

Tuesday, August 2, 2011 – 9:30 A.M.

Open Session

G.A.B. Board Room
 212 East Washington Avenue, Third Floor
 Madison, Wisconsin

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A. Call to Order	
B. Director’s Report of Appropriate Meeting Notice	
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<i>Break</i>	
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K. 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, September 12, 2011 at the Government Accountability Board offices, 212 East Washington Avenue, Third Floor in Madison, Wisconsin, beginning at 9:30 am.

State of Wisconsin\Government Accountability Board

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JUDGE THOMAS H. BARLAND
Chair

KEVIN J. KENNEDY
Director and General Counsel

Wisconsin Government Accountability Board

212 East Washington Avenue
Madison, Wisconsin
June 27, 2011
1 p.m.

Open Session Minutes

<u>Summary of Significant Actions Taken</u>	<u>Page</u>
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B. Approved Ballot Access for Robert Lussow	2
C. Approved Ballot Access for Kim Simac	2
D. Approved Ballot Access for David VanderLeest	3
E. Denied Ballot Access for John Nygren	4

Present: Judge Gerald Nichol (in person), Judge Thomas H. Barland, Judge Michael Brennan, Judge Thomas Cane, Judge David Deininger, and Judge Timothy Vocke (by teleconference)

Staff present: Kevin Kennedy, Nathaniel E. Robinson, Jonathan Becker, Michael Haas, Shane Falk, Ross Hein, and Reid Magney

A. Call to Order

Vice Chairperson Nichol called the teleconference meeting to order at 1 p.m. He welcomed Judge Timothy Vocke to the Board.

B. Director's Report of Appropriate Meeting Notice

Director and General Counsel Kevin Kennedy informed the Board that proper notice was given for the meeting.

C. Approval of Minutes of Previous Meetings

- 1. May 17, 2011 Meeting – Open Session**
- 2. May 23, 2011 Meeting – Open Session**

- 3. May 31, 2011 Meeting – Open Session**
- 4. June 8, 2011 Meeting – Open Session**

MOTION: Approve the Open Session minutes of the meetings of May 17, 2011, May 23, 2011, May 31, 2011, and June 8, 2011. Moved by Judge Barland, seconded by Judge Cane. Motion carried 5-0. Judge Vocke abstained because he was not a member of the Board at the time of the meetings.

D. Ballot Access Issues

Director Kennedy told the Board that ballot access issues would be taken in the following order: Robert Lussow, Kim Simac, David VanderLeest and John Nygren. At the request of Director Kennedy, the Board gave its unanimous consent to allow an appearance by Attorney Jennifer Lohr, who is admitted to the bar in New York State, has passed the bar in Wisconsin, and will be sworn in the following week. Attorney Jeremy Levinson is unable to attend the meeting.

1. Robert Lussow

Director Kennedy prepared a written report for the Board, and made an oral presentation.

MOTION: Find that nomination papers submitted by Robert Lussow contain 585 valid signatures as reflected by the staff analysis set out in its memorandum and challenge worksheet, which are adopted by the Board and incorporated by reference in this motion. Moved by Judge Deininger, seconded by Judge Cane. Motion carried unanimously.

MOTION: Find that the Declaration of Candidacy submitted by Robert Lussow substantially complies with the statutory requirement to list his municipality of residence for voting purposes when he listed a street address with a number, post office and ZIP code that is located in the Town of Bradley, Lincoln County, and State Senate District 12. Moved by Judge Cane, seconded by Judge Barland. Motion carried unanimously.

MOTION: Direct staff to certify Robert Lussow for placement on the ballot for the July 19, 2011 recall primary election in State Senate District 12. Moved by Judge Brennan, seconded by Judge Cane. Motion carried unanimously.

2. Kim Simac

Attorney Michael Screnock appeared on behalf of Kim Simac. He told the Board that not enough of Ms. Simac's petition signatures were challenged to remove her from the ballot. He said Ms. Simac had filed an amended Declaration of Candidacy.

Discussion.

MOTION: Find the nomination papers submitted by Kim Simac contain at least 601 and as many as 702 valid signatures as reflected by the staff analysis set out in its memorandum and challenge worksheet, which are adopted by the Board and incorporated by reference in this motion. Moved by Judge Cane, seconded by Judge Deininger. Motion carried unanimously.

MOTION: Find the Declaration of Candidacy submitted by Kim Simac substantially complies with the statutory requirement to list her municipality of residence for voting purposes when she listed a street address with a number, post office and zip code that is located in the Town of Lincoln, Vilas County and the 12th State Senate District. Moved by Judge Cane, seconded by Judge Deininger. Motion carried unanimously.

MOTION: Direct the staff to certify Kim Simac for placement on the ballot for the July 19, 2011 recall primary election for State Senate District 12. Moved by Judge Brennan, seconded by Judge Cane. Motion carried unanimously.

3. David VanderLeest

Director Kennedy informed the Board that there was no appearance by the challenger. Mr. VanderLeest appeared on his own behalf, and called the challenge to his candidacy an abuse of process. Judge Cane inquired about Mr. VanderLeest's address. He indicated he moved into a four-plex apartment building he owns within the 30th State Senate District on May 21, and moved from one apartment to another, which has a different street number.

Discussion.

Staff Counsel Michael Haas reviewed the staff memo concerning Mr. VanderLeest's nomination papers. Staff initially started out validating 462 signatures and struck 37 signatures, leaving 425. After reviewing Mr. VanderLeest's response, staff reinstated four signatures, for a total of 429.

Discussion.

MOTION: Deny the general challenge of Linda Patzke to the entirety of David VanderLeest's nomination papers based upon the address contained in his Declaration of Candidacy form, and the challenge to all nomination papers he circulated based upon the address he listed in the circulator's certificate. Moved by Judge Cane, seconded by Judge Barland. Motion carried unanimously.

MOTION: Find nomination papers submitted by David VanderLeest contain 429 valid signatures as reflected by the staff analysis set out in this memorandum and accompanying challenge worksheet, which are adopted by the Board and incorporated by reference in this motion. Moved by Judge Cane, seconded by Judge Deininger. Motion carried unanimously.

MOTION: Direct staff to certify David VanderLeest for placement of the ballot for the July 19, 2011 recall primary election in State Senate District 30. Moved by Judge Cane, seconded by Judge Brennan. Motion carried unanimously.

4. John Nygren

Jacob Hadju appeared in person on behalf of the Democratic Party of Wisconsin. He said Representative Nygren failed to submit 400 valid signatures. The Party is challenging 39 of the 424 signatures submitted.

Discussion.

Attorney Jennifer Lohr appeared on behalf of challenger Sara Scott, who has challenged 54 signatures. She said Ms. Scott agrees with the staff analysis.

Attorney Screnock appeared on behalf of Representative Nygren. He said that after staff initially determined there were 424 signatures, there was no need to supply any correcting affidavits.

Discussion.

Attorney Screnock asked the Board to consider reinstating several signatures. During the meeting, Board staff attempted to find the possible matches between the signatures with electors in the Statewide Voter Registration System and other online databases, but was unsuccessful.

Director Kennedy said the staff's recommendation is to certify 398 signatures.

MOTION: Affirm 26 signature challenges, verify that Candidate Nygren's nomination papers contain 398 valid signatures as reflected by the staff analysis set out in this Memorandum and accompanying challenge worksheet which are adopted by the Board and incorporated by reference in this motion. Moved by Judge Cane, seconded by Judge Deininger.

Roll call vote:	Brennan:	Aye	Cane:	Aye
	Deininger:	Aye	Nichol:	Aye
	Vocke:	Aye	Barland:	Aye

Motion carried unanimously.

MOTION: Deny Candidate Nygren ballot access in the July 19 recall primary in State Senate District 30. Moved by Judge Brennan, seconded by Judge Cane.

Roll call vote:	Brennan:	Aye	Cane:	Aye
	Deininger:	Aye	Nichol:	Aye
	Vocke:	Aye	Barland:	Aye

E. Director’s Report

Director Kennedy reported there was no need for a closed session. He thanked Ross Hein, Diane Lowe, Reid Magney and Steve Pickett for their work on the nomination paper challenges Friday, as well as Michael Haas and Shane Falk who gave up their weekends to work on the challenges analyses.

Judge Nichol expressed the Board’s appreciation for the staff’s work and dedication.

Director Kennedy briefed the Board on a report due to the Legislature’s Joint Committee on Finance regarding implementation of the voter photo ID law, which is due July 1, as well as staff’s plans to meet with county and municipal clerks at upcoming conferences. He also updated the Board on the status of the budget, noting that overall the Governor’s vetoes and the budget were helpful for the Board, given the fiscal challenges. It raises the threshold for economic interest disclosure and eliminates any public funding for campaigns. The Governor vetoed limitations on access to Statements of Economic Interests, and the budget enhanced the Contract Sunshine program.

F. Adjourn

MOTION: To adjourn. Moved by Judge Brennan, seconded by Judge Barland.
Motion carried unanimously.

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The next regular meeting of the Government Accountability Board is scheduled for Tuesday, August 2, 2011, at the G.A.B. offices located at 212 East Washington Avenue, Third Floor, in Madison, Wisconsin beginning at 9:30 a.m.

June 27, 2011 Government Accountability Board meeting minutes prepared by:

Reid Magney, Public Information Officer

July 21, 2011

June 27, 2011 Government Accountability Board meeting minutes certified by:

Judge Gerald Nichol, Acting Board Secretary

August 2, 2011

State of Wisconsin \ Government Accountability Board

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JUDGE THOMAS H. BARLAND
Chairperson

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For the August 2, 2011 Meeting

TO: Members, Wisconsin Government Accountability Board

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

Prepared and Presented by:
Michael Haas, Staff Counsel

SUBJECT: Requests of Wisconsin Citizens for Election Protection

Introduction

Since the Board's last regular meeting on May 17, 2011, Board staff has had a number of contacts with members of an organization called Wisconsin Citizens for Election Protection (WCEP), and specifically with Attorney James Mueller who represents the organization. WCEP members have expressed concern regarding observations they made during the recount of the Supreme Court Justice election. They also have described what they perceive to be serious ballot security issues as well as the unreliability of electronic voting equipment to accurately tabulate ballots due to the possibility of the machines malfunctioning or being tampered with by either election officials or third parties breaching the security of the equipment. The organization advocates hand counting ballots as the only reliable method of determining accurate results and ensuring ballot security.

On May 24, 2011, approximately 10-15 individuals demonstrated outside the Board's office and then in the office lobby, seeking answers to their concerns and a commitment that the Board would support greater use of hand counting of ballots by municipalities. Attorney Mueller has delivered several letters addressed to Board staff as well as to Board members, and made specific requests of municipal clerks involved in the recall elections to essentially permit observers to conduct a hand count on Election Night. Attorney Mueller met with Board staff on July 5, 2011, to discuss the questions he had raised and the guidance Board staff would be providing to clerks regarding his requests. He plans to make a presentation to the Board during the Public Comments period of the meeting.

In addition, Board staff has also received communications from other organizations which support hand counting of ballots, and which believe that electronic voting equipment is susceptible to undetected tampering. For example, an organization called Election Defense

Alliance attempted to conduct exit polls during the July recall elections as a method of checking the accuracy of the machine-tabulated results. Another organization, Center for Hand-Counted Paper Ballots, along with a UW-Madison professor, published an opinion column advocating hand counting of ballots in an online campus newsletter. These communications often cite a documentary film entitled "Hacking Democracy," which purports to demonstrate that unauthorized parties can tamper with voting equipment and data, assuming that they have access to the equipment's memory device. These stated concerns have been part of a broader national debate regarding the security of voting equipment, particularly since 2004, which have not been given great credibility by election administrators or the mainstream media. Board staff, however, can provide the Board with additional correspondence and a more thorough analysis of these issues if the Board so desires at a future meeting.

Attorney Mueller intends to make a presentation to the Board during the Public Comments portion of the agenda regarding the concerns of WCEP. Attached to this memorandum is additional background and documentation to assist the Board in considering Attorney Mueller's presentation and requests. Including Item E on the open session agenda will permit the Board, if it wishes, to discuss these issues and take any actions it deems appropriate during the meeting.

Correspondence

Attached to this memorandum are the following documents:

1. Correspondence from Attorney Mueller to Board members dated May 31, 2011, which makes specific requests for Board action.
2. Email correspondence from Attorney Mueller to Board members dated June 1, 2011 regarding observations made during the Supreme Court recount related to optical scanning equipment.
3. Email correspondence from Attorney Mueller to Director and General Counsel Kevin J. Kennedy dated June 20, 2011, summarizing issues and questions he had previously raised with Board staff.
4. Correspondence from Attorney Mueller to Kevin J. Kennedy stating that the Board is failing to adequately protect the integrity of Wisconsin elections, and describing actions that WCEP intends to take.
5. Correspondence from Attorney Mueller to municipal clerks involved in recall elections, dated July 1, 2011. The letter and accompanying news release asks clerks to seek waivers from the Board of the statutory requirement to use electronic tabulating equipment, and, alternatively, that clerks permit WCEP observers to visually inspect each ballot on Election Night as a means of verifying the unofficial machine-counted results.
6. Memorandum from Elections Division Administrator Nathaniel E. Robinson to municipal clerks dated July 7, 2011, providing guidance regarding the requests made by Attorney Mueller on behalf of WCEP.
7. Correspondence from Staff Counsel to Attorney Mueller dated July 21, 2011, which memorializes the issues discussed at the meeting of July 5, 2011.

Summary

While Board staff is considering all feedback related to observations from the Supreme Court recount, and intends to take a systematic approach to incorporating such input in future training and guidance, Board staff has not been presented with persuasive evidence that electronic voting equipment in Wisconsin has been or is at risk of being tampered with, either by election officials or by other parties. Board staff believes it is important for the Board to be informed regarding the debate and discussions which have been developing on this topic. No action is required of the Board at this time.

