on corporate independent expenditures in s. 11.38, Stats., shall not apply to MCFL corporations.
- (3) An MCFL corporation that accepts contributions or makes disbursements exceeding \$25 in aggregate during a calendar year shall file a registration statement with the appropriate filing officer and comply with the requirements of s. 11.05(3), Stats. The MCFL corporation’s name shall include the acronym “MCFL.”
- (4) An MCFL corporation making independent disbursements shall file the oath for independent disbursements required by s. 11.06(7), Stats. An MCFL corporation may not make a contribution to any candidate or committee.
- (5) An MCFL corporation shall file reports at the times required by ss. 11.12(6) and 11.20, Stats., and include all independent disbursements made, contributions received and made that are earmarked for independent disbursements, obligations incurred, and as follows:
- (a) A report of independent disbursements required by s. 11.06(1)(j), Stats.
 - (b) Information as otherwise required by ss. 11.06(1)(a), (b), (f), (g), (h), (i), (k), and (L), Stats.
 - (c) An MCFL corporation making independent disbursements aggregating more than \$20 later than 15 days prior to a primary or election file the special report of late disbursement required by s. 11.12(6), Stats.

SECTION 2. EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22(2) (intro.), Stats.

NOTICE OF HEARING
GOVERNMENT ACCOUNTABILITY BOARD
CR 09-

NOTICE IS HEREBY GIVEN that pursuant to ss. 5.05(1)(f), 227.11(2)(a), Stats., and interpreting s. 11.38, Stats., the Government Accountability Board will hold a public hearing to consider adoption of a rule to create s. GAB 1.90, Wis. Adm. Code, relating to MCFL corporations.

Hearing Information

The public hearing will be held at the time and location shown below.

Date and Time

at _____

Location

Government Accountability Board Office
212 E. Washington Avenue, 3rd Floor
Madison, Wisconsin 53703

This public hearing site is accessible to people with disabilities. If you have special needs or circumstances that may make communication or accessibility difficult at the hearing, please contact the person listed below.

ANALYSIS PREPARED BY GOVERNMENT ACCOUNTABILITY BOARD:

1. Statute Interpreted: s. 11.38, Stats.
2. Statutory Authority: ss. 5.05(1)(f) and 227.11(2)(a), Stats.
3. Explanation of agency authority: Under the current statute, s. 11.38, Stats., all corporations are prohibited from making contributions or disbursements for a political purpose other than to support or oppose a referendum.

In Federal Election Commission v. Massachusetts Citizens for Life, Inc. ("MCFL"), 479 U.S. 238 (1986), however, the Supreme Court held that the federal statute prohibiting corporate political contributions and disbursements was unconstitutional as applied to a nonprofit corporation's independent disbursements. This decision created a class of corporations, commonly referred to as MCFLs, that were exempt from prohibitions on corporate independent disbursements. To qualify for this exemption the corporation must meet the following requirements:

[I]t was formed for the express purpose of promoting political ideas, and cannot engage in business activities. . . . [I]t has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. . . . [It] was not established by a business

corporation or a labor union, and it is its policy not to accept contributions from such entities.

Id. at 264.

MCFL organizations are still required to file the same campaign finance disclosure reports as other entities making independent disbursements. *Id.* at 263. Proposed s. GAB 1.90 codifies the reporting requirements for MCFL organizations as set forth in four informal opinions of the Board.

MCFL was not altered by a subsequent U.S. Supreme Court decision on January 21, 2010, *Citizens United v. FEC*, 558 U.S. ____, (No. 08-205); however, disclosure and disclaimer requirements were strengthened.

4. Related statute(s) or rule(s): s. 11.06, 11.12(6), 11.20, and 11.38 Stats.
5. Plain language analysis: The proposed order will codify four informal opinions of the Board adopting the U.S. Supreme Court decision in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (“*MCFL*”), which exempts corporations meeting certain requirements from the statutory prohibition on corporations making independent disbursements. The proposed rule will specify the requirements corporations must meet and enumerate the provisions of reporting statutes that apply to qualifying corporations.
6. Summary of, and comparison with, existing or proposed federal regulations: At the federal level, the FEC has codified the *MCFL* decision at 11 CFR 114.10. The federal rule lists the requirements to qualify for the MCFL exemption and requires corporations wishing to take advantage of the exemption to file a letter or form certifying that they meet all of the requirements. The regulation also specifies with which provisions of federal campaign finance laws MCFL corporations are required to comply.
7. Comparison with rules in adjacent states:

Illinois allows corporations to make contributions to candidates and independent disbursements.

Iowa regulations define a class of entities known as political corporations. The definition of “political corporations” is substantively identical to the elements that the Supreme Court held justified the exemption in the *MCFL* case. Iowa Admin. Code 351-4.50(68A). Political corporations are exempted from the Iowa statute’s prohibition on corporations making independent disbursements. *Id.* Corporations wishing to take advantage of the exception must submit a letter certifying that they meet the requirements to be considered a political corporation. *Id.*

Michigan regulations define a class of entities known as qualified nonprofit corporations. The definition of “qualified nonprofit corporations” is substantively identical to the elements that the Supreme Court held justified the exemption in the *MCFL* case. Mich. Admin. Code 169.39b(3). Corporations meeting the definition are exempted from the Michigan statute’s prohibition on independent disbursements during the last 45 days before an election. *Id.*

Minnesota regulations also create an exemption for certain nonprofit corporations. To qualify for the exemption, the nonprofit corporation must meet three criteria that are substantively identical to the elements that the Supreme Court held justified the exemption in the *MCFL* case; however, Minnesota regulations go further than required by the *MCFL* decision exempting qualifying corporations from the prohibition on both corporate contributions and disbursements. Minn. Stat. 211B.15 subd. 15.

8. Summary of factual data and analytical methodologies: Adoption of the rule was predicated on state statutes and federal case law.
9. Analysis and supporting documentation used to determine effect on small businesses: The rule will have no effect on small business, nor any economic impact.
10. Effect on small business: The creation of this rule does not affect business.
11. Agency contact person: Shane W. Falk, Staff Counsel, Government Accountability Board, 212 E. Washington Avenue, 3rd Floor, P.O. Box 7984, Madison, Wisconsin 53707-7984; Phone 266-2094; Shane.Falk@wisconsin.gov
12. Place where comments are to be submitted and deadline for submission: Government Accountability Board, 212 E. Washington Avenue, 3rd Floor, P.O. Box 7984, Madison, Wisconsin 53707-7984, no later than April 30, 2010.

FISCAL ESTIMATE: The creation of this rule has no fiscal effect.

INITIAL REGULATORY FLEXIBILITY ANALYSIS: The creation of this rule does not affect business.

TEXT OF PROPOSED RULE:

SECTION 1. GAB 1.90 is created to read:

1.90 MCFL Corporations

(1) In this section:

- (a) "Contribution" has the meaning given in s. 11.01(6), Stats.

- (b) "Disbursement" has the meaning given in s. 11.01(7), Stats.
 - (c) "Filing officer" has the meaning given in s. 11.01(8), Stats.
 - (d) "Incurred obligation" has the meaning given in s. 11.01(11), Stats.
 - (e) (i) "Business activities" includes but is not limited to:
 - (A) Any provision of goods or services that results in income to the corporation; and
 - (B) Advertising or promotional activities which results in income to the corporation, other than in the form of membership dues or donations.
 - (ii) "Business activities" does not include fundraising activities that are expressly described as requests for donations that may be used for political purposes, such as supporting or opposing candidates.
 - (f) "MCFL corporation" means a corporation that meets all of the following requirements:
 - (i) The corporation was formed only for the express purpose of promoting political ideas and does not engage in business activities.
 - (ii) The corporation has no shareholders or other persons with a claim on its assets or earnings.
 - (iii) The corporation was not established by a business corporation or a labor union and does not accept contributions from such entities.
 - (iv) The corporation's major purpose is not campaign activity.
 - (v) The corporation has filed a letter with its filing officer certifying that it meets the requirements of this paragraph.
- (2) The prohibition on corporate independent expenditures in s. 11.38, Stats., shall not apply to MCFL corporations.
- (3) An MCFL corporation that accepts contributions or makes disbursements exceeding \$25 in aggregate during a calendar year shall file a registration statement with the appropriate filing officer and comply with the requirements of s. 11.05(3), Stats. The MCFL corporation's name shall include the acronym "MCFL."
- (4) An MCFL corporation making independent disbursements shall file the oath for independent disbursements required by s. 11.06(7), Stats. An MCFL corporation may not make a contribution to any candidate or committee.

(5) An MCFL corporation shall file reports at the times required by ss. 11.12(6) and 11.20, Stats., and include all independent disbursements made, contributions received and made that are earmarked for independent disbursements, obligations incurred, and as follows:

- (a) A report of independent disbursements required by s. 11.06(1)(j), Stats.
- (b) Information as otherwise required by ss. 11.06(1)(a), (b), (f), (g), (h), (i), (k), and (L), Stats.
- (c) An MCFL corporation making independent disbursements aggregating more than \$20 later than 15 days prior to a primary or election file the special report of late disbursement required by s. 11.12(6), Stats.

SECTION 2. EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22(2) (intro.), Stats.

State of Wisconsin \ Government Accountability Board

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JUDGE WILLIAM EICH
Chairperson

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For the March 23-24, 2010 Meeting

TO: Members, Wisconsin Government Accountability Board

FROM: Kevin J. Kennedy
Director and General Counsel
Government Accountability Board

Prepared and Presented by:

Shane W. Falk, Staff Counsel

SUBJECT: Status Report on Pending Administrative Rule-Making

This Status Report is for informational purposes only and no immediate action is requested. Following this cover page is a brief status of pending rule-making resulting from past actions of the Government Accountability Board. All administrative rules identified in this summary reference permanent rule-making. Please note that there are several additional rules not addressed in this status report that the Board has affirmed, but for which the staff has identified the need for additional review and revision. The staff will present recommendations at subsequent meetings regarding those involved rules.

STATUS REPORT ON PENDING ADMINISTRATIVE RULE-MAKING

Revise 1.10

Relating to: Registration by Nonresident Committees and Groups

Status: Board original action on May 5, 2008. Scope statement approved at August 10, 2009 meeting, which must be submitted to the Legislative Reference Bureau and then can begin rule-making process to revise title of 1.10. Likely will complete with 30 day notice rule-making, which will not require a public hearing before submittal to legislature (unless someone petitions for a hearing.)

Revise 1.15

Relating to: Filing Reports of Late Campaign Activity (Postmarked Reports)

Status: Board original action on March 30, 2009. Scope statement approved at August 10, 2009 meeting, which must be submitted to the Legislative Reference Bureau and then can begin rule-making process to remove two references to postmarked reports. Likely will complete with 30 day notice rule-making, which will not require a public hearing before submittal to legislature (unless someone petitions for a hearing.)

Revise 1.20

Relating to: Treatment and Reporting of In-Kind Contributions

Status: Board original action on May 5, 2008. Scope statement approved at August 10, 2009 meeting, which must be submitted to the Legislative Reference Bureau and then can begin rule-making process to remove a reference to an old form, Schedule 3-C, that is no longer necessary due to the implementation of CFIS. Likely will complete with 30 day notice rule-making, which will not require a public hearing before submittal to legislature (unless someone petitions for a hearing.)

Create 1.21

Relating to: Treatment of Joint Account Contributions

Status: Board original action on June 9, 2008. Scope statement approved at August 10, 2009 meeting, which must be submitted to the Legislative Reference Bureau and then can begin rule-making process to create a rule addressing treatment of contributions from joint accounts. Will return to Board with draft rule. Likely will complete with 30 day notice rule-making, which will not require a public hearing before submittal to legislature (unless someone petitions for a hearing.)

Revise 1.26

Relating to: Return of Contribution

Status: Board original action on May 5, 2008. Scope statement approved at August 10, 2009 meeting, which must be submitted to the Legislative Reference Bureau and then can begin rule-making process to correct grammatical error. Likely will complete

with 30 day notice rule-making, which will not require a public hearing before submittal to legislature (unless someone petitions for a hearing.)

Revise 1.28

Relating to: Scope of Regulated Activity; Election of Candidates

Status: Board original action January 15, 2009. Legislative Council review complete. Public hearing held on March 30, 2009. Legislative Report complete and filed with legislature, but was recalled by the Board pending the Supreme Court decision for Citizens United v. FEC. Citizens United v. FEC decision issued January 21, 2010. Revised analysis section of rule will be before the Board at the March 23-24, 2010 meeting. At the same meeting, staff will request authority to resubmit the rule to the Legislature and continue the promulgation process.

Revise 1.43

Relating to: Referendum-related activities by committees; candidate-related activities by groups.

Status: Board original action on May 5, 2008. Scope statement drafted for August 10, 2009 meeting and then can begin rule-making process to remove 1.43(2)(a) as the law no longer requires listing all candidates supported and s. 11.05(4), Stats., allows one registration statement. Likely will complete with 30 day notice rule-making, which will not require a public hearing before submittal to legislature (unless someone petitions for a hearing.)

Revise 1.85 and 1.855

Relating to: Conduit Registration and Reporting Requirements; Contributions from Conduit Accounts

Status: Board original action on October 6, 2008. Scope statement approved at August 10, 2009 meeting, which must be submitted to the Legislative Reference Bureau and then can begin rule-making process to harmonize certain portions of these rules with current law and new CFIS system. Likely will complete with 30 day notice rule-making, which will not require a public hearing before submittal to legislature (unless someone petitions for a hearing.)

Create 1.90

Relating to: MCFL Corporation Registration and Reporting Requirements

Status: Board original action August 27, 2008. Scope statement approved by the Board at the December 17, 2009 meeting. Draft rule will be before the Board at the March 23-24, 2010 meeting. This will officially begin the rule-making process to codify formal opinions regarding registration and reporting requirements of MCFL corporations. Will likely have to hold public hearing, so following submittal to Legislative Council will hold public hearing and then submittal to legislature before publication.

Revise Chapter 3

Relating to: Voter Registration, HAVA Checks

Status: Board original action August 27, 2008. Must draft scope statement and then begin rule-making process to make further revisions to Chapter 3 regarding voter registration and HAVA checks. Likely will complete with 30 day notice rule-making, which will not require a public hearing before submittal to legislature (unless someone petitions for a hearing.)

Repeal and Recreate Chapter 4

Relating to: Election Observers

Status: Board original action on August 27, 2008. Final draft of Chapter 4 approved March 30, 2009 based upon comments from emergency rule proceedings, but must submit scope statement to the Legislative Reference Bureau before submitting final version to Legislative Council for review. Thereafter, will hold public hearing and then submittal to legislature before publication.

Repeal and Recreation of Chapter 5

Relating to: Security of Ballots and Electronic Voting Systems

Status: Board original action on May 5, 2008. Legislative Council review complete. Public Hearing held November 11, 2008 and some additions may be necessary. The Legislative Report for Chapter 5 will be submitted after the Board considers an additional provision to the chapter at the October 5, 2009 and now November 9, 2009 meetings. These additions resulted from public comments. Additions approved by the Board at the November 9, 2009 meeting. By the time of the December 17, 2009 Board meeting, Legislative Report will be submitted and upon return, publication.

Revise 6.02

Relating to: Registration Statement Sufficiency.

Status: Board original action on March 30, 2009. Scope statement submitted for publication. Draft rule must will be presented to Board at the December 17, 2009 meeting and then can continue rule-making process to clarify sufficiency standards. Likely will complete with 30 day notice rule-making, which will not require a public hearing before submittal to legislature (unless someone petitions for a hearing.)

Revise 6.03

Relating to: Assistance by Government Accountability Board Staff

Status: Board original action on March 30, 2009. Scope statement and draft rule will be before the Board at the December 17, 2009 meeting. This will officially begin the rule-making process to update statutory citations with new statutes post 2007 Act 1. Likely will complete with a statutory procedure that will not require a public hearing before submittal to legislature.

Revise 6.04

Relating to: Filing Documents by FAX or Electronic Means

Status: Board original action on March 30, 2009. Scope statement submitted for publication. Draft rule must be presented to Board and then can continue rule-making process to clarify electronic filing requirements. Likely will complete with 30 day notice rule-making, which will not require a public hearing before submittal to legislature (unless someone petitions for a hearing.)

Revise 6.05

Relating to: Filing Campaign Finance Reports in Electronic Format

Status: Board original action on March 30, 2009. Scope statement published. Legislative Council Report back June 25, 2009. Need to make revisions suggested by Legislative Council and publish Notice of Hearing. Thereafter, submittal to legislature.

Revise Chapter 7

Relating to: Approval of Electronic Voting Equipment

Status: Board original action on May 5, 2008. Division Administrator Robinson establishing a committee to make recommendations. Must draft scope statement and then begin rule-making process. Will require public hearing, so following submittal to Legislative Council will have public hearing before submittal to legislature.

Revise 9.03

Relating to: Voting Procedures for Challenged Electors

Status: Board original action on May 5, 2008. Scope statement and draft rule will be before the Board at the December 17, 2009 meeting. This will officially begin the rule-making process to remove a reference to lever voting machines. Likely will complete with statutory procedure that will not require a public hearing before submittal to legislature.

Creation of Chapter 13

Relating to: Training Election Officials

Status: Board original action on January 28, 2008. Rule in draft form and ready for submittal to Legislative Council for review. Board approved draft rule at the August 10, 2009 meeting, so must now submit to Legislative Council for review. Thereafter, if not doing 30 day notice rule-making, will need public hearing and then submittal to legislature before publication.

Repeal 21.01, 21.04 and Revise 20.01

Relating to: 21.01—filing of all written communications and documents intended for former Ethics Board

21.04—transcripts of proceedings before former Ethics Board

20.01—procedures for complaints before former Elections Board

Status: Board original action on January 28, 2008. Legislative Council review complete. No public hearing necessary as processing as 30 day notice rule-making and no petition for public hearing was filed. These rules are ready for completion of legislative report and submittal to legislature. Thereafter, publication.

Creation of Chapter 22

Relating to: Settlement of Certain Campaign Finance, Ethics, and Lobbying Violations

Status: Board original action on June 9, 2008. Final draft of Chapter 22 approved March 30, 2009. Submitted to Legislative Council and report has been returned. Revisions made and Notice of Public Hearing published. Public Hearing held July 28, 2009 and reviewed by Board at the August 10, 2009 meeting. By the time of the December 17, 2009 Board meeting, Legislative Report will be submitted and upon return, publication.

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JUDGE WILLIAM EICH
Chairperson

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For the March 23-24, 2009 Meeting

TO: Members, Wisconsin Government Accountability Board

FROM: Kevin J. Kennedy
Director and General Counsel
Government Accountability Board

Prepared and Presented by:

Shane W. Falk, Staff Counsel

SUBJECT: Policy: Approval of Modifications to Voting Systems

Introduction and Recommendations:

Various voting systems that were approved for use in Wisconsin in 2006 remain in use. All of these voting systems involve materials and software that are subject to upgrades, modifications, or other engineering change orders. Voting systems vendors have now begun to submit requests to the Government Accountability Board to allow modifications to voting systems previously approved for use in Wisconsin. Currently, administrative code provisions regarding voting systems approval do not specifically prescribe procedures to process such a request.

Staff recommends that the Board approve an interim policy for application and approval of voting systems modifications to systems previously approved for use in Wisconsin. In addition, staff recommends that the Board delegate authority to the Director and General Counsel to review and approve voting systems modifications, provided those modifications are not substantial in nature. Finally, staff recommends that the Board direct the promulgation of administrative rules to codify a policy for application and approval of voting systems modifications to systems previously approved for use in Wisconsin.

Background:

Approval of software components of electronic voting systems is prescribed by §5.905, Wis. Stats. Approval of ballots, devices and equipment for electronic voting systems is prescribed by §5.91, Wis. Stats. Sections 5.905 and 5.91, Wis. Stats., establish basic necessary requirements for voting systems software and equipment. Pursuant to the specific authority granted by §§5.905(3) and 5.93, Wis. Stats., Chapter GAB 7, Wis. Adm. Code, prescribes the procedures and conditions for approval of electronic voting systems in Wisconsin, in the first instance and before the voting systems can be marketed and sold in Wisconsin. With the

evolving state of electronic voting systems technology, voting systems approved in the past are currently ripe for updates and modifications. In most instances, the updates and modifications result from changes in equipment parts and/or equipment parts' manufacturers and suppliers. Despite these updates and modifications, the voting systems substantially maintain the originally approved structure and operation.