James J. Mueller, Attorney at Law

4064 Timber Lane

Cross Plains, WI 53528

608.831.1610 Office 888.495.1178 Fax 608.333.4589 Cell

jimmueller@charter.net



May 31, 2011

Hand Delivered

Board Members

Wisconsin Governmental Accountability Board
212 East Washington Avenue, 3rd Floor
Post Office Box 7984 Madison, WI 53707-7984

Re: The Following Requests:

- 1) Have the Board schedule Additional Meetings prior to July 12'
- 2) Permit me to make a presentation to the Board,
- 3) Guidance to Election Officials regarding the Administration of the Recall Elections
- 4) Amend the Website Vote Authenticity page to acknowledge the potential for incorrect totals from optical scan devices.

Dear Board Members,

Wisconsin, with its Progressive traditions, is the acknowledged "Ground Zero" for a corporate financed agenda that attacks many of those traditions. The Recall elections, first scheduled for July 12, could be the turning point for whether or not those Progressive traditions will survive here and nationally.

Since the Recall Elections will be so important, huge amounts of money will be spent and all of the stops will be pulled out. It is therefore crucial that the Government Accountability Board hold Special Meeting to hear from those of us who have participated in the recent recount and who have concerns about the way our elections are administered.

On the reverse side of this letter I have listed some suggestions as to guidance that could be provided to elections officials. An additional 2 pages show that you have failed to account for the possibility of malfunction or misfeasance producing incorrect totals from the optical scanning devices. I look forward to your positive response to these requests.

Sincerely,

James J. Mueller
Attorney at Law
Wisconsin State Bar Member No. 1017455

Suggestions for Guidance from the GAB to Election Officials for the Recall Elections

- 1) Allow post election tests of the machine totals (hand count and compare results) before the ballots are sealed into the bags,
- 2) Inform all Clerks how to properly seal the ballot bags,
- 3) Establish the procedure that the first thing to do after the polls are closed is to secure all unused ballots, count them and run a 1/4 inch or larger drill bit through them several times in the area for initials.

DRILL GABby, DRILL.

- 4) Have all of the drilled unused ballots secured in a sealed bag and kept under the control of the County or Municipal Clerk who does not keep the voted Ballots,
- 5) Have copies of all ballot invoices sent to the GAB. Have the invoices include the number of ballots supplied or weight and weight per ballot,
- 6) Require that all telephone cords for the voting machine modems are disconnected until after the totals have been run,
- 7) Inform Clerks that the pre-voting public test that is done only verifies that the machine was properly working at that time for those few votes and that on Election Day undetectable malicious codes can kick in and flip votes.
- 8) Allow individuals making Public Records requests to inspect the ballots by viewing (not touching) each one before the ballots are sealed into the ballot bags. The display of the ballots should be sufficient so that the inspector can video the ballot and/or count the votes.

James J. Mueller, Attorney at Law

4064 Timber Lane

Cross Plains, WI 53528

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Note: In the Wisconsin GAB document below, the GAB doesn't even hint at the possibility of malfunction or misfeasance occurring in the use of optical scanning devices. Not allowing for malfunction or misfeasance in an optical scanning device appears to be evidence of malfunction or misfeasance in the GAB.

The Portions in Arial italics are recommendation by James J. Mueller on how to amend the following document in order to make it conform to current GAB practice.

<http://gab.wi.gov/elections-voting/recount/ballot-authenticity>

Authenticity of Ballots and Responsibility for Conducting Recounts

Questions about the authenticity of ballots have arisen during the recount process due to holes in some ballot bags, gaps in their closure or issues with security tags. A hole in a ballot bag or a missing security tag is not enough evidence alone to discard the ballots inside. The ability to put a hand into a ballot bag is not by itself evidence of fraud.

Wisconsin's system of counting ballots on Election Night, canvassing votes in the following days, and recounting those votes is designed to ensure an accurate, honest and transparent tabulation and reporting of the people's will at the ballot box, as well as to detect actual fraud.

Election Day Procedures

When most Wisconsin citizens vote on Election Day, they place their marked ballots into an optical scanning device, which records the votes and drops the marked ballots into a locked container.

Before ballots are cast, the optical scan voting device is secured with a tamper evident numbered seal. The seal number is recorded on the Inspectors' Statement by the poll workers. Voting occurs in a public location that anyone other than a candidate may observe while the polls are open. Any member of the public, including a candidate, may be present at the polling place after the polls close.

After the polls close, election workers print out a tape which lists the tabulated vote totals. *The totals from the device are presumed to be correct despite the fact that malfunction and malfeasance can occur. Poll workers are not allowed to hand count the ballots previously tabulated in an optical scanning device because that would be considered a recount and recounts can only be requested under certain conditions by a candidate.* The poll workers remove the voted ballots and place them into a secured container or bag. The bag is secured using a tamper evident numbered seal. Ballot containers have all potential openings secured in such a manner that no ballot may be removed, nor any ballot added, without visible interference or damage to that ballot container. The seal number is recorded on the Inspectors' Statement and Ballot Container Certificate by the poll workers. Election officials are required to maintain a chain of custody record that documents the movement and location of election ballots from the time of delivery of the ballots to the municipal clerk or board of election commissioners until the destruction of the ballots is authorized under § 7.23 Wis. Stats.

Even if the container or bag is somehow opened later, or if the chain of custody is broken, election officials have the original print-out tape from the machine, as well as the electronic memory device from the machine. This enables election officials to determine the election night vote count *unless a malfunction or misfeasance occurred in the optical scanning device on election day. In that case, it is impossible to determine what the actual vote was and the incorrect total will continue to be used.*

Recount Procedures

The recount is conducted by the County Boards of Canvassers using procedures specified by state law and the Government Accountability Board. During a recount, the people in charge of recounting the ballots are not the people who handled and counted the ballots on Election Night. If the ballots had been tampered with between the election and the recount, there would be a break in the chain of custody and an unexplained difference in the results *unless the break in the chain of custody occurred in order to make the votes on the ballots equal the tabulated totals produced by malfunctioning or maliciously coded optical scanning device.* Typically in a recount, there are minor differences due to ballot marking errors by voters or issues encountered with the optical scanners. In this election, 90 percent of the ballots were cast on paper and counted by optical scanners, 5 percent were cast on paper and counted by hand, and 5 percent were cast and tabulated on touch-screen equipment. In this recount, of the 90 percent that were originally counted by voting equipment on Election Night, more than half are being recounted by hand, which results in some ballots being counted that the voting equipment may not have attributed a vote due to ballot irregularity, such as the voter circling the candidate name instead of filling in the oval or arrow.

G.A.B. staff has created an internal review process to check each ward's recount totals against the original canvass totals to look for variances of plus or minus 10 votes. Any ward in which 10 more or 10 fewer votes are reported is flagged by staff for follow-up with the county clerk for an explanation of the reason. So far, we have found no significant, unexplained variances of vote totals. Staff will continue to review Waukesha County's results as they come in each day until the recount is complete.

Certification of the Election

Under state law, the G.A.B. is required to rely on the certifications of the county Boards of Canvassers in making its certification of the final results. If either of the campaigns has unresolved issues with how individual county Boards of Canvassers handled the recounting of certain ballots, their exclusive remedy under state law is through an appeal to the circuit court.

In its certification of election results, the Board Chairperson certifies that the attached tabular statement, as compiled from the certified returns made to the Government Accountability Board by the several counties of the State, contains a correct abstract of the total number of votes given for the election. It also determines and certifies the names of candidates who have received the greatest number of votes, and are duly elected. A certificate of election may not be issued by the Board's Director until the deadline for any appeal has passed.

**Haas, Michael R - GAB**

From: Jim Mueller [JimMueller@charter.net]
Sent: Wednesday, June 01, 2011 6:41 PM
To: GAB HelpDesk
Cc: Kennedy, Kevin - GAB; Falk, Shane - GAB; Haas, Michael R - GAB; Robinson, Nathaniel E - GAB
Subject: Undervoted Absentee Ballots

Dear GAB Baord Members,

My experience during the recount was that a lot of the changes in the total vote counts for the 2 candidates had to do with voted absentee ballots that the optical scanning machines oginally read as being undervotes. Most of the ones that I saw involved ballots that were clearly marked for a candidate but were done so with a single pencil line. It is interesting but it appeared that subsequent votes lower on the ballot were more pronounced (maybe the old pencil had to be warmed up). Since the recount did not involve those other races it is impossible to determine how many votes were being ignored on any one ballot.

Since the optical scanning machines did not produce the corrcet totals this means that the optical scanning devices are not perfect.

In order to embrace the advantages of technology you have made the decision to accept a certain degree of error in order to save time and money.

You could significantly increase the accuracy of the optical scanning device results by directing the poll workers to view all absentee ballots for such light marking and remake the lightly marked ballots as they do for the spoiled ballots that are rejected by the machine.

Is it possible to get a separate scanning device that could be used to show when a mark is too light to be detected by the optical scanning device?

Jim Mueller



Haas, Michael R - GAB

From: Jim Mueller [JimMueller@charter.net]
Sent: Monday, June 20, 2011 8:47 PM
To: Kennedy, Kevin - GAB
Cc: Falk, Shane - GAB; Haas, Michael R - GAB; Robinson, Nathaniel E - GAB
Subject: Questions about Ballot Security

Kevin,

During the Supreme Court Recount, I and several of the people who have formed WI Citizens for Election Protection became concerned about ballot security. It is evident by the existence of large numbers and large percentages of improperly sealed bags that there is improper training regarding and/or inadequate enforcement of laws and rules dealing with ballot security.

The lack of proper security and the poor condition of many of the bags has led many people to the conclusion that election fraud could occur or worse did occur and can not be easily detected with the procedures that are in place.

WI Citizens for Election Protection want these issues addressed before the Recall elections occur. We need answers to the following questions in order to proceed with Formal Complaints against the people who have not done their duty and as a result have caused widespread lack of confidence in the integrity of our procedures for vote counting, canvassing and recounting.

On June 1, 2011, I emailed the following message:

Nathaniel, Mike and Shane,

During the recount we learned that the damage to some of the ballot bags was being blamed on County Municipal workers who were picking up the ballot bags and other election materials from the individual Cities, Villages and Towns.

Wisconsin Statute 7.51 (5)(b) state that, "...The municipal clerk shall deliver the ballots, statements, tally sheets, lists, and envelopes for his or her municipality relating to any county, technical college district, state, or national election to the county clerk no later than 4 p.m. on the day following each such election or, in municipalities where absentee ballots are canvassed under s. 7.52, by 4 p.m. on the 2nd day following each such election, and no later than 4 p.m. on the day after receiving any corrected returns under s. 6.221 (6) (b). The person delivering the returns shall be paid out of the municipal treasury.

Does the GAB interpret Wisconsin Statute 7.51 (5)(b) to mean that the Municipal Clerk shall actually make the delivery of the election materials to the County Clerk?

Or are other individuals permitted to do this?

And if so, who may and how is the chain of custody and condition of the ballot bag recorded?

Is the delivery to the County Clerk's office or is it okay to deliver the ballot bags directly to the County's storage space?

Your prompt responses to these questions will be greatly appreciated.

Later on June 1, 2011 I emailed the following message:

Nathaniel, Mike and Shane,

During the recount I saw encounter some communities that had their ballots in bags and the bags secured in containers (Oshkosh used 90 gallon recycling containers commonly used for municipal curb side recycling programs. Most communities had their ballots in bags (some sealed properly and others not) but did not have separate ballot containers.

Wisconsin Statute 7.51(3)(a) state, "...secure them together so that they cannot be untied or tampered with without breaking the seal. The secured ballots together with any ballots marked "Defective" shall then be secured by the inspectors in the ballot container in such a manner that the container cannot be opened without breaking the seals or locks, or destroying the container.

Is it the GAB position that communities should comply with the statute and have the secured ballots further secured in containers?

Still later on June 1, 2011, I emailed the following message:

Nathaniel, Mike and Shane,

During the recount I observed numerous improperly sealed ballot bags that had been in the custody of the of the County Clerk for a period of 3 to 5 weeks before the bags were processed under the recount procedure.

Does the County Clerk have a legal duty to secure the ballots that are delivered to them?

I have not received a response to those questions.

Now, I have an additional questions.

We are aware of Clerks having in their custody unsecured unvoted ballots from recent elections.

Whose responsibility is it to have bound and sealed these unvoted ballots?

The Chief Election Inspector at each polling place on election night?

The Municipal Clerk when they are delivered to him/her?

The County Clerk when they are delivered to him/her?

Please expedite the answers to these questions.

Sincerely,

Jim Mueller

James J. Mueller, Attorney at Law

4064 Timber Lane
Cross Plains, WI 53528
Phone 608.333.4589 Email JimMueller@charter.net
Fax 1.888.495.1178



June 23, 2011

Kevin Kennedy
Director and General Counsel
Government Accountability Board

via email

Democracy isn't the voting - it's the counting - Tom Stoppard

Kevin,

WI Citizens for Election Protection, the group I am representing is very concerned about the ease with which Election Fraud could be perpetrated in Wisconsin. At the June 9, 2011 Assembly Election and Campaign Reform Committee Meeting, Rep. Pridemore acknowledged that all of the programmable voting systems in use in Wisconsin are hackable. In the May 2011, Special Congressional Election, the Republican Candidate had the court impound all of the voting systems because of fear that fraud was being committed by the malicious programming of the optical scanning machines.

We feel the State and/or the G.A.B. is failing to adequately protect the integrity of our elections. This is evidenced by the fact that the G.A.B.'s "Statement of Commitment to Election Integrity" <http://gab.wi.gov/node/5> deals only with voter fraud not Election Fraud and by your statement in the June 15th letter that, "There are specific procedures for the handling of ballots on Election Night... Those procedures to not include conducting a hand count of ballots..."

With the recall elections being as important as they are, it is mandatory that the results be beyond suspicion. The only way to protect against that electronic Election Fraud is to actually count the ballots

Therefore, WI Citizens for Election Protection is encouraging local election officials to hand count the ballots and citizens to count the votes through public records requests.

Paper Ballots under Wis. Stat. 5.40(5m)

Our understanding is that municipalities with Population under 7,500 may choose to use paper ballots even if they have used electronic voting systems in the past. Municipalities with population of 7,500 or more may petition for permission to use paper ballots. In both cases they still have to provide HAVA compliance voting systems.