Sections GAB 7.01(1)(f) and 7.03(1), Wis. Adm. Code, require vendors to notify the Board of any modification to a previously approved voting system and all jurisdictions using the voting system. Generally, this notification has been accomplished in writing, with specific engineering change orders (hereafter "ECO") identifying the modifications, and with supporting reports from Voting System Test Laboratories (hereafter "VSTLs"), determining whether a modification is *de minimis* and full reports where a modification may be more than *de minimis* in nature. In order for a modification to qualify as a "*de minimis*" change, it must maintain, unaltered, the reliability, functionality, capability and operability of a voting system.

In practice, an ECO may contain several modifications to a voting system; however, a municipality may only require one or two specific modifications to any voting system or part thereof. One must acknowledge that testing of the entire voting system with all ECO modifications may not replicate what exists in the field and, therefore, the voting system approval process prescribed by Chapter GAB 7, Wis. Adm. Code, is not practical for voting systems modifications.

Past interim approvals of modifications to voting systems were granted by the Director and General Counsel on a very limited and emergency basis. Formal approvals of modifications to voting systems may be granted by the Director and General Counsel upon delegation of that authority by the Board. Any approvals of modifications to voting systems are subject to the Government Accountability Board's adoption of the procedures and conditions set forth herein.

Authority:

Sections GAB 7.01(1)(f) and 7.03, Wis Adm. Code, grant discretion to the Board as to whether any voting systems modifications require additional approval of the entire voting system. A proper exercise of this discretion entails entire voting system review and approval, only if the modifications individually, or in the aggregate, are substantial in nature. Section GAB 7.03(5), Wis. Adm. Code, provides the Board discretion to exempt any electronic voting system from strict compliance with Chapter GAB 7, Wis. Adm. Code, upon good cause shown. A vendor presenting modifications to a voting system satisfies this good cause standard, if the voting system was previously approved by NASED or the U.S. EAC and the State Elections Board or Government Accountability Board, the modifications are not substantial (qualify as *de minimis*), and the modifications will not receive EAC review and certification for installation in a particular version of a voting system or component thereof.

Introduction to Policy:

The policy at the end of this Memorandum sets forth the procedures and conditions for approval of voting systems modifications and ECOs for voting systems that were previously approved by the former State Elections Board or the Government Accountability Board for use in Wisconsin. Electronic voting systems approved over the last decade now require upgrading resulting from changes in equipment parts and/or parts' manufacturers and suppliers, revised Environmental Protection Agency regulations, and software upgrades. These voting systems were previously tested and approved by the National Association of State Elections Directors (hereafter "NASED") and the State Elections Board. When the U.S. Election Assistance

Commission (hereafter “EAC”) assumed testing and certification responsibilities for voting systems from NASED, the EAC did not require re-testing and certification of voting systems previously approved by NASED; however, the EAC has specifically determined that it will not test and certify modifications to those previously NASED approved voting systems. In addition, it is still unclear whether the EAC will test and certify modifications to previously EAC approved voting systems. Therefore, the Government Accountability Board should establish procedures and conditions for approval of ECOs for voting systems that have been previously approved, but are subject to upgrades or modifications. Any such procedures and conditions for approval of modifications to previously approved voting systems should adhere to general standards for ongoing integrity and security of the voting systems, while at the same time balancing the variable condition of voting systems software and equipment in use.

Proposed Motions:

1. **MOTION:** Approve interim policy for application and approval of voting systems modifications to systems previously approved for use in Wisconsin.
2. **MOTION:** Pursuant to §5.05(1)(e), Wis. Stats., and his role as agency head and chief state election official, the Government Accountability Board delegates authority to its Director and General Counsel to accept, review, and exercise discretion to approve applications for voting systems modifications to systems previously approved for use in Wisconsin. The Director and General Counsel shall consult with the Board Chair to determine whether Board members should be polled or a special meeting conducted before action is taken. The Director and General Counsel shall also report, at the Board meeting immediately following action on this delegate authority, the specifics for the action taken, the basis for taking the action, and the outcome of that action.
3. **MOTION:** Staff shall prepare, for consideration at a future Board meeting, proposed administrative rules codifying a policy for application and approval of voting systems modifications to systems previously approved in Wisconsin.

Procedures and Conditions for Approval of Modifications to Voting Systems:

A. Vendor

1. Pursuant to GAB §§7.01(1)(f) and 7.03(1), Wis. Adm. Code, a vendor shall immediately notify the Government Accountability Board of any modification to a previously approved voting system. The vendor shall not offer, for use, sale or lease, any modified voting system, without prior approval of the Government Accountability Board. If the Government Accountability Board determines that the modifications are substantial, the Board may notify the vendor that the modifications require review and approval of the entire voting system pursuant to Chapter GAB 7, Wis. Adm. Code.
2. Upon application for approval of modifications to a previously approved voting system, the applicant-vendor shall pay the application fee prescribed by the Government Accountability Board. In addition, pursuant to GAB §7.01(a), Wis. Adm. Code, the vendor shall present a signed agreement that the vendor shall pay all costs, related to approval of the modifications, incurred by the Government Accountability Board, its designees and the vendor.
3. Pursuant to GAB §§7.01(1) and 7.03, Wis. Adm. Code, the application for approval of modifications to a previously approved voting system shall be accompanied by all of the following:
 - (a) Engineering Change Orders itemizing all modifications and providing complete specifications for all modified hardware, firmware, or software. Specifications shall include hardware part numbers or firmware/software versions.
 - (b) Documentation from a Voting System Test Laboratory (with an accreditation from the U.S. EAC) providing a determination of whether the modification is *de minimis*.
 - (c) If a modification is more than *de minimis*, complete testing reports from a VSTL (with an accreditation from the U.S. EAC) demonstrating that the modifications to the voting system conform to all the standards recommended by the Federal Elections Commission, NASED, and/or U.S. EAC.
 - (d) All technical manuals and documentation related to any modifications to the voting system.
 - (e) An itemization of all jurisdictions using the voting system affected by the application for approval of modifications.
 - (f) If any portion of the application or materials provided to the Government Accountability Board is copyrighted, trademarked, or otherwise trade secret, the application shall include written assertion of any protective interests, including a detailed description thereof, and redacted versions of the application and all materials consistent with any asserted protective interests.
4. Pursuant to GAB §7.03(1), Wis. Adm. Code, upon approval of any modifications to a previously approved voting system and as a condition of maintaining the Government Accountability Board's approval for the use of the voting system as modified, the vendor shall disclose all of the following to the Government Accountability Board in quarterly reports for so long as the voting system containing any approved modification is in use:

- (a) Jurisdiction in which a modification was made and date of modification.
- (b) Specific identification of the modification made including, but not limited to, the identification of the specific hardware part number or firmware/software version affected.
- (c) Identification of the specific equipment upon which a modification was made.
- (d) If no additional modifications were made to voting systems during the time period since a vendor's most recent quarterly report, then the vendor shall provide a letter certifying that no additional modifications were made in place of a full quarterly report.

B. Municipalities

Upon completion of each modification to a voting system and pursuant to GAB §7.02(2) and (3), Wis. Adm. Code, the clerk of a municipality in which a voting system was modified shall complete the following:

1. Conduct a logic and accuracy test (pre-election test) of any portion of a voting system affected by a modification to ensure that the modified voting system continues to meet the criteria set out in §5.91, Wis. Stats. This logic and accuracy test (pre-election test) shall be performed after a modification and immediately preceding and for each of the following election-types: a nonpartisan, partisan primary, general and presidential preference.
2. Upon completion of each logic and accuracy test (pre-election test,) provide a certification to the Government Accountability Board to include: the identification of the specific piece of equipment or software affected by the modification, the date of the modification, and whether the voting system passed the logic and accuracy test (pre-election test.) In no circumstance where a voting system fails the logic and accuracy test (pre-election test) shall it be used in an election without specific approval of the Government Accountability Board.
3. Following each of the first three elections after a voting system affected by a modification and in which the modified voting system or part thereof was used, perform a post-election audit, as prescribed by the Government Accountability Board, of that portion of the voting system affected by a modification. If the modified portion of the voting system was not used in an election, provide a certification of nonuse to the Government Accountability Board until such time as the portion of the voting system affected by the modification is used in an election and three post-election audits are completed.
4. Upon completion of the three post-election audits, provide a certification to the Government Accountability Board to include: the identification of the specific piece of equipment or software affected by the modification, the date of the modification, and whether the voting system passed the post-election audit.

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KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For the March 23, 24, 2010 Meeting

TO: Members, Wisconsin Government Accountability Board

FROM: Kevin J. Kennedy, Director and General Counsel
Wisconsin Government Accountability Board

Prepared by: Kevin J. Kennedy, Director and General Counsel

SUBJECT: Significant Legislative Activity

Introduction

The Legislative Status Report provides a description of and report on the key pieces of legislation monitored by the agency staff. This memorandum discusses recent legislative activity on items of particular note for the agency.

2009 Wisconsin Act 89

This legislation provides for the public financing of campaigns for Supreme Court Justice. The Governor signed 2009 Senate Bill 40 into law, with a partial veto, and it was published as 2009 Wisconsin Act 89. The veto increased the amount of funding available to counter independent expenditures by eliminating a floor in the matching amount. Independent expenditures will be matched dollar for dollar up to a threshold of three times the initial grant.

A staff report on implementation of the new law is presented separately. The new law has been challenged by two lawsuits. Board Members will be briefed on the defense of the lawsuits in closed session. Staff has worked with the legislative drafter to develop a trailer bill to address a number of drafting anomalies which raise questions about the administration of certain provisions of the new law. I have contacted the legislative authors and requested they consider introducing the trailer legislation to ensure the new law can be administered effectively.

Omnibus Election Legislation

Representative Jeff Smith, Chair of the Assembly Committee on Elections and Campaign Reform in conjunction with Senator Spencer Cogg, Chair of the Senate Committee on Labor, Elections and Urban Affairs have been working to put together a comprehensive bill on election administration which will capture several elements of legislative initiatives proposed by the

G.A.B. This includes our MOVE implementation legislation and most of the Board's recommendations to streamline in-person absentee voting set out in its Report on Early Voting adopted at the December 17, 2009 meeting. It will not move the deadline for in-person absentee voting from the day before the election (Monday) to the Friday preceding Election Day. It also will include several technical changes that were part of the agency's legislative agenda.

The proposal will include provisions for voter registration modernization in the form of automatic registration of eligible citizens based on information in existing government databases and on-line voter registration; permanent absentee voting; and provisions to prohibit voter intimidation and deceptive election practices.

I have not seen a draft of the proposed legislation at the time this report was prepared but Mike Haas, Nat Robinson and I have had several meetings with legislative staff to discuss the elements of the proposed legislation. A group of local election officials were briefed on the initiative the week of March 8, 2010. Once a copy of the proposal is available, our staff will prepare a summary for distribution to Board Members, agency staff and local election officials.

Legislative Response to *Citizens United v. Federal Election Commission*

Following the U.S. Supreme Court decision in *Citizens United v. Federal Election Commission*, the staff contacted members of the Legislature to encourage them to develop legislation that would remove the restriction on corporate expenditures and establish a mechanism for disclosing corporate campaign spending. A number of proposals have been developed. The most promising was a substitute amendment to 2009 Senate Bill 43 which had passed the Senate. Initially the legislation tracked the Board's proposed administrative rule on the scope of regulated activity to permit more disclosure of certain issue advocacy. The proposed substitute amendment has not been introduced as of the time this report was prepared.

However, two companion bills were introduced in each house which remove the restriction on corporate campaign expenditures. 2009 Senate Bill 540 and 209 Assembly Bill 812. The legislation also requires shareholders to approve any corporate political spending.

Electronic Filing of Campaign Finance Reports

2009 Senate Bill 236

This legislation permits campaign finance registrants to file a paper campaign finance report rather than filing in an electronic format. Under current law, any registrant with campaign receipts of more than \$20,000 in a campaign period – 2 years in an assembly campaign, 4 years in a state senate campaign – is required to file reports in an electronic format specified by the G.A.B. This legislation is a response to the frustration experienced by candidates with the CFIS tool. Supporters argue many volunteer treasurers will not be computer savvy enough to file campaign finance reports electronically and this would discourage prospective candidates from running for public office. The down side is registrants raising a large amount of money, with skilled staff would not be required to provide campaign finance information electronically. It would be difficult to make the information available to the public in a searchable format and in a timely manner. The legislation passed the Senate on November 5th on a voice vote and has been referred to the Assembly Committee on Elections and Campaign Reform.

2009 Assembly Bill 494

Representative Corey Mason has introduced legislation that would permit campaign finance registrants subject to the requirement to file electronic reports to use either a web-based system developed by the G.A.B. or file their report in a delimited electronic format such as an Excel spreadsheet. This legislation is also a response to the frustration experienced by candidates with the CFIS tool. The Assembly Committee on Elections and Campaign Reform is scheduled to exec on this bill on December 15, 2009. The Committee will consider two amendments the author had prepared after consulting with our staff. Jon Becker testified on this legislation at a November 17, 2009 hearing. The Board staff implemented a change to CFIS last fall that permits the use of an Excel spreadsheet to file a report.

Public Hearings

On February 2, 2010, the Assembly Committee on Elections and Campaign Reform held a public hearing on two bills introduced at the request of the G.A.B. 2009 Assembly 645 and 2009 Assembly Bill 646. AB 645 raises the threshold for registration and reporting by groups and individuals seeking to influence referendum results from the current level of \$25 to \$750. This legislation was introduced in response to litigation brought against the Board and a subsequent finding the threshold as applied to the litigant was too low. *Swaffer v. Deininger et al.* AB 646 adjusts the period for retention of certain election materials in state and local elections and clarifies electronic voting equipment data retention requirements for non-federal elections.

On February 17, 2010, the Assembly Committee on Elections and Campaign Reform held a public hearing on 2009 Assembly Bill 619 which grants a county, city, town, or village the authority to create local elections boards and to regulate the financing of campaigns for county, city, town, and village offices. 2009 Assembly Bill 751 authorizing Wisconsin to enter into an agreement among the states to elect the president of the United States by means of a national popular vote was also given a public hearing.

On February 25, 2010, the Assembly Committee on Elections and Campaign Reform held an executive session on 2009 Assembly Bill 645 and voted unanimously to recommend passage. The bill is now in the Assembly Committee on Rules, awaiting scheduling. 2009 Assembly Bill 619 was also reported out of the Committee.

On March 10, 2010, the Senate Committee on Labor, Elections and Urban Affairs held a public hearing on 2009 Senate Bill 540 which permits political disbursements by corporations and cooperative associations subject to approval by corporate shareholders.

On March 16, 2010, the Senate Committee on Labor, Elections and Urban Affairs held a public hearing on 2009 Assembly Bill 454 which limits the information concerning independent candidates for partisan office that appears on the ballot at elections.

On March 17 2010, the Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing held a hearing on 2009 Assembly Bill 104. This legislation requires non-resident political committees to fully disclose and itemize all campaign activity at the thresholds required by Wisconsin law. Current law requires the non-resident committee only to disclose Wisconsin receipts and expenditures to be disclosed at these lower levels.

On March 17, 2010, the Joint Legislative Committee on Information Policy and Technology conducted a hearing on various information technology projects. Jonathan Becker and I were requested to appear to discuss the development and status of the Campaign Finance Information System (CFIS) project.

On March 31 2010, the Assembly Committee on Elections and Campaign Reform is scheduled to hold a public hearing on its omnibus election administration legislation.

LEGISLATIVE STATUS REPORT

March 23, 2010 Meeting

Assembly Bills

- **Current Assembly Bills with New Activity**

Assembly Bill 2

Introduced by Representatives Pocan, Zigmunt, Barca, Benedict, Berceau, Bernard Schaber, Black, Clark, Danou, Fields, Grigsby, Hraychuck, Hubler, Jorgensen, Krusick, Mason, Molepske Jr., Nelson, Parisi, Pasch, Pope-Roberts, Radcliffe, Richards, Roys, Seidel, Sheridan, Shilling, Sinicki, Smith, Van Akkeren, A. Williams and Young. Cosponsored by Senators Wirch, Coggs, Hansen, Lassa, Lehman, Miller, Robson and Sullivan.

Relating to: state procurement of contractual services.

Status: Passed the Assembly and Senate. Approved by the Governor on 3/3/10 as 2009 Wisconsin Act 136. Published on 3/17/10.

Assembly Bill 104

Introduced by Representatives Spanbauer, Ballweg, Bies, Gunderson, Kaufert, Kestell, Petersen, Ripp, Strachota, and Townsend. Cosponsored by Senators Harsdorf, Lehman, Cowles, Olsen, Kedzie, Leibham and Hopper.

Relating to: reporting of information by nonresident registrants under the campaign finance law.

Status: Referred to Assembly Committee on Elections and Campaign Reform. Public hearing held on 11/17/09. Assembly passed on 2/16/10. Senate received and referred to the Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing.

Assembly Bill 327

Introduced by Representatives Schneider, A. Williams, and Hraychuck.

Relating to: contributions by state contractors, grantees, or loan recipients and their officers and substantial owners to certain elective state officials.

Status: Referred to Assembly Committee on Elections and Campaign Reform. Public hearing held on 2/2/10.

Assembly Bill 454

Introduced by Representatives Smith, Stone, Hilgenberg, A. Williams, Jorgensen and Vruwink. Cosponsored by Senators Taylor, Lehman and Kedzie.

Relating to: information concerning independent candidates for partisan office that appears on the ballot at elections.

Status: Referred to Assembly Committee on Elections and Campaign Reform. Assembly amendment 1 offered by Representative Smith. Public hearing held on 11/17/09. Assembly amendment 1 adoption recommended by committee on Elections and Campaign Reform. Assembly report passage as amended recommended by committee on Elections and Campaign Reform. Assembly passed on 2/16/10. Senate received and referred to Senate Committee on Labor, Elections and Urban Affairs.

Assembly Bill 494

Introduced by Representatives Mason, Vos, Sherman, Kestell, Roys, Gunderson, Berceau, LeMahieu, Pope-Roberts, A. Williams, Clark, Townsend, Nerison, Brooks, Jorgensen and Grigsby. Cosponsored by Senators Risser, Darling, Holperin and Taylor.

Relating to: the methodology for filing campaign finance reports in electronic format.

Status: Referred to Assembly Committee on Elections and Campaign Reform. Public hearing held on 11/17/09. Assembly substitute amendment 1 offered by Representative Mason. Assembly Substitute Amendment 1 adoption recommended by committee on Elections and Campaign Reform. Assembly report passage as amended recommended by committee on Elections and Campaign Reform. Referred to committee on Rules. Assembly substitute amendment 1 adopted. Assembly then passed.

Senate referred to Senate Committee on Ethics Reform and Government Operations. Public hearing held 2/24/10. Senate Substitute amendment 1 adopted. Available for scheduling.

Assembly Bill 545

Introduced by Representatives Smith, Hilgenberg, Pope-Roberts, Parisi, Berceau, Mason, Bies and Sinicki. Cosponsored by Senators Lehman, Taylor and Schultz.

Relating to: residency of election officials.

Status: Referred to Assembly Committee on Elections and Campaign Reform. Public hearing held on 11/17/09. Assembly report passage recommended by committee on Elections and Campaign Reform.

- **New Assembly Bills**

Assembly Bill 619

Introduced by Representatives Pocan, Smith, Berceau, Hebl, Milroy, Parisi, Pope-Roberts, A. Williams and Zepnick. Cosponsored by Senators Risser, Lehman, Miller and Sullivan.

Relating to: county, city, town, and village authority to create local elections boards and to regulate the financing of campaigns for county, city, town, and village offices; duties of municipal and county boards of election commissioners; and granting rule-making authority.