Post-Election Testing

Wisconsin requires pre-election tests that are useless against election fraud but does not require a post election test which would always disclose such fraud. Our research did not

discover any statutory language prohibiting a post-election test. We will encourage local election officials to seek out ways to complete post-election tests (counting the votes and comparing them to the tabulated results).

Public Records Access

In your letter of June 15th you wrote, "It possible that ballots could be made available in response to a public records request after the canvassing process if a member of the public wishes to review ballots and attempt to confirm whether the machine count corresponds to that review."

We feel that the least intrusive and most meaningful time for Election Observers to be able to see the ballots and count the votes is at the polling place at the point where the Election Inspectors are sorting through all of the ballots to find any additional write-ins and to count them to reconcile with the totals from the poll list totals and the machines. We will be encouraging interested parties to make Public Records requests to "inspect" (look but not touch) the ballots at that time.

Our experience during the recounts was that an observer using a hand held counter/clicker can count the votes as the Election Inspector moves the ballot from one pile to another during their inspection of the ballots. We expect that local Election Officials will welcome the chance to have others confirm the validity of the counting process and will therefore cooperate with such a public records request. We are prepared to argue that the public's need to know that the votes have been correctly counted outweighs the small amount of effort needed to allow such an inspection.

Your Mission is Our Mission

The G.A.B. Mission statement, "*The G.A.B. and its staff are committed to ensuring that Wisconsin elections are administered through open, fair and impartial procedures that guarantee that the vote of each individual counts, and that the will of the electorate prevails. ...The Board and its staff are dedicated to enforcing the election, ...laws vigorously to reduce the opportunity for corruption and maintain public confidence in representative government.*"

WI Citizens for Election Protection shares these goals and is seeking to achieve them through maximizing an open process of hand and visual counting of votes.

Sincerely,

Jim Mueller



James J. Mueller, Attorney at Law

4064 Timber Lane

Cross Plains, WI 53528

608.831.1610 Office 888.495.1178 Fax 608.333.4589 Cell

JimMueller@charter.net

July 1, 2011

Dear Municipal Clerk,

The upcoming recall elections could be the most important and closely scrutinized state elections of our lifetime. The people of Wisconsin are energized and engaged like never before. I am a founding member of Wisconsin Citizens for Election Protection. WCEP's goal is to restore transparency, accuracy, faith and integrity in the electoral process.

As the municipal clerk, you work hard to conduct the elections in such a way as to ensure that each ballot is counted as the voter intended. I fully understand the enormity of this charge. Every election from 1999 to 2005 as Clerk/Administrator of the Town of Middleton, I also dutifully carried out the prescribed election procedures with the confidence that election fraud could not happen in Wisconsin. *I was wrong.*

My confidence was deeply shaken when;

- 1) I participated as an observer in the Supreme Court Election Recount and witnessed a diverse array of "anomalies" and flawed election procedures,
- 2) the optical scanners and the DRE voting machines were impounded in the Special Congressional Election in New York because of suspected election fraud, and
- 3) I heard Wisconsin's Republican Representative Pridemore describe how the electronic voting machines in use in Wisconsin can easily be programmed to flip votes without detection by the Clerk or other election officials. The transcript of Representative Pridemore's statement to the Assembly Election and Campaign Reform Committee is attached.

These experiences, along with my lifelong interest in the election process, compelled me to help to implement change to preserve the integrity of Wisconsin's elections. I joined with others who share my goals, to create WCEP.

After extensive research, we have concluded that the most accurate method of counting the vote is a public hand count of the ballots on Election night. The upcoming recall elections will provide the perfect opportunity to hand count votes, since there will be only one race on the ballot. A municipality with a population under 7,500 is at liberty to hand count ballots. Municipalities with a population over 7,500 need permission from the Government Accountability Board to hand count ballots. For your

information, I have attached the City of Merrill's request and their approval from GAB for hand counting the ballots in the recall election.

If you choose not to hand count the votes, our organization may issue a public record request, asking you to provide us the opportunity to visually inspect each ballot as Election Officials sort through the ballots on Election night to find write-in votes. This non-touching inspection will assure the public that the votes have been counted, and will eliminate the need for recounts or further public record requests.

We want to ensure that the care and hard work you put in to elections is bolstered by demonstrating transparency and accuracy in each step of the process, including counting each and every vote as the voter intended.

I would appreciate a response by email, indicating if you intend to publicly hand count the votes in the upcoming recall elections. If you would like additional information, or if I can help you in any way, feel free to contact me at Clerks.Count@gmail.com or call me at (608) 333-4589.

Thank you,

Jim Mueller, Founding Member
Wisconsin Citizens for Election Protection

PRESS RELEASE
July 5, 2011
FOR IMMEDIATE RELEASE

Non Partisan Group Urges Hand Count of Ballots in WI Recall Elections

The Wisconsin Citizens for Election Protection group is urging municipal clerks to hand count the ballots in the upcoming recall elections of six Republican and three Democratic Senators in Wisconsin. The non-partisan group says this is the only possible guarantee of accuracy and transparency in the electoral process.

“Wisconsin’s voting machines can be programmed to miscount the votes, and the clerks won’t even know,” says Jim Mueller, legal counsel for Wisconsin Citizens for Election Protection (WCEP).

Mueller, a former Municipal Clerk and Election Official, himself, explains “the State Supreme Court recount revealed many flaws in the electoral process. Even the mandatory machine testing and the securing of the ballot bags won’t shine the light on possible election fraud. A public hand count of the votes on election night is the only way we can be sure that each ballot is counted as the voter intended. The voting public must have confidence that each vote matters.”

At the June 9 meeting of the Assembly Election and Campaign Finance Committee, Republican Representative Don Pridemore stated that some machines can be programmed to count inaccurately, and explained “two candidates in order to maintain a zero count can be programmed by adding votes to one candidate and subtracting votes. In other words, starting out at a positive and negative number even before the first ballot goes in the machine. And then you can zero out the count and then it will look like zero and looks like everything’s correct; but embedded in the programming are numbers that would offset each other’s total as the ballots come in.”

Wisconsin Statutes allow municipalities to hand count ballots, though municipalities with more than 7,500 residents need permission from the WI Government Accountability Board. A municipality can save money by hand counting, because it eliminates the cost of programming of optical scan machines and it can use lower-cost paper for the ballots. Most towns hand count their ballots and the City of Merrill has also requested and received the go-ahead to perform a hand count. WCEP’s goal is to see the rest of Wisconsin’s municipalities follow their lead. WCEP has emailed each municipal clerk in the recall districts, requesting that they hand count the ballots on election night. WCEP will file public record requests to view ballots on election night in municipalities that do not hand count.

Mueller says, “The most important elections in Wisconsin’s history require the most accurate method of determining the winners. Hand counting the ballots on election night prevents

hacked machines, unsealed ballot bags or misplaced ballots from changing the outcome of elections.”

To speak with Jim Mueller you can call him at 608-333-4589 or e-mail him at jimmueller@charter.net

For more information on WCEP and their work to create election transparency and accuracy, visit them on the web at <http://electionprotectionwisconsin.com/7-2/>

Contact

Jim Mueller

Phone 608-333-4589

jimmueller@charter.net

In the Matter of)
)
The Petition of the)
City of Merrill)

Petition 11-03

By a motion passed on June 17, 2011 by the City of Merrill Common Council, the City of Merrill has requested the Government Accountability Board grant permission, pursuant to §5.40(5m), Wis. Stats., to use paper ballots, in addition to the accessible voting equipment, at the recall primary and recall election in the 12th Senate District, to be held on July 19, 2011 and August 16, 2011, respectively. The City of Merrill typically uses optical scan electronic voting equipment in addition to the accessible voting equipment.

The office of State Senator, District 12 is the only item on the primary and election ballots in the City of Merrill. The reason for the petition is to provide a cost-effective special election. Use of paper ballots, in addition to the accessible voting equipment, will allow the City of Merrill to save the cost of programming the optical scan voting equipment and the cost of printing optical scan ballots. The use of accessible voting equipment and paper ballots, rather than optical scan equipment, will not create a hardship for the voters of the City of Merrill.

Wisconsin law permits municipalities required to use electronic voting equipment to petition the government Accountability Board for permission to use paper ballots, rather than utilize an optical scan system, for a specific election. §5.40(5m), Wis. Stats. The Government Accountability Board has delegated the authority to act on petitions for the use of paper ballots to its Director and General Counsel pursuant to the provisions of §5.05(1)(e), Wis. Stats.

On behalf of the Government Accountability Board, I grant the request of the City of Merrill to use the accessible voting equipment and paper ballots for the July 19, 2011 recall primary and the August 16, 2011 recall election.

Dated, June 21, 2011

By the Government Accountability Board

Kevin J. Kennedy
Director and General Counsel

State of Wisconsin\Government Accountability Board

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JUDGE THOMAS H. BARLAND
Chair

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: July 7, 2011

TO: All Municipal Clerks

FROM: Nathaniel E. Robinson, Elections Division Administrator
Government Accountability Board

SUBJECT: Guidance regarding Wisconsin Citizens for Election Protection request

Municipal clerks in the senate districts conducting recall elections this summer have received a request from Attorney James Mueller on behalf of an organization called Wisconsin Citizens for Election Protection (WCEP), dated July 1, 2011. Several clerks have requested guidance from the Government Accountability Board in responding to the request. This memorandum provides the Board's guidance and recommendations specifically for clerks currently conducting recall elections, but also for all municipalities which may receive similar inquiries in the future.

WCEP makes two requests of clerks, which apparently are intended to illustrate whether machine counting of ballots is unreliable or inaccurate. As you know, the recent statewide recount, in which many of the ballots originally counted by machine were recounted by hand, gave us a direct demonstration of the overall accuracy of the voting equipment.

The first request of WCEP is to encourage municipal clerks in municipalities over 7,500 to request a waiver from the G.A.B. from the statutory requirement to use electronic voting equipment. That decision, of course, is up to each municipality and the G.A.B. will respond to any such requests. Section 5.40(5m), Wis. Stats. requires the governing body of the municipality seeking such a waiver to petition the G.A.B. for permission to use paper ballots and voting booths for a specific election.

Attorney Mueller's correspondence also indicates that, in municipalities which use voting equipment, WCEP observers may submit a public records request, asking that the observers be allowed to visually inspect each ballot on Election Night as inspectors sort through them to identify write-in votes. While you and your election inspectors may wish to accommodate such a request, we do not believe that any provision of Wisconsin's election laws or Public Records Law requires that you do so on Election Night.

Observers are certainly entitled to watch the process of canvassing ballots after the polls close, but they are not permitted to interfere with or disrupt the process. Wis. Stats. §7.41. In the Board's opinion, election inspectors should focus on their specific statutory duties to canvass and secure ballots, and to forward results to the municipal clerk. If the request to view or photograph individual ballots will disrupt the canvassing process, distract inspectors from their duties, or delay completion of the process, we would discourage inspectors from granting the request of WCEP to inspect individual ballots on Election Night.

In addition, if a public records request is made to inspect ballots, such requests should be directed to the clerk as custodian of those records, not to election inspectors. Also, clerks should keep in mind that ballots must be secured until the time allowed for filing a recount petition, or appealing a recount, has expired, pursuant to §7.23(2), Wis. Stats. Absent a recount request or a pending public records request, ballots involving a federal office may be destroyed after 22 months, and ballots without a federal office may be destroyed 14 days after a primary and 21 days after other elections. §7.23, Wis. Stats.

We suggest that you consult with your municipal attorney to use the balancing test for any public records request. However, because the election process is not completed until all recount deadlines have expired, it is the Board's opinion that public access to ballots should be denied prior to the expiration of any applicable recount deadline in order to preserve the integrity of the election.

We hope that this information is helpful and we are available to consult further with you or your municipal attorney regarding this guidance. If you have questions or comments, please feel free to contact our Help Desk at 608-261-2028.

State of Wisconsin\Government Accountability Board

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JUDGE THOMAS H. BARLAND
Chair

KEVIN J. KENNEDY
Director and General Counsel

July 25, 2011

Delivered by email to jimmueller@charter.net

Attorney James J. Mueller
4064 Timber Lane
Cross Plains, WI 53528

Dear Attorney Mueller:

This correspondence memorializes our meeting of July 5, 2011, in which we discussed questions and concerns you raised related to the security of ballots and electronic voting equipment, on behalf of Wisconsin Citizens for Election Protection (WCEP). The Government Accountability Board was also represented in that meeting by Elections Division Administrator Nathaniel E. Robinson, Elections Supervisor Ross Hein, and Lead Elections Specialist Diane Lowe.

In summary, we discussed the following points which you had raised in correspondence to the Board:

1. Your May 31, 2011 and June 1, 2011 correspondence to Board members made several specific requests. We advised that the Board would not schedule a special meeting to consider your requests prior to the July recall elections or its regularly scheduled meeting of August 2, 2011. You are free to make a presentation to the Board during the Public Comments period of that meeting, and such remarks are limited to five minutes per person. We do not intend to list your request as a separate agenda item, but Board staff will provide the Board with your correspondence and background materials prior to the meeting. We also advised that Board staff would consider your feedback based upon observations made during the Supreme Court Justice recount as part of a broader review of lessons learned and future training of local election officials. Finally, we do not believe there is sufficient reason to incorporate your suggested language in the Board's statement regarding the authenticity of ballots.
2. We also responded to questions you raised in your email to Director and General Counsel Kevin J. Kennedy dated June 20, 2011. We advised that we interpret §7.51(5)(b), Wis. Stats., to permit municipal employees other than the municipal clerk to make the actual delivery of ballots and election materials to the county clerk. The language in that statutory provision stating that the person delivering the returns shall be paid out of the municipal treasury appears to support this interpretation. The individual making the delivery should be noted on the chain of custody documentation. We also clarified that the county clerk may determine whether ballots should be delivered to the county clerk's office or to another location pending the official canvass and any potential recount. The county clerk should certainly be aware of when and where the ballots are being delivered.

You also asked whether the language in §7.51(3)(a), Wis. Stats., regarding securing ballots requires that ballots be secured together with a seal and then secured a second time in a

container. We advised that we interpret that language to require that ballots be secured in a container with a tamper evident seal, but not separately bound together and sealed. The language in that provision may be a bit antiquated and refer to the practice of gathering together ballots and sealing them with wax.

We further advised that, if a county clerk receives ballots which are not secured, the clerk should either require the municipality to secure the container, or the county clerk may do so, and should document that action. Finally, we advised that unvoted ballots are not required to be bound and sealed, and they are not secured with voted ballots.

3. In response to your letter to Mr. Kennedy dated June 23, 2011 and your subsequent correspondence to municipal clerks dated July 1, 2011, we advised that it is up to each governing body in a municipality over 7500 in population to determine whether it wished to seek a waiver from the Board of the requirement to tabulate ballots with electronic equipment. The Board evaluates each such request on its own merits. We did not receive any such requests other than the one made by the City of Merrill which you cited.

Regarding your alternative request that municipalities permit observers to visually inspect each ballot on Election Night, we advised that each chief inspector or municipality was free to grant or deny this request. We clarified, however, that the Board would not require clerks to accommodate this request, and that we would discourage clerks from following such a procedure if it would disrupt the specific steps that election inspectors are required to complete after the polls closed. We also stated that we would advise clerks not to permit access to the ballots after they are secured in response to a public records request until all recount deadlines have expired. With this correspondence I am providing a copy of the July 7, 2011 memorandum we distributed to clerks addressing these items, which you indicated you have already obtained.

I hope that this summary accurately reflects your recollection of our conversation. We appreciate the time you took to discuss your concerns and the interest of WCEP members in ensuring the integrity of Wisconsin elections. Please feel free to contact me if you have any questions regarding this correspondence.

Government Accountability Board



Michael Haas
Staff Counsel

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JUDGE THOMAS H. BARLAND
Chairperson

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For the August 2, 2011 Meeting

TO: Members, Wisconsin Government Accountability Board

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

Prepared by:

Shane W. Falk, Staff Counsel

SUBJECT: Central Count Absentee Guidance

Introduction and Recommendations:

Sections 7.52 and 7.53(2m), Wis. Stats., were created by 2005 Wisconsin Act 451, which permits the governing body of a municipality to provide for the canvassing of all absentee ballots on Election Day by a municipal board of absentee ballot canvassers. This process is commonly referred to as "central count absentee." Following the enactment of §§7.52 and 7.53(2m), Wis. Stats., the governing bodies of several municipalities adopted ordinances permitting the central count of absentee ballots. Currently, there are 15 municipalities with central count of absentee ballots, including larger municipalities such as Milwaukee, Kenosha, Brookfield, and Wausau.

Recently, a married couple who voted in Milwaukee were charged and tried for alleged double-voting because they both submitted an absentee ballot and both then voted in-person at the polls. See exhibit A (Milwaukee Journal Sentinel article dated May 25, 2011.) The couple was found "not guilty" by a jury. In reviewing this situation, staff became concerned that the central count absentee guidance issued by the State Elections Board on February 21, 2007 and reissued by the G.A.B. on January 17, 2008 needed further review and clarification. See exhibit B (G.A.B. guidance dated January 17, 2008).

The G.A.B. and its predecessor, the S.E.B., have long had a policy permitting an elector to appear in person on Election Day to vote, even if that same elector had already submitted an absentee ballot, so long as the absentee ballot had not already been "cast" - processed and tabulated. If the absentee ballot had not yet been cast, the elector is permitted to vote in-person and the election officials are to reject the elector's absentee ballot. If the absentee ballot had already been cast and a voting number assigned to the elector, the election officials are to prohibit the elector from voting in-person. Application of this policy to central count absentee municipalities has been inconsistent.

Recommendation:

1. Staff recommends that the Board approve the draft revised guideline for central count absentee that follows this Memorandum as Exhibit C and incorporate more specific information on central count absentee processes in the Election Day Manual and G.A.B. training.
2. Staff recommends that the Board solicit further comment from the current 15 central count absentee municipalities with respect to the draft revised central count absentee guidance and return to the Board at a later meeting to report findings for consideration by the Board before formal adoption of the revised guidance, as well as revision of the Election Day Manual and G.A.B. training.

Background:

The background, requirements to establish a central count absentee process, Election Day procedures, voter lists, and procedures for processing central count absentee ballots are set forth in the G.A.B. guidance dated January 17, 2008 and which follows this Memorandum as Exhibit B. Clerks have pointed out to staff that the Election Day Manual does not specifically address central count absentee in great detail and there is no reference to central count absentee in the section of the manual relating to the “absentee” watermark on the poll list. Clerks have also identified that some procedural inconsistencies in the central count absentee process have emerged since the State Election Board’s first guidance in 2007 and that the G.A.B. training on the central count absentee process has been minimal thus far. Some clerks apparently were not even aware of the 2007 and 2008 guidance issued by the S.E.B. and G.A.B.

The issue raised by the prosecution of the couple in Milwaukee for allegedly double-voting is addressed in the “miscellaneous issues” section of the January 17, 2008 guidance and specifically the following two paragraphs:

“A list of absentee ballots issued must be provided to each polling place, so that the inspectors do not permit a voter who has been issued an absentee ballot to vote at the polling place. If the voter insists that the absentee ballot was not returned to the municipal clerk, the voter may cast a challenged ballot at the polling place.

If it is determined that an elector voted both by absentee ballot and in person, the absentee ballot is void.”

The first paragraph quoted above identifies a procedure that appears to differ from the absentee ballot process in municipalities that do not have central count absentee with respect to addressing an in-person elector on Election Day who has also submitted an absentee ballot. It does appear to place the burden on the elector to avoid potentially casting two ballots for the same election, whereas that burden has traditionally been born by the election officials. It also seems to conflict with provisions of §7.53(1) and (2)(d), Wis. Stats., which require the board of canvassers to reconcile the poll list of the electors who vote by absentee ballot with the

corresponding poll list of the electors who vote in-person to ensure that no elector is allowed to cast more than one ballot, said statutes clearly stating that if an elector who votes in-person has submitted an absentee ballot, the absentee ballot is void.

The second quoted paragraph above is consistent with the Board's longstanding policy to permit an elector to vote in-person on Election Day, rejecting any absentee ballot; however, it does only implicitly require the election officials or clerk to reject the absentee ballots for any electors having voted in-person. Obviously, the purpose was to prevent a situation where two ballots were counted for the same elector at the same election. The second quoted paragraph above was likely a quote from §§7.53(1) and (2)(d), Wis. Stats., but did not include the prefatory provision requiring the board of canvassers to reconcile the poll list of the electors who vote by absentee ballot with the corresponding poll list of the electors who vote in-person to ensure that no elector is allowed to cast more than one ballot.

In practice, some municipalities with central count absentee have adopted a policy whereby an election official at the poll calls the central count absentee location when confronted with an elector on Election Day that wishes to vote in-person, but has the "absentee" watermark adjacent to the elector's name on the poll list. If the election officials at the central count absentee location confirm that they have not processed the elector's absentee ballot, the absentee ballot is rejected and the elector is permitted to vote in-person at the poll; however, if the election officials at the central count absentee location have already processed the absentee ballot, the elector is not permitted to vote in-person. This process avoids having to challenge ballots at the polls and placing the burden on the elector to assure that his or her absentee ballot has not been cast. This process also preserves the elector's ability to vote in-person on Election Day if he or she so chooses, even if the elector has already submitted an absentee ballot (so long as that absentee ballot has not been cast.) Under these practices, electors voting in municipalities with central count absentee are treated the same as electors in municipalities without central count absentee, where those absentee ballots are processed at the individual polling locations on Election Day.

Some municipalities with central count absentee are too large and have 10,000 or more absentee voters (elector having requested an absentee ballot) for any given election, making it practically impossible to have election officials at the polls contacting election officials at the central count absentee location. In the larger municipalities, such as Milwaukee, on average 75% of the issued absentee ballots are returned. On average in Milwaukee for any given election, 10,000 absentee requests are processed, which then leaves roughly 2,500 unreturned absentee ballots per election. A high percentage of those electors not returning their absentee ballot end up voting in-person at the polls on Election Day. A municipality like Milwaukee has asserted that it is not practical to require Chief Inspectors, staffing 190 polling locations in Milwaukee, to call the central count site to even inquire on these 2,500 unreturned absentee ballots, let alone also having to contact the central count regarding additional in-person electors that have already returned an absentee ballot.

These larger municipalities have adopted central count absentee policies whereby in-person electors at the poll are denied the ability to vote in-person on Election Day, if there is an absentee watermark adjacent to their names on the poll lists. In the instances where an election official misses the notation and permits the elector to vote in-person, clerks have referred any

elector having cast an absentee ballot and having voted in-person at the polls to their district attorney for prosecution for double-voting. It appears that this is what occurred with the couple in Milwaukee that were charged, tried, and found not guilty by a jury. This process seems to place the burden on the elector to know whether his or her absentee ballot is accepted and processed by the central count location. This approach appears to treat those electors subject to this central count absentee process different than electors from other municipalities without central count absentee and even some municipalities that do have central count absentee.

It appears likely that no municipality with central count absentee requires the board of canvassers to reconcile the poll list of electors who vote by absentee ballot with the corresponding poll list of the electors who vote in-person to ensure that no elector is allowed to cast more than one ballot.

Analysis:

No person may vote more than once in the same election. §12.13(1)(e), Wis. Stats. Whoever intentionally violates §12.13(1)(e), Wis. Stats., is guilty of a Class I felony. §12.60(1)(a), Wis. Stats. An elector may obtain an absentee ballot pursuant to §§6.86 and 6.865, Wis. Stats., in lieu of voting in-person at the polls on Election Day. Statutorily prescribed procedures set forth the absentee ballot canvassing process, in part to insure that no person votes more than once in the same election.

In municipalities without central count absentee, the municipal clerk shall deliver all timely received absentee ballots to the election inspectors of the proper ward or election district where the absentee ballots are canvassed. §6.88(2), Wis. Stats. Except in municipalities with central count absentee, the inspectors shall canvass the absentee ballots at any time between the opening and closing of the polls on Election Day. §6.88(3)(a), Wis. Stats. At the polls in the same room where votes are being cast, the inspectors shall review the certification on the absentee envelope. Id. “When the inspectors find that the certification has been properly executed, the applicant is a qualified elector of the ward or election district, and the applicant has not voted in the election, they shall enter an indication on the poll list next to the applicant’s name indicating that an absentee ballot is cast by the elector.” Id. (emphasis added.) After opening the absentee envelope, removing the ballot, verify endorsement by the issuing clerk, and verifying whether proof of residence is required, “the inspectors shall then deposit the ballot into the proper ballot box and enter the absent elector’s name or voting number after his or her name on the poll list in the same manner as if the elector had been present and voted in person.” Id.

The procedures for municipalities using central count absentee are set forth in §§7.52 and 7.53(2m), Wis. Stats. In counting the absentee ballots, the board of absentee ballot canvassers shall use 2 duplicate copies of a single poll list for the entire municipality and upon accepting each absentee ballot, shall enter a poll list number on the poll list next to the name of the elector who voted the ballot. §7.52(2), Wis. Stats. The board of absentee ballot canvassers shall mark the poll list number of each elector who casts an absentee ballot on the back of the elector’s ballot before depositing the ballot into the proper ballot box and entering the absent elector’s name or poll list number after his or her name on the poll list. §7.52(3)(a), Wis. Stats.

After any canvass of the absentee ballots is completed under §7.52, Wis. Stats., the board of canvassers shall reconcile the poll list of the electors who vote by absentee ballot with the corresponding poll list of the electors who vote in-person to ensure that no elector is allowed to cast more than one ballot. §§7.53(1) and (2)(d), Wis. Stats. If an elector who votes in person has submitted an absentee ballot, the absentee ballot is void. Id. The purpose of marking the poll list number of each elector on the back of the elector's ballot before depositing it in the ballot box is to provide for easy identification and later rejection of the absentee ballot after the reconciliation of the poll list of the electors who vote by absentee ballot with the corresponding poll list of the electors who vote in-person, pursuant to §§7.53(1) and (2)(d), Wis. Stats.

The statutory procedures with regard to central count absentee are clear and unambiguous with respect to handling electors who vote in-person at the polls after having received and even having submitted an absentee ballot. A reconciliation of the central count absentee poll list with the corresponding poll list for electors having voted in-person at the polls must occur to ensure that an elector is not allowed to cast more than one ballot. The statutory remedy for a central count absentee elector having submitted an absentee ballot and also having voted in-person at the polls is also clear - the absentee ballot is void. These statutory procedures further ensure that electors from municipalities with central count absentee are allowed to vote in-person after having submitted an absentee ballot, very similar to absentee electors in municipalities where absentee ballots are canvassed at the polls on Election Day.

Proposed Motions:

1. **MOTION:** The Board approves the draft revised guideline for central count absentee and directs staff to incorporate more specific information on central count absentee processes in the Election Day Manual and G.A.B. training.
2. **MOTION:** Staff shall solicit further comment from the current 15 central count absentee municipalities with respect to the draft revised central count absentee guidance and return to the Board at a later meeting to report findings for consideration by the Board before formal adoption of the revised guidance, as well as revision of the Election Day Manual and G.A.B. training.



Jury finds couple who voted twice not guilty of election fraud

Intentions considered in rendering verdict

By Bruce Vielmetti of the Journal Sentinel

May 25, 2011 |(74) Comments

A Milwaukee couple wept and hugged their lawyers Wednesday after a jury found them not guilty of election fraud for voting twice in the 2008 presidential election.

But they had little to say after escaping a possible prison sentence.

"I'm drained right now," said Herbert Gunka, 61.

"I'm speechless," said Suzanne Gunka, 56, as they quickly left the Milwaukee County Safety Building.

The Gunkas admitted casting both absentee and election-day ballots, but insisted the latter was only because they honestly believed the former had not been counted, due in part to talk radio discussions that raised their fear of fraud and stolen votes. They said they never meant to have each vote count.

They were among 20 people charged by the Election Fraud Task Force, including several cases of felons voting, or improper registration of voters, but the only case of double voting. The Gunkas were charged in March 2010.

"We believe the evidence presented reflected a violation of the state election laws, but we respect the jury's verdict," said Bill Cosh, spokesman for Attorney General J.B. Van Hollen.