Status: Referred to committee on Elections and Campaign Reform. Public hearing held on 2/17/10. Assembly report passage recommended by committee on Elections and Campaign Reform. Referred to committee on Rules.

Assembly Bill 630

Introduced by Representatives Kestell, Kerkman, Townsend, Suder, Knodl, Van Roy, Vos, Murtha, Gunderson, A. Ott, Brooks, J. Ott, Honadel, Ziegelbauer, Lothian, Ballweg and LeMahieu. Cosponsored by Senators Darling, Leibham, Grothman, Olsen and Cowles.

Relating to: enforcement of the citizenship qualification for voting in elections in this state.

Status: Referred to committee on Elections and Campaign Reform.

Assembly Bill 645

Introduced by committee on ELECTIONS AND CAMPAIGN REFORM, by request of Government Accountability Board.

Relating to: the threshold for registration and reporting by groups and individuals seeking to influence referendum results.

Status: Referred to Assembly Committee on Elections and Campaign Reform. Public hearing held 2/2/10. Assembly report passage recommended by committee on Elections and Campaign Reform. Referred to committee on Rules.

Assembly Bill 646

Introduced by committee on ELECTIONS AND CAMPAIGN REFORM, by request of Government Accountability Board.

Relating to: the period for retention of certain election materials in state and local elections.

Status: Referred to Assembly Committee on Elections and Campaign Reform. Public hearing held on 2/2/2010.

Assembly Bill 669

Introduced by Representatives Grigsby, Sinicki, A. Williams, Kessler, Turner, Mason and Toles. Cosponsored by Senator Coggs.

Relating to: the governance, and election of members of the board of school directors, of a first class city school district, and tenure for school principals.

Status: Referred to Assembly Committee on Rules.

Assembly Bill 812

In Introduced by Representatives Black, Berceau, Cullen, Kessler, Steinbrink, Pope-Roberts, Turner and Molepske Jr.; cosponsored by Senators Wirch, Lassa, Coggs, Lehman and Miller.

Relating to: political disbursements by corporations and cooperative associations and the scope of regulated activity under the campaign finance law.

Status: Referred to committee on Elections and Campaign Reform. Assembly amendment 1 offered by Representative Black. Assembly amendment 2 offered by Representative Black.

Assembly Bill 814

Introduced by Representatives Kramer, Petersen, Davis, Knodl, Vos, Zipperer, Huebsch, Townsend, Strachota, Gunderson, J. Ott, Suder and LeMahieu. Cosponsored by Senators Kanavas, Carpenter, Lazich, Hopper, Darling, Leibham, Schultz and Olsen.

Relating to: an optional identification requirement for voting in elections.

Status: Referred to committee on Elections and Campaign Reform.

Introduced by: Representatives Smith, Hilgenberg, Pope-Roberts, Parisi, Berceau, Mason, Bies and Sinicki. Cosponsored by Senators Lehman, Taylor and Schultz.

Status: Referred to Assembly Committee on Elections and Campaign Reform. Public hearing held on 11/17/09.

Assembly Joint Resolutions

- **Current Assembly Joint Resolutions with New Activity**

- **Assembly Joint Resolution 63**

- Introduced by Representatives Kessler, Black, Grigsby, Turner and A. Williams.
Cosponsored by Senator Taylor.

- Relating to:** excluding incarcerated, disenfranchised felons from the enumeration of population for apportionment and redistricting of legislative, county, and certain other district offices (first consideration).

- Status:** Referred to Assembly Committee on State Affairs and Homeland Security. Public hearing held on 9/15/09. Withdrawn from committee on State Affairs and Homeland Security and referred to Assembly Committee on Elections and Campaign Reform pursuant to Assembly Rule 42 (3)(c). Public hearing held on 2/2/2010.

- **New Assembly Joint Resolutions**

- **None**

Senate Bills

- **Current Senate Bills with New Activity**

Senate Bill 43

Introduced by Senators Erpenbach, Kreitlow, Ellis, Vinehout, Hansen, Risser, Lehman, Holperin, Harsdorf, Carpenter, Cowles and Robson. Cosponsored by Representatives Dexter, Hebl, Cullen, Zigmunt, Sherman, Barca, Hintz, Black, Hilgenberg, Mason, Toles, Hixson, Pope-Roberts, Pocan, Kaufert and Berceau.

Relating to: the scope of regulated activity under the campaign finance law.

Status: Referred to Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing. Senate substitute amendment 1 offered by Senator Erpenbach. Public hearing held on 5/27/09. Report adoption of Senate Substitute Amendment 1 recommended on 9/17/09 by committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing. Report passage as amended recommended on 9/17/09 by committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing. Senate substitute amendment 1 adopted. Senate passed. Senators Miller, Lassa and Sullivan added as coauthors. Assembly received from Senate on 1/20/2010.

Senate Bill 227

Introduced by Joint Legislative Council.

Relating to: interim successors for legislators, meetings of the legislature and legislative committees, and temporary seat of government for the legislature.

Status: Referred to Senate Committee on Small Business, Emergency Preparedness, Technical Colleges, and Consumer Protection. Senate amendment 3 offered by Senator Jauch. Senate amendment 3 adopted. Senate passed on 2/23/10. Assembly received and referred to the Assembly Committee on Rules. Assembly amendment 1 offered by Representatives Ballweg and Schneider. Assembly amendment 1 adopted. Assembly concurred in as amended. Senate concurred in as amended, Assembly amendment 1 adopted. Available for scheduling.

Senate Bill 383

Introduced by Senators Taylor, Risser, Erpenbach and Wirch. Cosponsored by Representatives Seidel, Parisi, Pope-Roberts, Turner, Tauchen, Pasch, Staskunas, Lothian, Berceau, Danou and Townsend.

Relating to: municipal court elections, judges, and procedure, and providing penalties.

Status: Referred to committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing. Adoption of Senate Amendment 1 recommended by committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing. Senate Report passage as amended recommended by committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing. Senate amendment 1 to Senate amendment 1 offered by Senator Taylor. Senator Miller added as a coauthor. Senate amendment 1 adopted. Senate amendment 1 to Senate amendment 1 adopted. Senate passed. Assembly received and referred to Assembly Committee on Corrections and the Courts. Public hearing held on 2/26/10. Assembly amendment 1 offered by Representative Seidel. Assembly 2 offered by Representative Kessler. Assembly 3 offered by Representative Parisi.

Senate Bill 417

Introduced by committee on Judiciary, Corrections, Campaign Finance Reform, and Housing.

Relating to: the threshold for registration and reporting by groups and individuals seeking to influence referendum results.

Status: Referred to committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing. Senate report passage recommended by committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing. Available for scheduling.

- **New Senate Bills**

Senate Bill 435

Introduced by committee on LABOR, ELECTIONS AND URBAN AFFAIRS, by request of Government Accountability Board.

Relating to: the period for retention of certain election materials in state and local elections.

Status: Referred to committee on Labor, Elections and Urban Affairs

Senate Bill 540

Introduced by Senators Wirch, Lassa, Coggs, Lehman and Miller. Cosponsored by Representatives Black, Pope- Roberts, Turner, Steinbrink, Kessler, Cullen and Berceau.

Relating to: political disbursements by corporations and cooperative associations and the scope of regulated activity under the campaign finance law.

Status: Referred to Senate Committee on Labor, Elections and Urban Affairs. Representative Molepske Jr. added as a cosponsor. Senate amendment 1 offered by Senator Wirch. Public hearing scheduled for 3/10/10.

Senate Joint Resolutions

- **Current Senate Joint Resolutions with New Activity**

None

- **New Senate Joint Resolutions**

None

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JUDGE MICHAEL BRENNAN
Chair

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For the March 23, 2010, Meeting

TO: Members, Wisconsin Government Accountability Board

FROM: Kevin J. Kennedy
Director and General Counsel
Wisconsin Government Accountability Board

Prepared and Presented by:
Nathaniel E. Robinson
Elections Division Administrator

SUBJECT: Elections Division Update

Election Administration Update

Introduction

Since the Government Accountability Board's December 17, 2009, meeting, the Elections Division has focused on the following tasks:

Noteworthy Election Administration Activities

1. Spring Election

There are three Court of Appeals Districts (1, 2 and 4) and 44 Circuit Court Judge positions up for election April 6, 2010. Six candidates registered for the three Court of Appeals Judge positions and 62 candidates registered for the office Circuit Court Judge, for a total of 68 candidates. Two candidates for Circuit Court Judge did not qualify for the ballot, which reduced the number of qualifying candidates to 66. Five offices required a primary on February 16, 2010: Court of Appeals Judge, District 4, Oconto County Circuit Court Judge, Branch 2, Pierce County Circuit Court Judge, Walworth County Circuit Court Judge, Branch 4 and Winnebago County Circuit Court Judge, Branch 5. The primaries involved 29 counties. On January 12, 2010, 48 candidates were certified to the election ballot and 18 were certified to the primary ballot.

The deadline for G.A.B. to receive the county canvasses for the primary was Tuesday, February 23, 2010. All canvasses were received timely; 2 canvasses were received on February 18, 21 were received on February 19, and 6 were received on February 22. The deadline for G.A.B. staff to complete the canvass was Tuesday, March 2, 2010. The canvass was completed and certified on Thursday, February 25, 2010. Ten candidates were certified to the election ballot, which brings the total number of candidates for the April 6, 2010 election to 58 candidates. A

special thank you to Ross Hein who, except for final proofing, single-handedly conducted the entire canvassing process. Board Chair, Judge Eich, signed the February 16, 2010, Spring Primary Canvass on Friday, January 26, 2010.

2. Cost of Elections

At the December 17, 2009 meeting, the Election Administration Update referred to questions raised recently with respect to the cost of various election components and what level of government is required to pay for what services. Most of the confusion comes when a school or special district is the only level of government holding an election (usually a primary or referendum) on one of the four regularly-scheduled election days.

Staff Counsel Mike Haas and Lead Elections Specialist Diane Lowe, in consultation with the Election Administration Team, have revised and expanded the Cost of Elections Document to better address the statutory financial responsibility for elections assigned to each level of government.