One juror said the panel felt the state didn't prove the Gunkas each meant for both of their votes to count, and didn't think the fact they initially lied to agents who came asking questions a year later betrayed anything more than the panic Herbert Gunka said gripped him when he realized what was happening.

Assistant Attorney General David Maas had stressed the couple's personal responsibility to ask about their prior vote before casting a second, but the juror said that cut both ways.

"You have a personal responsibility when you have a job as a poll worker," said Nicole Matenaer of West Allis.

Election officials testified that a poll worker should have noted the word "absentee" printed in gray left of the Gunkas' names in the poll book Nov. 2, 2008, and asked them if they had sent in their absentee ballots. If they had answered yes, the worker was not supposed to give them ballots.

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Matenaer also wondered why Maas did not put the poll workers on as witnesses, a question raised by the defense.

She said jurors were also disturbed by the fact the state Department of Justice agents who showed up at the Gunkas' house in September 2009 intentionally misled him about the purpose of their visit, and secretly recorded Herbert Gunka, yet expected him and his wife to be completely forthcoming with them.

"It's all about honesty," Matenaer said.

The jury had heard the agents' recording of their doorway interview with Herbert Gunka, and they asked to hear it a second time during four hours of deliberations.

Ambush or opportunity?

In his closing argument, Maas stressed how the agents gave both Herbert and Suzanne, interviewed a short time later at her workplace, multiple chances to admit they had voted absentee, and gone together to their polling place a week later.

But the couple's attorneys said they were just scared by the ambush-style interviews.

Herbert Gunka's attorney, Patrick C. Brennan, reminded the jury that his client had voted 32 times since 1992, and never twice in the same election.

"He's not a criminal," Brennan said. "He's a responsible citizen.

"All the man wanted was for his one vote to count."

Patrick Cafferty, representing Suzanne Gunka, argued that the government "goes too far" when it charges people who make honest errors.

Jurors in the two-day trial got a crash course in Milwaukee voting procedures.

Before 2008, absentee ballots were counted at each polling place, and a red A was marked after a voter's name on the poll book. But starting that year, all absentee votes were counted at a central location. If a voter requested an absentee ballot, it is indicated in gray on the left margin of the poll book.

Herbert Gunka testified that, succumbing to similar concerns in 2004, he went to his polling place, saw the red A next to his name, and was reassured his vote was counted. He said he hadn't read letters sent with absentee ballots in 2008 explaining the change and, when he checked on election day and didn't see the A, concluded his first ballot had been lost or stolen.

After the verdict, Circuit Judge Richard Sankovitz told the Gunkas it must have been odd for them, as frequent voters, to see how many people in the jury pool admitted they never vote.

He also advised them to change their listening habits. "Talk radio hosts are the purveyors of misinformation," the judge said.

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Find this article at:

<http://www.jsonline.com/news/crime/122632359.html>

Check the box to include the list of links referenced in the article.

State of Wisconsin \ Government Accountability Board

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KEVIN J. KENNEDY
Legal Counsel

MEMORANDUM

DATE: January 17, 2008

TO: Municipal and County Clerks

FROM: Nathaniel E. Robinson, Administrator
Elections Division, WI Government Accountability Board

SUBJECT: Establishing Central Count Absentee Procedures

Special Note: The Wisconsin Legislature created the new Government Accountability Board (GAB) in January 2007, which assumed the combined responsibilities of the former State Elections Board and the State Ethics Board on Thursday, January 10, 2008. The GAB is made up of two divisions: the Elections Division and the Ethics and Accountability Division. Welcome to the new GAB!

This memorandum provides some basic information for municipalities who want to utilize a municipal board of absentee ballot canvassers for counting absentee ballots on Election Day. 2005 Wisconsin Act 451 permits the governing body of a municipality to provide for the canvassing of all absentee ballots on Election Day by a municipal board of absentee ballot canvassers. Section 7.52, Wis. Stats.

This memorandum also provides the basic requirements for establishing procedures for utilizing a municipal board of absentee ballot canvassers to count absentee ballots on Election Day. There are a number of administrative procedures that will have to be developed to ensure individuals do not vote absentee and in person and that votes cast by absentee ballot are properly reported for the canvass of election results. We expect that these procedures can be further developed after municipalities have had some initial experience with a municipal board of absentee ballot canvassers counting absentee ballots on Election Day.

What is required?

If the governing body decides to provide for the canvassing of all absentee ballots on Election Day by a municipal board of absentee ballot canvassers, it must adopt an ordinance. Section 7.52 (1), Wis. Stats. The municipal clerk is required to notify the Elections Division in writing before the municipality adopts the ordinance and consult with the Elections Division staff concerning administration of a central location for counting absentee ballots.

The governing body must also establish a municipal board of absentee ballot canvassers. Section 7.53 (2m), Wis. Stats. The municipal board of absentee ballot canvassers is the municipal clerk and two other qualified electors of the municipality appointed by the clerk. They serve two-year terms beginning January 1st of odd-numbered years.

Election Day Procedures

The municipal board of absentee ballot canvassers shall publicly convene between 7 a.m. and 10 p.m. on Election Day to count the absentee ballots for the municipality. The municipal clerk shall give at least 48 hours notice of the meeting of the municipal board of absentee ballot canvassers.

Any member of the public has the right to observe the proceedings of the municipal board of absentee ballot canvassers just as they do at the polling place.

Election inspectors may be appointed to assist the municipal board of absentee ballot canvassers with counting the absentee ballots for the municipality. If appointed, there must be an odd number of inspectors, and there must be at least three inspectors present at all times while absentee ballots are counted.

No later than 8 p.m. on Election Day, the municipal clerk shall post an informational statement in the clerk's office and on the Internet, at a site announced by the clerk, before the polls open at 7 a.m. The statement shall list the number of absentee ballots that have been issued and the number of absentee ballots that have been returned by the close of the polls on Election Day. The statement shall not include the name or address of absentee voters. If the municipality does not have a website where this information can be posted, the municipality is not required to make an Internet posting.

Voter Lists

The municipal board of absentee ballot canvassers shall use two duplicate SVRS-generated copies of a single poll list for the entire municipality. The list shall be annotated with voter numbers beginning with the number 1, along with an indication the voter cast an absentee ballot. If the voter's name does not appear on the poll list, the name and voter number shall be recorded on the supplemental poll list.

Procedures for Processing Absentee Ballots

No earlier than 7:00 a.m. on Election Day, the municipal board of absentee ballot canvassers shall open the carrier envelope or container in which the absentee ballots were delivered to the polling place so that a member of the public may observe the opening.

As each ballot is processed, the municipal board of absentee ballot canvassers shall announce the name of the absentee voter so that any member of the public present may hear the voter's name. The municipal board of absentee ballot canvassers shall carefully examine the certificate to determine it is signed and witnessed and the elector is a qualified voter in the reporting unit for which the absentee ballot is being processed.

The municipal board of absentee ballot canvassers shall compare the certificate envelope to the list of ineligible voters provided by the Department of Corrections. If the absentee voter's name appears on the list, the municipal board of absentee ballot canvassers shall challenge the absentee ballot.

The municipal board of absentee ballot canvassers shall carefully open the certificate envelope, remove the ballot from the certificate envelope and verify that the ballot has been initialed by the municipal clerk or a deputy clerk. NOTE: If the ballot does not contain the initials of either the municipal clerk or a deputy clerk, the omission is noted on the Inspectors' Statement (Form EB-104), and the ballot is processed. An absentee ballot is not rejected solely because the initials of the clerk or deputy clerk are missing.

The municipal board of absentee ballot canvassers shall mark the voter number on the back of the ballot and on the poll list along with the indication the voter cast an absentee ballot.

If the poll list indicates the voter was required to provide proof of residence as a first-time voter, the municipal board of absentee ballot canvassers shall record the type of document provided on the poll list. If no proof of residence was provided, the municipal board of absentee ballot canvassers shall treat the absentee ballot as a provisional ballot.

The municipal board of absentee ballot canvassers may not count the absentee ballot and shall mark the ballot as "Rejected" if:

- The certification is insufficient (not signed or witnessed);
- The voter is not a qualified elector of the reporting unit;
- The absentee certificate envelope was open or had been opened and resealed;
- The absentee certificate envelope contains more than one ballot of any one kind;
- The certificate of an absentee elector who received an absentee ballot by Fax or e-mail is missing;
- Proof is submitted that the elector has died.

The reason for rejection shall be recorded on the certificate envelope and on the Inspectors' Statement (Form EB-104) by the municipal board of absentee ballot canvassers. The rejected absentee ballots shall be placed in the brown envelope for rejected absentee ballots (Form EB-102).

After recording the voter number for a properly cast absentee ballot, the municipal board of absentee ballot canvassers shall deposit the absentee ballot in the ballot box or vote tabulating device. The used certificate envelopes shall be placed in the white envelope for used certificate envelopes (Form EB-103).

Follow the Same General Procedures as Used at the Polling Place

The municipal board of absentee ballot canvassers shall follow the same general procedures, and use the same forms as are used at the polling place when processing, counting and securing absentee ballots. Duplicate original tally sheets and a single Inspectors' Statement (Form EB-104) must be maintained for each reporting unit. Rejected absentee ballots and used certificate envelopes are not required to be maintained by reporting unit. Rejected absentee ballots may be placed in a single Rejected Absentee Ballot envelope or container. Used certificate envelopes may be placed in a single Used Certificate envelope or container.

Challenging Absentee Ballots

An absentee ballot may be challenged in the same manner as it would be challenged at the polling place. Any qualified elector may challenge an absentee ballot. The municipal board of absentee ballot canvassers shall challenge an absentee ballot cast by an elector whose name appears on the ineligible voter list. The municipal board of absentee ballot canvassers shall follow the challenge procedures set out in the Election Day Manual and ElBd Chapter 9, Wis. Admin. Code using the EB 104-C to document the challenge.

Completing and Delivering Forms

The municipal board of absentee ballot canvassers shall carefully record the votes for each reporting unit on duplicate original tally sheets, which are signed by the board of absentee ballot canvassers and anyone who assisted in the counting. Municipalities utilizing an optical scan voting system shall use two machine printouts as tally sheets. However, write-in votes must be recorded on duplicate original tally sheets (Form EB-105). The ballots and materials shall be delivered to the municipal clerk following processing and counting of the absentee ballots, and after completing, recording and securing the required forms.

Miscellaneous Issues

Automatic tabulating devices must be properly set up, programmed and tested before Election Day to count absentee ballots by reporting unit for the entire municipality.

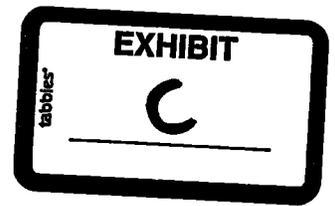
A list of absentee ballots issued must be provided to each polling place, so that the inspectors do not permit a voter who has been issued an absentee ballot to vote at the polling place. If the voter insists that the absentee ballot was not returned to the municipal clerk, the voter may cast a challenged ballot at the polling place.

If it is determined that an elector voted both by absentee ballot and in person, the absentee ballot is void.

Detailed training, including checklists and instructions shall be provided to the municipal board of absentee ballot canvassers by the municipal clerk.

Questions and Comments

If clerks have questions on the utilization of a municipal board of absentee ballot canvassers to count absentee ballots contact the Elections Division staff. We also encourage you to identify issues and detail procedures so that the central count absentee ballot process can be improved and shared with all clerks.



Guideline—Central Count Absentee

Special Note: This guideline provides some basic information for municipalities who want to utilize a municipal board of absentee ballot canvassers for counting absentee ballots on Election Day. Section 7.52, Wis. Stats., permits the governing body of a municipality to provide for the canvassing of all absentee ballots on Election Day by a municipal board of absentee ballot canvassers.

This guideline also provides the basic requirements for establishing procedures for utilizing a municipal board of absentee ballot canvassers to count absentee ballots on Election Day. There are a number of administrative procedures that will have to be developed to ensure individuals do not vote absentee and in person for the same election. In addition, these administrative procedures will ensure that votes cast by absentee ballot are properly reported for the canvass of election results.

What is required?

If the governing body decides to provide for the canvassing of all absentee ballots on Election Day by a municipal board of absentee ballot canvassers, it must adopt an ordinance. Section 7.52 (1), Wis. Stats. The municipal clerk is required to notify the Elections Division in writing before the municipality adopts the ordinance and consult with the Elections Division staff concerning administration of a central location for counting absentee ballots.

The governing body must also establish a municipal board of absentee ballot canvassers. Section 7.53 (2m), Wis. Stats. The municipal board of absentee ballot canvassers is the municipal clerk and two other qualified electors of the municipality appointed by the clerk. They serve two-year terms beginning January 1st of odd-numbered years.

Election Day Procedures

The municipal board of absentee ballot canvassers shall publicly convene between 7 a.m. and 10 p.m. on Election Day to count the absentee ballots for the municipality. The municipal clerk shall give at least 48 hours notice of the meeting of the municipal board of absentee ballot canvassers.

Any member of the public has the right to observe the proceedings of the municipal board of absentee ballot canvassers just as they do at the polling place.

Election inspectors may be appointed to assist the municipal board of absentee ballot canvassers with counting the absentee ballots for the municipality. If appointed, there must be an odd number of inspectors, and there must be at least three inspectors present at all times while absentee ballots are counted.

No later than 8 p.m. on Election Day, the municipal clerk shall post an informational statement in the clerk's office and on the Internet, at a site announced by the clerk, before the polls open at 7 a.m. The statement shall list the number of absentee ballots that have been issued and the number of absentee ballots that have been returned by the close of the polls on Election Day. The statement shall not include the name or address of absentee voters. If the municipality does not have a website where this information can be posted, the municipality is not required to make an Internet posting.

After any canvass of the absentee ballots is completed under §7.52, Wis. Stats., the board of canvassers shall reconcile the poll list of the electors who vote by absentee ballot with the corresponding poll list of the electors who vote in-person to ensure that no elector is allowed to cast more than one ballot. §§7.53(1) and (2)(d), Wis. Stats. If an elector who votes in person has submitted an absentee ballot, the absentee ballot is void. Id. The purpose of marking the poll list number of each elector on the back of the elector's ballot before depositing it in the ballot box is to provide for easy identification and later rejection of the absentee ballot after the reconciliation of the poll list of the electors who vote by absentee ballot with the corresponding poll list of the electors who vote in-person, pursuant to §§7.53(1) and (2)(d), Wis. Stats.

Voter Lists

The municipal board of absentee ballot canvassers shall use two duplicate SVRS-generated copies of a single poll list for the entire municipality. The list shall be annotated with voter numbers beginning with the number 1, along with an indication the voter cast an absentee ballot. If the voter's name does not appear on the poll list, the name and voter number shall be recorded on the supplemental poll list.

Procedures for Processing Absentee Ballots

No earlier than 7:00 a.m. on Election Day, the municipal board of absentee ballot canvassers shall open the carrier envelope or container in which the absentee ballots were delivered to the polling place so that a member of the public may observe the opening.

As each ballot is processed, the municipal board of absentee ballot canvassers shall announce the name of the absentee voter so that any member of the public present may hear the voter's name. The municipal board of absentee ballot canvassers shall carefully examine the certificate to determine it is signed and witnessed and the elector is a qualified voter in the reporting unit for which the absentee ballot is being processed.

The municipal board of absentee ballot canvassers shall compare the certificate envelope to the list of ineligible voters provided by the Department of Corrections. If the absentee voter's name appears on the list, the municipal board of absentee ballot canvassers shall challenge the absentee ballot.

The municipal board of absentee ballot canvassers shall carefully open the certificate envelope, remove the ballot from the certificate envelope and verify that the ballot has been initialed by the municipal clerk or a deputy clerk. NOTE: If the ballot does not contain the initials of either the municipal clerk or a deputy clerk, the omission is noted on the Inspectors' Statement (Form GAB-104), and the ballot is processed. An absentee ballot is not rejected solely because the initials of the clerk or deputy clerk are missing.

The municipal board of absentee ballot canvassers shall mark the voter number on the back of the ballot and on the poll list along with the indication the voter cast an absentee ballot.

If the poll list indicates the voter was required to provide proof of residence as a first-time voter, the municipal board of absentee ballot canvassers shall record the type of document provided on the poll list. If no proof of residence was provided, the municipal board of absentee ballot canvassers shall treat the absentee ballot as a provisional ballot.

The municipal board of absentee ballot canvassers may not count the absentee ballot and shall mark the ballot as "Rejected" if:

- The certification is insufficient (not signed or witnessed);
- The voter is not a qualified elector of the reporting unit;
- The absentee certificate envelope was open or had been opened and resealed;
- The absentee certificate envelope contains more than one ballot of any one kind;

- The certificate of an absentee elector who received an absentee ballot by Fax or e-mail is missing;
- Proof is submitted that the elector has died.

The reason for rejection shall be recorded on the certificate envelope and on the Inspectors' Statement (Form GAB-104) by the municipal board of absentee ballot canvassers. The rejected absentee ballots shall be placed in the brown envelope for rejected absentee ballots (Form GAB-102).

After recording the voter number for a properly cast absentee ballot, the municipal board of absentee ballot canvassers shall deposit the absentee ballot in the ballot box or vote tabulating device. The used certificate envelopes shall be placed in the white envelope for used certificate envelopes (Form GAB-103).

Follow the Same General Procedures as Used at the Polling Place

The municipal board of absentee ballot canvassers shall follow the same general procedures, and use the same forms as are used at the polling place when processing, counting and securing absentee ballots. Duplicate original tally sheets and a single Inspectors' Statement (Form GAB-104) must be maintained for each reporting unit. Rejected absentee ballots and used certificate envelopes are not required to be maintained by reporting unit. Rejected absentee ballots may be placed in a single Rejected Absentee Ballot envelope or container. Used certificate envelopes may be placed in a single Used Certificate envelope or container.

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Completing and Delivering Forms

The municipal board of absentee ballot canvassers shall carefully record the votes for each reporting unit on duplicate original tally sheets, which

are signed by the board of absentee ballot canvassers and anyone who assisted in the counting. Municipalities utilizing an optical scan voting system shall use two machine printouts as tally sheets. However, write-in votes must be recorded on duplicate original tally sheets (Form GAB-105). The ballots and materials shall be delivered to the municipal clerk following processing and counting of the absentee ballots, and after completing, recording and securing the required forms.

Miscellaneous Issues

Automatic tabulating devices must be properly set up, programmed and tested before Election Day to count absentee ballots by reporting unit for the entire municipality.

Detailed training, including checklists and instructions shall be provided to the municipal board of absentee ballot canvassers by the municipal clerk.

Questions and Comments

If clerks have questions on the utilization of a municipal board of absentee ballot canvassers to count absentee ballots contact the Elections Division staff. We also encourage you to identify issues and detail procedures so that the central count absentee ballot process can be improved and shared with all clerks.

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JUDGE THOMAS H. BARLAND
Chairperson

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For the August 2, 2011 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
Elections Division Staff

SUBJECT: Review of Recount Minutes and Procedures

Following the completion of the statewide recount of the election for Supreme Court Justice, each county submitted its recount minutes to the Board. The minutes were then posted on the Board's website for all interested parties to review. The length and detail of the minutes varied, ranging from one page submitted by Menominee County to over 300 pages from Waukesha County. Elections Specialist Aaron Frailing thoroughly reviewed each set of minutes to determine what issues arose and what errors in procedure were discovered through the recount.

Attached is a summary of the most common issues mentioned in the recount minutes. Board staff intends to use this information as points of emphasis in training of local election officials. The attached summary has also been posted on the Board's website for the public's information.

State of Wisconsin \ Government Accountability Board

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JUDGE THOMAS H. BARLAND
Chairperson

KEVIN J. KENNEDY
Director and General Counsel

DATE: July 20, 2011

TO: Wisconsin County Clerks Association
Wisconsin Municipal Clerk Association
City of Milwaukee Election Commission
Milwaukee County Election Commission

FROM: Nathaniel E. Robinson
Elections Division Administrator
Wisconsin Government Accountability Board

SUBJECT: Review of Minutes from the Recount of the State Supreme Court Justice

As part of the recount of the State Supreme Court Justice contest from the April 5, 2011 Spring Election, counties were required to take detailed minutes of the recount proceedings and submit them to the Government Accountability Board (G.A.B.). In order to garner information from these minutes, the minutes collected from all 72 counties were reviewed and the incidents from the recount were compiled and summarized.

Below is a list of issues that occurred statewide. This list is delineated into different categories in order to make it user-friendly. These items made up the vast majority of incidents recorded in the recount minutes. While the issues identified in the Board of Canvassers' minutes need to be corrected for future elections, the G.A.B. has no evidence that any of the incidents affected the outcome of the election or demonstrated intentional wrongdoing by local election officials. To the contrary, the recount primarily confirmed the accuracy of the original canvass result and, where errors in the process or discrepancies were discovered, it was the meticulous work of recount officials which ensured that each ballot was reviewed to try to determine the voter's intent.

The G.A.B. presents this summary in the spirit of transparency, with the purpose of continuously improving election administration and maintaining public confidence in Wisconsin's electoral system.

Issues regarding Poll Book Reconciliation

- When recording voter numbers in the poll book, Election Inspectors skipped or duplicated numbers.
- When issuing voter numbers in the poll book for Election Day registrants, Election Inspectors did not record participation for these voters in the supplemental poll book. Instead, the Inspectors recorded voter participation in the pre-printed section of the poll book only, or the Inspectors recorded participation in both the supplemental poll book and regular poll book.
- Elections Inspectors, when recording participation for absentee electors, failed to notate which electors voted by absentee ballot in the poll book.

Issues dealing with Ballots/Ballot Containers

- Election Inspectors were inconsistent with the handling of spoiled, damaged and replacement ballots. These ballots were inconsistently marked as damaged or replaced, or were not marked at all and were often put in incorrect envelopes for delivery to the municipal clerk's office.
- Municipalities failed to accurately mark ballots with the name of the municipality or reporting unit in which the ballot was being cast.
- Election Inspectors failed to enclose all ballots with the election materials. Additionally, ballot containers were not properly secured in the office of the municipal clerk. On several occasions, the County Board of Canvassers had to request further investigation of missing ballots.
- There was difficulty in determining voter intent on many ballots due to many electors using incorrect ballot marking devices.
- Ballot containers were not properly sealed. Also, ballot containers contained holes generally from too many ballots being stored in the ballot bags. Tamper evident seal numbers documented on the Ballot Container Certificate (GAB-101) and Inspectors' Statement were incorrectly recorded.

Issues dealing with the Absentee process and Absentee Ballots

- Absentee Certificate Envelopes lacked witness signatures.
- Many absentee ballots failed to include the initials of the issuing clerk or deputy clerk.
- Requests for absentee ballots were taken incorrectly, such as by telephone.
- Absentee ballots cast in the Clerk's office lacked witness signatures.
- Municipal clerks did not use the combination Absentee Certificate Envelope/Application for in-person absentee voting, and also did not require that the absentee voter complete an absentee application.

Issues dealing with Voting Equipment and Elections Materials

- Municipalities incorrectly used the Pre-Lat cartridge for the entire election.
- Municipalities mixed the test ballots with the official ballots.
- Many tamper evident seals used were old and brittle; thus, causing the seals to break during transit or during handling, and these were never notated on the chain of custody statement or the GAB-104 Inspectors' Statement.
- Many Election Inspectors and clerks were unfamiliar with how to troubleshoot voting equipment issues, such as jammed ballots. Additionally, there were many instances where the voter verified paper audit trail was loaded backwards causing candidate selections to not print on the paper receipt.
- Errors that occurred with voting equipment were not properly documented and recorded on the Inspectors' Statement (GAB-104). This required further investigation on behalf of the County Board of Canvassers.
- Some County Boards of Canvassers improperly used the drawdown process.

Issues regarding required GAB Forms (GAB-101, GAB-104, etc.)

- Election Inspectors failed to fill out the Inspectors' Statement (GAB-104) completely on election night. This resulted in tamper evident seals for ballot containers not being recorded on the Inspectors' statement or the Ballot Container Certification. In addition, in many cases, Election Inspectors failed to sign the required forms, incidents were not clearly defined, and poll book reconciliation errors were not remedied.
- Election Inspectors failed to accurately record statistics regarding absentee ballots or total number of electors and ballots. This led to inaccurate recording of participation statistics.

Conclusion

Overall, the statewide Recount for the office of Supreme Court Justice was handled professionally and efficiently by local election officials. Although it was a difficult task, the recount provided the Government Accountability Board, county and municipal clerks, and the public a unique opportunity to review election-related business processes.

Lessons learned will generate new training opportunities including WisLine training teleconferences, step-by-step guides and additional topics for in-person and virtual classroom training conducted by the Government Accountability Board and our clerk partners. The Government Accountability Board will continue to offer new help guides, such as the Poll Worker Checklist, in order to assist and train local election officials. New and comprehensive training and public education initiatives will continue to demonstrate to concerned members of the public that elections in the State of Wisconsin are being carried out efficiently, effectively and with the fullest possible transparency now and in the future.

State of Wisconsin \ Government Accountability Board

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JUDGE THOMAS BARLAND
Chairperson

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For the Meeting of August 2, 2011

TO: Members, Wisconsin Government Accountability Board

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

Prepared and Presented by:
Michael Haas, Staff Counsel
Edward Edney, SVRS Application Trainer

SUBJECT: Legislative Status Report

Following is a summary of legislative proposals that Board staff is monitoring:

1. Senate Bill 6 and Assembly Bill 7 and Assembly Bill 67: Photo ID:

SB6 and AB7 were introduced as identical companion bills which would require electors to show a valid form of photo identification prior to receiving a ballot. SB6 was amended, but laid on the table in the Senate on June 8, 2011. AB7 was also amended through two substitute amendments, but was made a special order of business before the Assembly on May 11, 2011. The Assembly adopted both substitute amendments, and passed the bill. The Senate concurred on May 19, 2011. The bill was then approved by the Governor on May 25, 2011 as Wisconsin Act 23, which was published on June 9, 2011.

AB67 was introduced as a separate companion bill to SB6 which would require electors to show a valid form of photo identification prior to receiving a ballot. AB67 would in addition change the deadlines for late registration and in-person absentee voting, and require G.A.B. to provide an interactive electronic registration form. The bill was referred to committee, but was not taken up.

2. Senate Bill 17 and Assembly Bill 28: Reporting by nonresident committees:

SB17 and AB28 are companion bills which would expand the amount of campaign finance information which is required to be reported by nonresident political committees. Currently such committees are required to report only contributions received by Wisconsin residents and expenditures made which involve Wisconsin elections. SB17 was referred to committee, but has not been scheduled for a public hearing. AB28 was also referred to committee, which held a public hearing on June 9, 2011.

3. Assembly Bill 32: Communications by legislators:

AB32 was referred to committee and had a public hearing on June 2, 2011. The bill would modify the statute which prohibits legislators who are up for re-election from distributing more than 49 pieces of substantially identical material between June 1st of the election year and the date of the election. The bill would create an exception for communications to constituents during the 45 days following a declaration of emergency if the communication relates to the subject of the emergency.

4. Senate Bill 35: Reducing legislative districts

SB35 reduces the number of State Senators from 33 to 25 and the number of Assembly Representatives from 99 to 75. The bill would apply to the next decennial legislative redistricting that occurs after its enactment. The bill was referred to committee and has not been scheduled for public hearing.

5. Senate Bill 25 and Assembly Bill 36: Dissolving regional transit authorities

SB25 and AB36 are companion bills which would eliminate legislative authorization to create regional transit authorities, dissolve any existing regional transit authority and the Southeastern Regional Transit Authority, and eliminating the Southeast Wisconsin transit capital assistance program. RTAs may conduct referendum elections, and therefore this legislation would affect the Board's administration of SVRS. The companion bills have been referred to the respective oversight committees.

6. Senate Bill 115 and Assembly Bill 162: Changing the Presidential Preference Primary

SB115 and AB162 are companion bills which would change the date of the presidential preference primary from the 3rd Tuesday in February to the first Tuesday in April in those years in which the president and vice president are elected. The bills also change the dates of all related election events to accommodate the change in the date of the primary. Both SB115 and AB162 were referred to committee and had public hearings on June 02, 2011.