3. Accessibility Update

There are 1,851 municipalities in Wisconsin. We have received 2,590 completed accessibility surveys from 1,778 municipalities (96%). 73 municipalities have not submitted a new survey.

Grant applications were received for 876 polling places. Municipalities with more than one polling place had to apply by location. 527 Type A grants and 28 Type B Grants were awarded. A total of 555 grants (63%) were approved. A definition of the Type A and B grants is noted below.

Type A Grants - \$105,885.90

These grants were for actual supplies. Items were purchased in bulk and bundles by the G.A.B. and then distributed to municipalities based on need. Items included:

- Parking and pathway signage
- Portable bases on which to mount the signage
- Cones to designate accessible parking spaces
- Wireless door bells
- Portable threshold ramps
- Swing-clear door hinges
- Accessible voting booths
- Page magnifiers
- Signature guides
- Door pressure gauges

Type B Grants - \$14,346.82

These grants provided up to \$1,500 per polling place for improvements that were not related to supplies purchased in bulk. Due to federal funding rules, improvements could not be made for permanent, capital construction activities. Examples of Type B grant projects included: replacing round door knobs with accessible door hardware, installing portable ramps, installing automatic door openers, and adding curbside voting signage.

4. Collaboration with Clerk Customers

- Tuesday, February 23, 2010: Staff met with Dane County Municipal Clerks, as well as the Dane County Clerk to review a draft protocol designed to improve the accuracy of responses to clerks' inquiries and requests.
- Thursday, February 25, 2010: Staff updated District IV members of the Wisconsin Municipal Clerks Association on 2010 elections activities.
- Tuesday, March 2, 2010: During their annual winter meeting, staff updated members of the Wisconsin County Clerks Association on 2010 election activities.

5. Training

See the attached Training Summary

Other Noteworthy Initiatives:

1. Voter Data Interface

Clerks continue to use SVRS to run HAVA Checks to validate against Department of Transportation (DOT) and Social Security Administration (SSA) records, and confirm matches with Department of Corrections (DOC) felon information and Department of Health Services (DHS) death data, as part of on-going HAVA compliance.

Clerks process HAVA Checks and confirm matches on a continuous basis during the course of their daily election administration tasks, having done so since the Interfaces became functional in SVRS on August 6, 2008. The number of HAVA Checks done by clerks on a regular basis reported below should not be confused with the Retroactive HAVA Check process. Retroactive HAVA Check information is in addition to the HAVA Checks performed by our Clerks.

Since the Board's last meeting on December 17, 2009, Clerks processed approximately 7,460 HAVA Checks with DOT/SSA on voter applications in SVRS.

2. Retroactive HAVA Checks Status

A Final Report on the Retroactive HAVA Check Project will be presented to the Board as a separate Agenda item.

3. Voter Registration Statistics

As of Friday, March 5, 2010, there were a total of 4,523,186 voter records stored in SVRS. Of this number, 3,427,804 were active voters; 880,764 were inactive; and, 214,620 were cancelled voters.

NOTE: An Active Voter is one whose name will appear on the poll list. An Inactive voter is one who may become active again, e.g. convicted felon. A Cancelled Voter is one who will not become active again, e.g. deceased person.

Comment: The number of records in SVRS has decreased since the last report due to the work of clerk users and Board staff in merging duplicate voter records as part of regular list maintenance. 29,988 merges have been completed in SVRS between December 17, 2009, and March 8, 2010.

4. Efforts to Improve the Statewide Voter Registration System's Performance

As previously reported, an Ad-Hoc SVRS Study Team was formed to evaluate the SVRS and plan for the future of the SVRS application. The team met to review a proposed "roadmap" for the future of SVRS. The roadmap is being finalized with comments from the Team and will be presented to Board management in March. Board management also met with Board IT staff regarding a proposal presented by DET to provide more comprehensive IS support services for the Board's portfolio of applications. The Director and General Counsel and agency management continue to analyze the DET proposal. The Team's "roadmap" and DET's proposal will form a cohesive plan for the future.

5. Online Voter Registration Initiative

The Team for developing online voter registration has begun formal data gathering on the experiences and best practices from other states that have already implemented online registration, or are in the process of developing such systems. The team has also worked on cost estimates of developing an online registration system, based on input from the public and lawmakers about what features such a system might include as well as what other states are doing. A member of the Legislature and the Legislative Fiscal Bureau requested a cost estimate based upon high level requirements for implementing online voter registration. With assistance from the Division of Enterprise Technology's Bureau of Business Application Support, the team prepared an "order of magnitude" estimate. The estimate can be used for planning purposes. As the specifications for online voter registration become more clearly defined, the cost estimate for the project will become more precise. Board staff has emphasized the benefit of keeping legislation free of detailed requirements to allow G.A.B. the needed flexibility in developing a system. This flexibility will allow us to explore solutions that are innovative and cost effective.

6. Improving the Canvass Process

The Team to improve the canvas process and retire the Board's current election administration software, SWEBIS II, continued to meet. DET presented a walkthrough of proposed changes. DET continues to work on the canvass application taking into account business requirements and comments from Board staff. Next steps include vetting the canvass process with our clerk partners before final changes are determined and the timeline for implementation is set.

7. G.A.B. Help Desk

The G.A.B. Help Desk is supporting over 1,700 active SVRS users. The Help Desk staff continues to assist with processing Retroactive HAVA Letter calls and voter record update tracking. Help Desk staff also improves and maintains the two training environments that are being utilized in the SVRS training of clerk users.

The majority of calls were from SVRS users and clerks requesting assistance with the administration of the February Spring Primary in SVRS, supporting clerks in running various reports in SVRS (such as poll lists and voter lists for candidates), providing assistance for the set-up and other preparation tasks for the April Spring Election and aiding users in setting up new computers to run SVRS.

G.A.B. Help Desk Call Volume	
December 2009	497
January 2010	776
February 2010 (Feb 16 Primary)	1,012

Total for last 3 months	2,285
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The Help Desk maintained extended hours before, during and after the February Spring Primary to support clerks who needed assistance outside of regular business hours.

8. Voter/Felon Comparison Audit

After all information relating to voter registration and participation was completed in SVRS for the November 2008 Presidential and General Election, SVRS staff compared the list of voters with a list of felons still under supervision on Election Day, as provided by DOC.

- 213 voters were matched and the list was sent to DOC for confirmation that the felons on the list were indeed still under supervision on Election Day.
- Once the verification by DOC staff was completed, a list of 195 remaining voters was sent to affected Clerks to review for accuracy. The 78 affected Clerks had until September 21 to respond.
- After review of Clerk responses and clarification by DOC on some records, 124 individuals were referred to the appropriate 37 District Attorneys on November 17.
- Staff Counsel has received 16 telephone contacts from District Attorneys regarding the referrals requesting further information and providing comments.
- 19 District Attorneys subsequently filed their required 40-day status reports. One District Attorney filed a partial report.
- On February 3, 2010, 17 District Attorneys were sent reminder notices that their 40-day status reports had not been received and were overdue.
- As of March 8, 2010, 9 District Attorneys have given no response at all to the referral.

With all voter information relating to voter registration and participation for the February 17, 2009 Spring Primary and April 7, 2009 Spring Election completed in SVRS, the Board staff began the voter comparison for these election events.

- 3 potential matches were found for the February Primary and 16 potential matches were found for the April Election.
- After verification by DOC staff that the felons on the list were indeed still under supervision on Election Day, 3 names remained for the February Primary and the number was reduced to 12 names for the April Election.
- Lists of the 15 remaining voters were sent to the 15 affected Clerks for their review on December 4, 2009.
- Once review of the Clerk's responses was completed, 8 individuals were referred to the appropriate 7 District Attorneys on February 3, 2010. 2 potential from the February 2009 primary and 6 from the April 2009 election.
- 4 District Attorneys have responded with the statuses of their investigations.

- March 12, 2010, is the deadline for the 40-day status report from the affected District Attorneys.

9. Inter-State Voter Registration Data Sharing

One of the methods to improve the accuracy of voter information in SVRS is to share voter registration data between states, and enhance the detection of possible voter fraud, particularly the states that border Wisconsin: Illinois, Iowa, Michigan and Minnesota. A Board project team launched an initiative in December to research and engage in data sharing with neighboring states. The Team is in contact with representatives in our neighboring states and initial discussions regarding a sharing agreement has begun with one state.

Under current state statutes, the state is prohibited from sharing the voter's date of birth. In order to have effective matching, the date of birth is a necessary piece of identifying information. The Team has proposed that Board staff perform the matching in-house. This will allow us to match our voter data with other states' data and still comply with the law.

10. SVRS Core Activities

A. Software Upgrade(s)

A new version of the SVRS application, version 6.7 was installed for clerks to use on December 20, 2009. This new version included long awaited enhancements to the duplicate matching function in SVRS.

Work continues on SVRS version 7.0 which includes a major upgrade to the underlying code framework, as well as enhancements to the system that will allow Board staff to retire the old unsupported Elections Administration system, SWEBIS II. Version 7.0 is scheduled to be installed for clerks to use in May of 2010.

B. System Outages

SVRS users experienced an outage of the SVRS system on from Sunday through Tuesday, January 17 - 19. A database issue occurred on Sunday night which prevented users from logging in. To compound the issue, both G.A.B. and DET offices were closed on Monday, January 18, in observance of Martin Luther King Jr. Day. An automatic alert was generated on Sunday night at DET and a problem ticket was called in by Board staff on Monday, however the issue was not resolved until Tuesday morning when DET offices opened again for business. It appears that the level of service offered by DET to agencies shifted from "on call" to "best effort" or "standby." Unfortunately, Board management was not informed of this change and believed that our "on call" service would have been able to correct the issue.

SVRS users experienced another outage of the SVRS system from early morning on Sunday, February 14, through Monday morning, February 15, 2010. The outage was caused by a hardware failure on one of the database servers and the failover to the other database server failed. The batch job scheduling in SVRS was unavailable through most of Monday. A problem ticket was called in by Board staff at 6:45 am on Monday morning, however with DET staff in furlough status, a standby staff person had to be paged adding to the delay in diagnosing and resolving the problem.