AB 162 remains in committee. SB 115 was amended with one senate substitute amendment and passed on June 08, 2011. The Assembly has received SB 115 and referred it to committee.

7. Senate Bill 116 and Assembly Bill 161: Changing the September Partisan Primary

SB116 and AB161 are companion bills which would change the date of the September primary from the 2nd Tuesday in September to the 2nd Tuesday in August, and rename it the "Partisan Primary". SB116 and AB 161 also change the dates of related election events to accommodate the change in the date of the primary. In addition, the bills make various changes in the laws pertaining to absentee voting by military and overseas electors.

SB116 and AB161 were referred to committee and had public hearings on June 02, 2011. AB161 remains in committee. SB116 was amended in the Senate with one substitute amendment and passed on June 08, 2011. The Assembly has received SB 116 and referred it to committee.

9. Assembly Bill 169: Residency of election officials

AB169 provides that an individual who serves as an election official at a polling place on Election Day need be an elector only of the county where he or she serves. AB169 was referred to committee and has had a public hearing on June 9, 2011

10. Assembly Bill 196: Restrictions on campaign finance rule making authority

AB196 prohibits the promulgation of certain rules concerning campaign financing by the Government Accountability Board. It was referred to committee and has not been scheduled for public hearing.

Under AB196, the Board is unable to promulgate a rule that affects the authority of a corporation or cooperative to make a disbursement independently of a candidate or any agent or authorized committee of such a candidate. In addition, apart from the requirements imposed under the campaign finance law, the board is unable to impose upon any person, including any organization, any registration, reporting, filing, accounting, treasury, or fee payment requirement, or any attribution requirement in making communications.

11. Assembly Bill 198: Redistricting Standards

AB198 requires the Legislative Reference Bureau and the Government Accountability Board to jointly develop standards for legislative and congressional districts based on population requirements under the Wisconsin Constitution and the U.S. Constitution and requirements under Section 2 of the Voting Rights Act. It was referred to committee and has not been scheduled for public hearing.

12. Senate Bill 148 and Senate Bill 149 and Senate Bill 150: Redistricting

SB148, SB149, and SB150 are companion bills related to the state redistricting plans based on the 2010 federal census. SB148 redistricts state legislative districts and SB149 redistricts congressional districts. SB150 requires that municipal ward plans, and the aldermanic and supervisory districts upon which they are based, reflect municipal boundaries on April 1 of the year of each federal decennial census.

SB148, SB149, and SB150 were all referred to committee and had public hearings on July 13, 2011. The bills passed in the Senate on July 19, 2011. SB148 was amended with one senate amendment, and SB150 was amended with two senate amendments. SB149 was not amended. All bills were then concurred in the Assembly on July 20, 2011.

LEGISLATIVE STATUS REPORT

August 2, 2011 Meeting

Assembly Bills

Assembly Bill 7

Introduced by Representatives Stone, Tauchen, Honadel, J. Ott, Vos, Pridemore, Bernier, LeMahieu, August, Spanbauer, Kramer, Petersen, Ziegelbauer, Kestell, Ripp, Van Roy, Kerkman, Jacque, Litjens, Nass, Kaufert, Strachota, Steineke, Kapenga, Krug, Farrow, Knodl, Kleefisch, Kooyenga, Ballweg, Endsley, Rivard, Thiesfeldt, A. Ott, Petryk, Williams, Severson, Wynn, Knudson, Kuglitsch, Petrowski, Nygren, Meyer, Tiffany, Bies, Knilans, J. Fitzgerald and Klenke; cosponsored by Senators Leibham, Lazich, Vukmir, Kapanke, Grothman, Darling, Galloway, Wanggaard, Kedzie, Ellis, Zipperer, Olsen, Schultz, Moulton, Lasee, Cowles, Hopper Harsdorf, S. Fitzgerald and Carpenter.

Relating to: requiring certain identification in order to vote at a polling place or obtain an absentee ballot, verification of the addresses of electors, absentee voting procedure in certain residential care apartment complexes and adult family homes, identification cards issued by the Department of Transportation, creating an identification certificate issued by the Department of Transportation, requiring the exercise of rule-making authority, and providing a penalty.

Status: Referred to committee on Election and Campaign Reform. Public hearing held 4/27/11. Assembly substitute amendment 1 offered by committee on Election and Campaign Reform. Referred to joint committee on Finance. Assembly substitute amendment 2 offered by joint committee on Finance. Assembly amendment 1 to Assembly substitute amendment 2 offered by joint committee on Finance. Joint committee on Finance recommended adoption of Assembly substitute amendment 2 and Assembly amendment 1 to Assembly substitute amendment 2. Referred to the committee on Rules and made a special order of business on 5/11/2011 pursuant to Assembly Resolution 9. Assembly substitute amendment 2 and Assembly amendment 1 to Assembly substitute amendment 2 adopted. Assembly passed on 5/11/2011; Senate concurred on 5/19/2011. Approved by the Governor on 5/25/2011 as Wisconsin Act 23. Published on 6/9/2011.

Assembly Bill 28

Introduced by Representatives Spanbauer, Bernard Schaber, Bernier, Hintz, Hulsey, Mason, Pope-Roberts, Rivard and Steineke; cosponsored by Senators Harsdorf, Cowles, T. Cullen and Holperin.

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

Status: Referred to committee on Election and Campaign Reform. Public hearing held on 06/09/2011.

Assembly Bill 32

Introduced by Representatives Toles, Young, Pasch, E. Coggs, Zepnick, Turner, Berceau, Grigsby, Kessler and Bernard Schaber; cosponsored by Senators Schultz and Taylor.

Relating to: communications by members of the legislature.

Status: Referred to committee on Election and Campaign Reform. Public hearing held on 06/02/2011.

Assembly Bill 36

Introduced by Representatives Nass, Ripp, Vos, Wynn, Pridemore, Mursau, Petersen, Nygren, Kerkman, August and LeMahieu; cosponsored by Senators Grothman, Wanggaard, Lazich, Vukmir, Lasee and Moulton.

Relating to: eliminating authorization to create a regional transit authority, dissolving any existing regional transit authority and the Southeastern Regional Transit Authority, and eliminating the Southeast Wisconsin transit capital assistance program.

Status: Referred to committee on Transportation.

Assembly Bill 67

Introduced by Representatives Pridemore, Strachota, Thiesfeldt and LeMahieu; cosponsored by Senators Grothman and Darling.

Relating to: late voter registration, absentee voting in person, and implementation of a voter identification requirement at elections.

Status: Referred to committee on Election and Campaign Reform.

Assembly Bill 161

Introduced by Representatives Tauchen; cosponsored by Senator Lazich.

Relating to: the dates of the September primary and certain other election occurrences and absentee voting.

Status: Referred to committee on Election and Campaign Reform. Assembly substitute amendment 1 offered by committee on Election and Campaign Reform. Assembly

amendment 1 and 2 to Assembly substitute amendment 1 offered by committee on Election and Campaign Reform. Assembly amendment 3 to Assembly substitute amendment 1 offered by Representatives Kessler and Zamarripa.

Assembly Bill 162

Introduced by Representatives Tauchen; cosponsored by Senator Lazich.

Relating to: the date of the presidential preference primary and certain other election occurrences.

Status: Referred to committee on Election and Campaign Reform. Public hearing held on 06/02/2011. Assembly substitute amendment 1 offered by committee on Election and Campaign Reform.

Assembly Bill 169

Introduced by Representatives Pridemore and Spanbauer.

Relating to: residency of elections officials.

Status: Referred to committee on Election and Campaign Reform. Public hearing held on 06/09/2011.

Assembly Bill 196

Introduced by joint committee for review of Administrative Rules. Representatives Pridemore and Spanbauer.

Relating to: prohibiting the promulgation of certain rules concerning campaign financing by the Government Accountability Board.

Status: Referred to committee on Election and Campaign Reform.

Assembly Bill 198

Introduced by Representatives Hulse, Sinicki, Young, Roys, Ringhand, Bernard Schaber, Pohan, Clark, Fields, Berceau, Hintz, Pope-Roberts and Barca; cosponsored by Senators S. Coggs, Risser and Wirch.

Relating to: preparation of legislative and congressional districting plans by the Legislative Reference Bureau and the Government Accountability Board.

Status: Referred to committee on Homeland Security and State Affairs.

AB 200 (07.20.11)

Assembly Joint Resolutions

- **None**

AJR 48 (07.20.11)

Senate Bills

Senate Bill 6

Introduced by Senators Leibham, Lazich, Vukmir, Kapanke, Grothman, Darling, Galloway, Wanggaard, Kedzie, Ellis, Zipperer, Olsen, Schultz, Moulton, Lasee, Cowles, Hopper, Harsdorf, S. Fitzgerald and Carpenter; cosponsored by Representatives Stone, Tauchen, Honadel, J. Ott, Vos, Pridemore, Bernier, LeMahieu, August, Spanbauer, Kramer, Petersen, Ziegelbauer, Kestell, Ripp, Van Roy, Kerkman, Jacque, Litjens, Nass, Kaufert, Strachota, Steineke, Kapenga, Krug, Farrow, Knodl, Kleefisch, Kooyenga, Ballweg, Endsley, Rivard, Thiesfeldt, A. Ott, Petryk, Williams, Severson, Wynn, Knudson, Kuglitsch, Petrowski, Nygren, Meyer, Bies and Tiffany.

Relating to: requiring certain identification in order to vote at a polling place or obtain an absentee ballot, verification of the addresses of electors, absentee voting procedure in certain residential care apartment complexes and adult family homes, identification cards issued by the Department of Transportation, creating an identification certificate issued by the Department of Transportation, requiring the exercise of rule-making authority, and providing a penalty.

Status: Referred to committee on Transportation and Elections. Representative Knilans added as a cosponsor. Public hearing held on 1/26/11. Senate substitute amendment 1 offered by Senators Lazich and Leibham. Referred to joint committee on Finance by committee on Senate Organization. Withdrawn from joint committee on Finance and made available for scheduling by committee on Senate Organization. Senate amendment 1 to Senate substitute amendment 1 offered by Senator Leibham and adopted on 2/24/11. LRB corrections to Senate Substitute Amendment 1 on 2/24/11/ and 4/27/11. LRB corrections to Senate Amendment 1 to Senate Substitute Amendment 1 on 3/01/11 and 4/27/11. Senate laid on the table 6/08/11.

Senate Bill 17

Introduced by Senators Harsdorf, Cowles, Holperin and T.Cullen; cosponsored by Representatives Spanbauer, Bernier, Hintz, Hulsey, Mason, Parisi, Pope-Roberts, Rivard, Steineke and Bernard Schaber.

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

Status: Referred to committee on Transportation and Elections.

Senate Bill 25

Introduced by Senators Grothman, Wanggaard, Lazich, Vukmir, Lasee and Moulton; cosponsored by Representatives Nass, Ripp, Vos, Wynn, Pridemore, Mursau, Petersen, Nygren, Kerkman, Suder, August and LeMahieu.

Relating to: eliminating authorization to create a regional transit authority, dissolving any existing regional transit authority and the Southeastern Regional Transit Authority, and eliminating the Southeast Wisconsin transit capital assistance program.

Status: Referred to committee on Transportation and Elections.

Senate Bill 35

Introduced by Senators Carpenter; cosponsored by Representatives Kaufert.

Relating to: the number of legislative districts.

Status: Referred to committee on Judiciary, Utilities, Commerce, and Government Operations.

Senate Bill 115

Introduced by Senator Lazich; cosponsored by Representative Tauchen.

Relating to: the date of the presidential preference primary and certain other election occurrences.

Status: Referred to committee on Transportation and Elections. Public hearing held on 6/02/11. Adoption of senate substitute amendment 1 recommended by committee on Transportation and Elections. Senate substitute amendment 1 adopted and bill passed on 6/08/11. Assembly received from the Senate and referred to committee on Election and Campaign Reform.

Senate Bill 116

Introduced by Senator Lazich; cosponsored by Representative Tauchen.

Relating to: the dates of the September primary and certain other election occurrences and absentee voting.

Status: Referred to committee on Transportation and Elections. Public hearing held on 06/02/2011. Senate substitute amendment 1 offered by Senator Lazich. Senate substitute amendment 1 adopted. Senate passed on 06/08/2011. Assembly received and referred to committee on Election and Campaign Reform.

Senate Bill 148

Introduced by committee on Senate Organization.

Relating to: legislative redistricting.

Status: Referred to committee on Judiciary, Utilities, Commerce, and Government Operations. Senate amendment 1 offered by committee on Senate Organization. Senate amendment 2 offered by Senator Zipperer. Adoption of Senate Amendment 2 recommended by committee on Judiciary, Utilities, Commerce, and Government Operations. Senate adopted Senate amendment 2 and passed on 07/19/2011. Assembly concurred on 07/20/2011.

Senate Bill 149

Introduced by committee on Senate Organization.

Relating to: congressional redistricting.

Status: Referred to committee on Judiciary, Utilities, Commerce, and Government Operations. Public hearing held on 07/13/2011. Passage recommended by committee on Judiciary, Utilities, Commerce, and Government Operations. Senate passed on 7/19/2011. Assembly concurred on 07/20/2011.

Senate Bill 150

Introduced by committee on Senate Organization.

Relating to: division of municipalities into wards and redistricting of supervisory and aldermanic districts and appointing a panel to hear challenges to the apportionment of a congressional or legislative district, and hearing certain appeals.

Status: Referred to committee on Judiciary, Utilities, Commerce, and Government Operations. Public hearing held on 07/13/2011. Senate amendments 1, 2, and 3 offered by Senators Erpenbach and Risser. Senate amendment 4 offered by Senator Zipperer. Adoption of Senate Amendment 4 recommended by committee on Judiciary, Utilities, Commerce, and Government Operations. Place on Senate calendar for 07/19/2011. Senate amendment 5 offer by Senator Zipperer. Senate adopted Senate Amendments 4 and 5, and passed. Assembly concurred on 7/20/2011.