SVRS was not fully usable until Monday late afternoon when the application scheduler was fully functional. It was extremely fortunate that the DET Standby staff person happened to

be very familiar with the application architecture and infrastructure. Staff had not arranged for "standby" support for Sunday so the system remained unavailable with no support all day Sunday and into Monday. Because of the outage, the HAVA required Interface with DOT as well as the death, felon and duplicate voter matching in SVRS did not process until Tuesday morning

C. DET Support

As previously reported, DET Administrator Anderson has appointed a senior-level staff person to manage IT issues between DET and the Board. This DET representative, who serves as our portfolio manager, meets weekly with Board technical staff to monitor and follow-up open issues and requests and to assist in resolution. Board staff is in the process of evaluating the first 2 months' activities to apprise G.A.B. management as to how well this new arrangement is working. A report of our impressions, perceptions, and how well our expectations are being met, will be shared with Administrator Anderson sometime in April.

30-Day Forecast

- Staff will continue to prepare for, and assist our 1,851 municipal and 72 county clerk customers get ready for the April 6, 2010, Spring Election. Starting Wednesday, March 31, 2010, we will extend our operating hours as follows:
 - Wednesday, March 31 through Friday, April 2, 2010, from 6:30 a.m. until 6:00 p.m.
 - Saturday, April 3, 2010, from 9:00 a.m. until 12 Noon
 - **No Sunday, April 4, 2010 Extended Hours**
 - Monday, April 5, 2010, from 6:30 a.m. until 6:00 p.m.
 - Tuesday, April 6, 2010, **Election Day**, from 6:30 a.m. until 9:00p.m.
 - Wednesday, April 7, 2010, from 6:30 a.m. until 6:00 p.m.
- Progress continues toward an automated canvass process within the SVRS so that the aging and fragile election information system known as SWEBIS II may be retired. Complete roll out of the system is slated for the September Partisan Primary.

Action Items

The Board's approval is requested for staff to apply for \$1.3 Federal Fiscal Year (FFY) 2010 Requirements Payments.

Wisconsin is eligible to receive \$1,285,090 million dollars in Federal Fiscal Year (FFY) 2010 Requirements Payments. The required match is \$67,637. Board's permission is requested to apply for these funds. The required match will be provided through existing State-approved resources.

Proposed Motion: That the Board authorized staff to apply for \$1,285,090 million dollars in Federal Fiscal Year (FFY) 2010 Requirements Payments.

ATTACHMENT

GAB Election Division's Training Initiatives
12/18/10 – 3/22/10

Training Type	Description	Class Duration	Target Audience	Number of Classes	Number of Students
SVRS "Initial" Application and Election Management	Instruction in core SVRS functions – how to navigate the system, how to add voters, how to set up elections and print poll books.	16 hours	New users of the SVRS application software.	6 classes conducted in Madison (2), Whitehall, West Allis, Elkhorn and Chilton. Additional classes scheduled on an "as needed" basis.	45
SVRS "Advanced" Election Management	Instruction for those who have taken "initial" SVRS training and need refresher training or want to work with more advanced features of SVRS.	3 types of classes: Election Management; Absentee Process; HAVA Interfaces, Reports, Labels & Mailings; 4 hours each	Experienced users of the SVRS application software.	17	185
Voter Registration	Basic training in adding voter registration applications, searching for voters, updated voters.	3 hours	Municipal and county clerks, staff and temp workers who provide election support only.	The WBETS site is available to train temporary workers.	Ongoing, self-directed training is available online.
Municipal Clerk	2005 Wisconsin Act 451 requires that all municipal clerks attend a state-sponsored training program at least once every 2 years.	3 hours	All Municipal clerks are required to take the training; other staff may attend.	6 classes conducted Wausau, Spooner, Madison (2), Dodgeville and Green Bay.	55

ATTACHMENT

GAB Election Division's Training Initiatives
12/18/10 – 3/22/10

Training Type	Description	Class Duration	Target Audience	Number of Classes	Number of Students
Chief Inspector	Instruction for new Chief Inspectors before they can serve as an election official for a municipality during an election.	3 hours	Election workers for a municipality.	37 classes conducted in locations across the state.	980
Special Registration Deputy	2005 Wisconsin Act 451 allows a qualified elector of Wisconsin to be appointed as a Special Registration Deputy (SRD) for the purpose of registering electors of any municipality in Wisconsin during periods of open voter registration.	2 hours	Qualified electors in Wisconsin.	9 classes conducted in Gillett, Oshkosh, Fond du Lac., Fennimore, Madison, Green Bay (2) and Brookfield (2). *All Eligible SRDS from the 2007-2008 term were invited to be "reappointed" to the position for the 2009-2010 term.	110
WisLine	Series of 10 programs designed to keep local government officers up to date on the administration of elections in Wisconsin.	80 minute conference call, hosted by the UW Extension, conducted by Elections Division staff.	Clerks and chief inspectors; campaign treasurers and candidates.	January 20, 2010: Absentee Voting; March 17, 2010: Recount How-To's	Average 200 per class

ATTACHMENT

GAB Election Division's Training Initiatives
12/18/10 – 3/22/10

Training Type	Description	Class Duration	Target Audience	Number of Classes	Number of Students
WBETS	Web Based Election Training System. Still under development. Reference materials were made available to the clerks in February; voter registration training made available to clerks 3/24/2008.	Varies	County and municipal clerks and their staff.	Phase 1 of eLearning training plan close to completion; Phase 2 under discussion.	Site is available for clerks to train temp workers in data entry; relies are also able to access the site upon request.
HAVA Interfaces	Instruction in the user of the interface functionality in SVRS to check death records, felon records, DOT records and duplicate records against voter records as part of HAVA compliance requirements.	2 hours	All clerks (staff as determined by clerk).	Pilot of web-based training presented to the Standards Committee on May 14, 2008. Lessons available online June 2, 2008.	Eventually 2000+
Other initiatives:	<ul style="list-style-type: none"> • Board staff developing clerk-trainer program. • Board staff working on migration of several training programs to online and DVD formats. 				

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JUDGE WILLIAM EICH
Chairperson

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: March 23-24, 2010

TO: Members, Wisconsin Government Accountability Board

FROM: Kevin J. Kennedy, Legal Counsel
Wisconsin Government Accountability Board

Prepared by: Jonathan Becker, Administrator
Ethics and Accountability Division

SUBJECT: Ethics and Accountability Division Program Activity

Campaign Finance Program

Richard Bohringer, Tracey Porter and Dennis Morvak, Campaign Finance Auditors

2010 January Continuing Reports

Materials for the 2010 January Continuing report were sent to all candidates, PACs, parties, conduits, and sponsoring organizations. This report covers their activity through December 31, 2009 and was due by February 1, 2010. 1251 committees were required to file a campaign finance report. As of March 12, we have received 1,239 campaign finance reports. Of those reports received, 816 reports were filed electronically and 423 reports were received from paper filers.

There are 12 committees that have not filed campaign finance reports yet for the January Continuing 2010 report period. The non-filers include 1 candidate, 3 political parties, 5 PACs, and 3 corporations (all conduits have filed). Staff has made efforts to follow up with all committee that did not timely file.

Campaign finance auditors worked extended hours, including weekend hours, during the days leading up to and immediately following the February 1 filing deadline in order to be as accessible for filers as possible. Staff continues to work with those candidates, PACs, parties, conduits and corporations on filing campaign finance information using the Campaign Finance Information System.

Annual Filing Fees

Any non-candidate committee with expenses over \$2,500 is required to pay a \$100 filing fee. This fee was due on or before February 1, 2010. As of March 12, 2010, the G.A.B. has collected \$33,100 in filing fees. If this fee is not paid timely, the committee is required to pay a total of \$300 for filing fees, and up to a \$500 forfeiture.

Spring Pre-Primary and Pre-Election Reports

Materials for the Spring Pre-Primary filing were sent to those candidates participating in the Spring Primary election. 127 pre-primary reports were filed with the G.A.B.; 44 of those reports were filed by

candidates. This report covers campaign finance activity from February 2 through March 22, 2010 and is due on or before March 29, 2010.

Campaign Finance Information System Performance and Update

The Campaign Finance Information System performance continues to improve. During the peak filing period leading up to the February 1, 2010 filing deadline, only one system issue occurred. CFIS was unable to generate a .PDF copy of the GAB-2 report filed by the Friends of Scott Walker committee due to the size of the .PDF file and a lack of available system resources. Representatives from PCC Technology Group were on site to work with staff from the Division of Enterprise Technology and the GAB to implement a fix to solve the problem. The .PDF file of the Walker campaign’s report is now available in the system for all to view. This problem did not prevent users from filing information in the system nor did it prevent individuals from accessing information already filed. PCC Technology is currently working to create and implement a system enhancement to prevent this problem from occurring for future filers. GAB staff and PCC Technology continue to work to enhance the system’s functionality and performance.

Lobbying Update

Tommy Winkler, Assistant Division Administrator

Statement of Lobbying Activities and Expenditures Reports

Lobbying principal organizations and lobbyists registered and licensed in the 2009-2010 legislative session completed and filed their second six month Statement of Lobbying Activities and Expenditures reports covering lobbying activity and expenditures from July through December, 2009. These reports were due on or before February 1, 2010. The program received 99% reporting compliance with this filing. Statistical information for the first year of the 2009-2010 legislative session is provided in Table 1 below. Lobbying information filed in 2009 is compared to lobbying information filed in 2007. Staff continues to process matters that are the subject of lobbying communications reported by principal organizations as required by Chapter 13, *Wisconsin Statutes*.

TABLE 1

2009-2010 Legislative Session: Lobbying by the Numbers (Comparison to 2007-2008 Legislative Session)			
	<u>2009</u>	<u>2007</u>	<u>Difference</u>
Hours Lobbied	~ 276,900	~ 268,200	+8,700
Dollars Spent	~ \$36,206,000	~ \$34,387,000	+\$1,819,000
Number of Organizations Registered to Lobby	736	749	-13
Number of Lobbyists Licensed to Lobby	752	788	-36

Lobbying Registration and Reporting Information

Government Accountability Board staff continues to process 2009-2010 lobbying registrations, licenses and authorizations. Processing performance and revenue statistics related to this session’s registration is provided in Table 2 below.

TABLE 2

2009-2010 Legislative Session: Lobbying Registration by the Numbers (Data Current as of March 12, 2010)			
	Number	Cost	Revenue Generated
Organizations Registered	754	\$375	\$282,750
Lobbyists Licenses Issued (Single)	646	\$250	\$161,500
Lobbyists Licenses Issued (Multiple)	136	\$400	\$54,400
Lobbyists Authorizations Issued	1685	\$125	\$210,625

New Lobbying Website Project Update

GAB staff is prepared to begin work on creating a new and enhanced version of the web-based Eye on Lobbying information system. GAB is partnering with the Division of Enterprise Technology to build the new database application. Pursuant to §13.685 (8), *Wisconsin Statutes*, the Board was required to submit a proposed contract to the co-chairpersons of the Joint Committee on Finance for a 14 day passive review before entering into a contract with a vendor to upgrade the lobbying database and Internet site. This process has been completed; GAB staff is now completing the final administrative steps to receive spending authority for the project, and once granted, will begin the design and build of the new application. Staff intends to include and solicit feedback from members of the lobbying community and other interested stakeholders in the design of the new application.

Financial Disclosure Update

Cindy Kreckow, Ethics and Lobbying Support Specialist

Statements of Economic Interests – Judicial Candidates for Spring Election

Government Accountability Board staff recently mailed and processed Statements of Economic Interests for candidates running in the spring election. 6 appellate court candidates, 62 circuit court candidates and 125 municipal judge candidates filed statements with the Board.

Statements of Economic Interests – Annual Filing

In addition to the statements mailed to incumbent appellate court, circuit court, and municipal judge candidates, Government Accountability Board staff sent an additional **1,944** pre-printed Statements of Economic Interests to state public officials required to file a statement with the Board under Chapter 19, *Wisconsin Statutes*. Statements are mailed over the course of eight weeks, beginning January 25, 2010. As of Friday, March 12, 2010, **1,210** statements have been filed. Of those filed, **1,193** statements have been processed into the online index available on the agency's website. Statements of Economic Interests are due on or before April 30, 2010. Staff will continue to process incoming statements throughout March and April and will follow up with those officials who have yet to file to ensure they are aware of the statutory deadline.

Staff will also be sending out quarterly financial disclosure statements to State Investment Board members on March 31. These statements are to be completed and returned to the G.A.B. no later than April 30, 2010.

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KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For the March 23-24, 2010 Meeting

TO: Members, Wisconsin Government Accountability Board

FROM: Kevin J. Kennedy, Director and General Counsel
Wisconsin Government Accountability Board

Prepared by: Kevin J. Kennedy, Director and General Counsel
Sharrie Hauge, Chief Administrative Officer
Reid Magney, Public Information Officer

SUBJECT: Administrative Activities

Agency Operations

Introduction

The primary administrative focus for this reporting period has been on preparing for the agency's federal compliance audit, staff recruitments, communicating with agency customers, working with the Legislature and presentations.

Noteworthy Activities

1. Federal Performance Audit

On March 8, 2010, an Entrance Conference was held to begin the performance audit of Wisconsin's administration of Help America Vote Act Funds. The U.S. Election Assistance Commission (EAC), Office of Inspector General (OIG) hired the accounting firm Clifton Gunderson LLP to conduct the audit. During the Entrance Conference the auditors explained the timeline and methodology for the audit. The audit will be conducted in two phases. The first phase is the Introduction and Informational Gathering Phase that began on March 8, 2010 after the Entrance Conference through March 12, 2010. After this phase is complete the auditors will provide the EAC OIG with a plan to conduct the audit. During the Survey Phase the auditors interviewed staff, observed activities; reviewed existing documentation such as: internal and external reports, program operations and financial manuals; and, our policies and procedures.

The second phase of the audit will begin on March 22, 2010. The auditors will conduct audit field work once the EAC accepts the audit plan. The HAVA audit field work will

consist of testing payroll expenditures, major procurement transactions, direct/indirect codes, and visiting municipalities to count and verify voting equipment purchases.

In preparation for the audit, staff continues to compile expenditure information for all HAVA years, interest earned data, documentation of all capital assets and developing step by step descriptions of the voting equipment grant/sub grant program.

2. Staffing

Currently, we are seeking approval from the Centralized Position Review Committee to fill an Ethics Specialist position to support areas of campaign finance, lobbying and financial disclosure. We are also seeking approval to fill an Elections Specialist position to assist in implementing the new Federally-Approved Military Overseas Voter Empowerment Act (MOVE).

3. Communications Report

Since the December 17, 2009, Board meeting, the Public Information Officer has responded to numerous media inquiries and planned communications strategy in furtherance of the Board's mission.

Our project to consolidate the web sites of the former Elections and Ethics boards will be coming to fruition soon. The PIO has spent significant time designing and developing the new web site, using the same free, open source software used by the White House. The Web Site Team guiding the project meets weekly, and its members are spending significant time working to move large amounts of content from the old Elections and Ethics division sites to the new development site. All of this content must be reviewed, and some of it must be updated before posting. The development site will go through a period of beta testing by clerks and other agency stakeholders to gather feedback and make any necessary changes prior to going live. The team has decided to launch the new site in May to avoid adversely affecting clerks, who will depend on our current site during the Spring Election period.

The PIO also worked on a variety of other projects, including designing new agency business cards, updating Board publications, communicating with our clerk partners, serving on the Online Voter Registration Team, responding to media inquiries about the January 2010 Continuing Campaign Finance Report, attending meetings with the Director and Legislators regarding the MOVE Act, and responding to concerns from Legislators on a variety of topics.

4. Meetings and Presentations

The Director and General Counsel had several informal meetings and contacts with key agency stakeholders related to agency information technology issues, proposed legislation and the Campaign Finance Information System (CFIS). This included meetings with several senators related to the confirmation of Judge Barland and Judge Myse to the Government Accountability Board. Judge Barland received unanimous confirmation on February 3, 2010. A vote on Judge Myse's confirmation has not been scheduled.

I monitored several meetings organized by the Elections Division related to early voting, on-line voter registration, 2010 census planning, SVRS enhancements, election official training and clerk communications. I also monitored Ethics and Accountability Division discussions on SEI reporting, lobbying and CFIS planning. I also was involved in discussions on the development of the lobbying web site update that has begun.

On the evening of December 15, 2009, Nat Robinson and I attended *Protect Wisconsin's Vote Education Summit* presented by One Wisconsin Now (OWN). The summit included a presentation on voter registration modernization by Adam Skaggs from the Brennan Center for Justice as well as a panel discussion on restoring the vote for felons. An election protection attorney also spoke on Election Day issues from the perspective of an election observer.

On January 7, 8, 2010, I attended a meeting of the Joint Election Officials Liaison Committee (JEOLC). This annual summit provides an opportunity to meet with Congressional staff to discuss proposed and pending federal legislation related to election administration. This provides an excellent opportunity to provide input as Congress continues to consider election reform proposals.

On January 21, 2010 I made a Continuing Legal Education presentation for attorneys and election officials at the Center for the Study of Politics and Governance. The Center is part of the Hubert H. Humphrey Institute of Public Affairs at the University of Minnesota.

Nat Robinson and I attended the winter meeting of the National Association of State Election Directors (NASSED) in Washington, DC, January 27 through January 30, 2010. The meeting provided an opportunity to meet with state election directors from several states and territories. The agenda included presentations on the MOVE Act and voting equipment certification. Representatives of the U.S. Census Bureau, the Federal Voting Assistance Program (FVAP) of the Department of Defense and U.S. Department of Justice also made presentations and responded to questions.

On January 31, 2010, I made a presentation on voter registration list maintenance, data matching issues and litigation relating to statewide voter registration data bases as part of a Continuing Legal Education program for state election attorneys for the National Association of State Election Directors (NASSED). Shane Falk and Mike Haas attended the program which also featured presentations on the MOVE Act, voter registration modernization and working with the United States Department of Justice. Mike Haas attended a presentation on the MOVE Act at the meeting of the National Association of Secretaries for State (NASS) on the day following the CLE program.

Kate Kruizenga has been assisting me in setting up the annual meeting of the Government Accountability Candidate Committee. A mailing has been sent out to former judges inviting them to apply for a six-year term on the Government Accountability Board. Applicants must respond to a questionnaire that is designed to assess candidate eligibility. They are also requested to submit a letter of interest along with a description of professional qualifications.

The Committee Members are Court of Appeals Judges Ralph Adam Fine, Daniel Anderson, Edward Brunner and Charles Dykman. The Committee will meet on April 12, 2010 to nominate at least two individuals to serve a six-year term on the Government Accountability Board. Judge Eich's term expires on May 1, 2010, although he may continue to serve until a successor is appointed by the Governor following receipt of the nominations from the Candidate Committee.

Barbara Hansen, Ross Hein and I attended a special workshop on Critical Issues in Voter Registration and Election Administration sponsored by the Election Center on February 10-12, 2010. The workshop was followed by a professional education program on comparative democracies. Both the workshop and the professional education class are part of the continuing certification requirements for the Certified Election and Registration Administrator (CERA) program.

On March 2, 2010 I participated with Ross Hein, Shane Falk and Nat Robinson in a series of presentations to the County Clerks Association. G.A.B staff discussed pending legislation, voting equipment certification, and development of a new election canvass reporting system. Representatives from the Pew Center for the States also made a presentation on voter registration modernization.

The agency Management Team continues to work with Oskar Anderson, the state's chief information technology officer, and his staff to address technical service support issues and explore means of managing our application development. Although we are a small agency, our information technology activity is huge and is an essential element of our program operations. We are discussing ways to ensure we have the technical professional support to ensure better implementation of information technology projects along with support for existing applications.

Looking Ahead

The staff will continue to prepare for the federal audit of HAVA funds, to work with the Legislature on legislative initiatives, to carryout a number of organization functions related to ongoing investigations, administrative rule promulgation, informational manual revisions, preparing for the 2010 election cycle and rolling out the revised agency web site.

Action Items

None