SB 153 (07.20.11)

Senate Joint Resolutions

- None

SJR 35 (07.19.11)

State of Wisconsin \ Government Accountability Board

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JUDGE THOMAS H. BARLAND
Chairperson

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For the August 2, 2011 Meeting

TO: Members, Wisconsin Government Accountability Board

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

Prepared by:

Shane W. Falk, Staff Counsel

SUBJECT: Administrative Rule-Making Post 2011 Act 21 (as amended by 2011 Act 32)

Introduction:

The Legislature adopted and Governor Walker signed into law 2011 Act 21 (enacted May 23, 2011 and effective June 8, 2011). This Act significantly alters authority of agencies to promulgate administrative rules and also prescribes new procedures that are a significant departure from longstanding procedures. Unfortunately, 2011 Act 21 required additional clarifications, which were made in the State Budget (2011 Act 32, §§2725d-2740) which the Legislature adopted and Governor Walker signed into law. (enacted June 26, 2011 and effective July 1, 2011.)

This Memorandum provides a brief summary of rule-making procedures following adoption of 2011 Act 21 (as amended by 2011 Act 32.) Staff makes several recommendations and proposed motions to address some issues associated with the new rule-making procedures.

In addition, staff has reworked the previous format of the status of the Board's pending rule-making to organize all pending rules according to the various effective dates of 2011 Act 21, grouping pending rules in categories according to the level of the application of the new rule-making procedures. Proposed motions and the Status Report on Pending Administrative Rule-Making begins on page 11 of this Memorandum.

I. Summary of Rule-Making Procedures Following Adoption of 2011 Wisconsin Act 21 (as amended by 2011 Wisconsin Act 32) relating to the Authority to Promulgate Admin. Rules and Rule-Making Procedures

There are various effective dates for 2011 Act 21, depending upon the current status of any rule-making. Further complicating the process, several provisions of 2011 Act 21 were amended by the State Budget (2011 Act 32), which has different enactment and effective dates.

Regardless, since the State Budget was effective on July 1, 2011, the combined revisions to the administrative rule-making procedures from both Acts are now effective. A brief summary is found in Section I(A) below.

In addition, 2011 Act 21 adopted new venue provisions for declaratory judgment actions on administrative rules. A brief summary is found in Section I(B) below.

The summary of an agency's authority to promulgate administrative rules is found in Section I(C) below.

The summary of administrative rule-making procedures is found in Section I(D) below and attempts to combine the new procedures created by both Acts.

A. Significant Effective Dates:

New requirements regarding the authority to promulgate administrative rules and adding a detailed economic impact analysis for every proposed rule-making, are effective for any rule submitted to the legislative council staff for review on or after June 8, 2011. (2011 Act 21, §9355(1-2)).

New statutory provisions clarifying the legislative review of proposed administrative rules are effective for any rule submitted to the Legislature on or after June 8, 2011. (2011 Act 21, §9355(4)). However, in the State Budget (2011 Act 32, §§2738m, 2739c through 2739L), amendments were made to 2011 Act 21, which are effective on or after July 1, 2011.

New requirements regarding gubernatorial approval of permanent and emergency administrative rules are effective for any proposed rule or emergency rule whose statement of scope is presented to the governor for approval on or after June 8, 2011. (2011 Act 21, §9355(3)). However, in the State Budget (2011 Act 32, §§2739n and 2739p), amendments were made to 2011 Act 21, which are effective on or after July 1, 2011.

B. Judicial Review and Venue:

The exclusive means of judicial review of the validity of a rule shall be an action for declaratory judgment as to the validity of such rule and brought in the circuit court for the county where the party asserting the invalidity of the rule resides or has its principal place of business or, if that party is a nonresident or does not have its principal place of business in this state, in the circuit court for the county where the dispute arose. The agency shall be a party defendant. (2011 Act 21, §62; §227.40, Wis. Stats.)

The court shall render a declaratory judgment in the action only when it appears from the complaint and the supporting evidence that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of the plaintiff. A declaratory judgment may be rendered whether or not the plaintiff has first requested the agency to pass upon the validity of the rule in question. (Id.)

Upon entry of a final order in a declaratory judgment action, the court shall notify the legislative reference bureau of the court's determination as to the validity or invalidity of the rule and the

legislative reference bureau shall publish a notice of that determination in the administrative register and insert an annotation of that determination in the administrative code. (2011 Act 21, §62g; §227.40(6), Wis. Stats.)

The effective date for these venue provisions in declaratory judgment cases apply to actions for declaratory judgment commenced on or after June 8, 2011. (2011 Act 21, §9309(1)).

C. Authority to Promulgate Administrative Rules

All of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency (2011 Act 21, §§2-3; §227.11(2)(a), Wis. Stats.):

1. A statutory or non-statutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the Legislature.
2. A statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the Legislature.
3. A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the statutory provision.

D Rule-Making Procedures Post 2011 Act 21 (as amended by 2011 Act 32)

The following procedures now apply to permanent rule-making. Several of these provisions also apply to emergency rule-making. For clarity and brevity purposes, the emergency rule procedures are specifically noted in *italicized* print.

1. Statement of Scope (2011 Act 21, §§4-6; §227.135, Wis. Stats.)
 - a. An agency that has prepared a statement of the scope of a proposed rule shall present the statement to the governor and to the individual or body with policy-making authority over the subject matter of the proposed rule for approval. The agency may not send the statement to the legislative reference bureau for publication until the governor issues a written notice of approval of the statement. The body with policy-making authority may not approve the rule until at least 10 days after the publication of the statement in the administrative register by the legislative reference bureau.

No state employee or official may perform any activity in connection with the drafting of the proposed rule until the governor and the body with policy-making authority approves the statement.

- b. If the governor approves the statement of scope, the agency shall send the statement to the legislative reference bureau for publication in the administrative register and also provide a copy of the statement to the secretary of administration.
- c. If at any time after the scope of a proposed rule is approved by the Governor and body with policy-making authority the agency changes the scope of the proposed rule in any meaningful or measurable way, the agency shall prepare and obtain approval of a revised statement of scope in the same manner as the original statement.
- d. *An agency shall prepare a statement of scope of any proposed emergency rule and obtain approval of the governor and the body with policy-making authority in the same process as for a permanent rule. The statement of scope is sent to the legislative reference bureau for publication in the administrative register and copied to the secretary of DOA, only after receipt of written approval from the governor. The body with policy-making authority may not approve the statement until at least 10 days after publication in the administrative register.*

No state employee or official may perform any activity in connection with the drafting of the proposed emergency rule except for preparation of the statement of scope, until the governor and the body with policy-making authority approves the statement. (2011 Act 21, §60; 2011 Act 32, §2739n; §227.24(1)(e)1d, Wis. Stats.)

- 2. Economic Impact Analyses of Proposed Rules (2011 Act 21, §7-28; §§227.137-138, Wis. Stats.)

An economic impact analysis is now required for any proposed permanent rule-making. This requirement also applies to any emergency rule-making. For clarity and brevity purposes, the emergency rule requirements are specifically noted in *italicized* print.

- a. An agency shall prepare and economic impact analysis for a proposed rule before submitted the proposed rule to the legislative council staff.
- b. An economic impact analysis of a proposed rule shall contain information on the economic effect of the proposed rule on specific businesses, business sectors, public utility ratepayers, local government units, and the state's economy as a whole. When preparing the analysis, the agency shall solicit information and advice from businesses, associations representing businesses, local governmental units, and individuals that may be affected by

the proposed rule. The agency shall prepare the economic impact analysis in coordination with local governmental units that may be affected by the proposed rule. The agency may request information that is reasonably necessary for the preparation of the economic impact analysis from other businesses, associations, local governmental units, individuals, and from other agencies.

- c. The economic impact report shall include all of the following:

An analysis and quantification of the policy problem that the rule intends to address, including comparisons with approaches used by the federal government and by Illinois, Iowa, Michigan, and Minnesota to address that policy problem and if the agency chooses a different approach, a statement as to why the agency chose a different approach.

An analysis and detailed quantification of the economic impact of the rule, including the implementation and compliance costs that are reasonably expected to be incurred by or passed along to the businesses, local governmental units, and individuals that may be affected by the rule.

An analysis of the actual and quantifiable benefits of the rule, including an assessment of how effective the rule will be in addressing the policy problem the rule intends to address.

An analysis of alternatives to the rule, including the alternative of not promulgating the rule.

A determination made in consultation with the businesses, local governmental units, and individuals that may be affected by the rule as to whether the rule would adversely affect in a material way the economy, a sector of the economy, productivity, jobs, or the overall economic competitiveness of this state.

- d. On the same day that the agency submits the economic impact analysis to the legislative council staff, the agency shall also submit that analysis to the DOA, the governor, and to the chief clerks of each house of the Legislature, who shall distribute the analysis to the presiding officers of their respective houses, to the chairpersons of the appropriate standing committees of their respective houses and to the co-chairpersons of the joint committee for review of administrative rules. The agency shall revise this analysis, if the rule is modified after submission such that the economic impact of the rule is significantly changed. A revised analysis shall be prepared and submitted in the same manner as an original analysis.

e. If the economic impact analysis regarding the rule indicates that a total of \$20,000,000 or more in implementation and compliance costs are reasonably expected to be incurred by or passed along to businesses, local governmental units, or individuals as a result of the rule, the DOA shall review the rule and issue a report. The agency may not submit the rule to the Legislature for review until the agency receives the DOA report and approval.

3. Submittal to Legislative Council Staff (2011 Act 21, §29; §227.15, Wis. Stats.)

Prior to a public hearing on a proposed rule, or if no public hearing is required, prior to submittal to the governor and legislature, the agency shall submit the proposed rule to the legislative council staff for review in the form required by §227.14(1), Wis. Stats., and shall include the economic impact analysis required under §227.137, Wis. Stats.

4. Public Hearing, if Required (No changes)(§§227.16-18 and 227.24, Wis. Stats.)

5. Approval by Governor (2011 Act 21, §32; §227.185, Wis. Stats.)

After a proposed rule is in final draft form, the agency shall submit the proposed rule to the governor for approval. The governor, in his or her discretion, may approve or reject the proposed rule. If the governor approves a proposed rule, the governor shall provide the agency with written notice of that approval. No proposed rule may be submitted to the legislature for review under §227.19(2), Wis. Stats., unless the governor has approved the proposed rule in writing.

An agency shall submit the proposed emergency rule in final draft form to the governor for approval in the same fashion as approval. The governor, in his or her discretion, may approve or reject the proposed emergency rule. If the governor approves the proposed emergency rule, the governor shall provide the agency with a written notice of that approval.

An agency may not file an emergency rule with the legislative reference bureau as provided in §227.20, Wis. Stats., and an emergency rule may not be published until the governor approves the emergency rule in writing.

6. Legislative Review Prior to Promulgation (2011 Act 21, §§33-58; 2011 Act 32, §§2738m, 2739c through 2739L; §227.19, Wis. Stats.)

An agency shall submit a notice to the chief clerk of each house of the legislature when a proposed rule is in final draft form. The notices shall be submitted in triplicate and shall be accompanied by a report in the form specified in §227.19(3), Wis. Stats., including a copy of any economic impact analysis. The agency shall submit to the legislative reference bureau for publication in the register a statement that a proposed rule has been submitted to

the chief clerk of each house of the legislature. Each chief clerk shall enter a similar statement in the journal of his or her house.

The major change adopted by 2011 Act 21 and 2011 Act 32 address the elimination of the previous passive approval provisions for standing committees in the legislature. In the past, if the two standing committees did not act within their 30 day review period, an agency could promulgate the proposed rule based solely on the legislature's passive approval. Under the new provisions, even if there are no objections by the standing committees, they must still refer the proposed rule to the Joint Committee for Review of Administrative Rules, which then has 30 days to review the proposed rule.

An agency may not promulgate a proposed rule until the Joint Committee for Review of Administrative Rules nonconcur in any objections of a committee, concurs in the approval of the committees, waives its jurisdiction over the proposed rule, or until the expiration of the JCRAR review period (if no committee has objected to the proposed rule), or until a bill to prevent promulgation fails to be enacted.

If JCRAR objects to the proposed rule or a part of a proposed rule, it shall, within 30 days of the date of the objection, meet and take executive action regarding the introduction, in each house of the legislature, of a bill to support the objection. These bills shall be introduced within 5 working days after JCRAR takes executive action.

The legislature may not consider a bill to prevent promulgation of the proposed rule until JCRAR has submitted a written report on the bill, which shall be printed as an appendix to each bill and contain the contents required by §227.19(6)(a)1-4, Wis. Stats.

In addition, some jurisdiction changes were adopted to clarify that the end of a legislative session will not terminate legislative review, but rather the jurisdiction continues to the next legislative session where a new 30 day review period begins.

7. Submission of Final Draft Rule to Legislative Reference Bureau for Publication in the Administrative Register and Code (No changes)(§227.20, Wis. Stats.)

II. Governor, DOA, and Legislative Reference Bureau Direction

The legislative reference bureau is in the process of updating and significantly revising its Administrative Rules Procedures Manual, following the effective date of 2011 Act 21. Since the changes are so substantial, it likely will not be completed for some time.

In the meantime, the Governor's office, Department of Administration and the Legislative Reference Bureau have provided staff with some direction on the new rules procedure.

Following this Memorandum is a June 7, 2011 email from the Governor's Chief Legal Counsel providing some direction on the gubernatorial approval process. See exhibit A.

Following this Memorandum is a June 8, 2011 email from DOA providing some direction and a form for the economic impact analysis. See exhibit B.

Following this Memorandum are June 7, June 13, and July 1, 2011 emails from the Legislative Reference Bureau attempting to clarify procedures and provide some direction on the form of filings with that office. These early communications likely resulted in the clarification provisions inserted into the State Budget to address the emergency rule procedures following 2011 Act 21. See exhibit C.

Finally, as staff was preparing this Memorandum, DOA issued another guidance Memo dated July 19, 2011, which follows and does not contradict staff's Memorandum. See exhibit D. The DOA Memo provides notice that the Governor intends to issue an Executive Order with more detailed guidelines.

III. Staff Identified Rule-Making Procedural Issues and Recommendations

Staff has identified two major concerns for G.A.B. rule-making, pending and future, as a result of the adoption of 2011 Act 21 (as amended by 2011 Act 32).

A. Significant Delays in Rule-Making

Recommendation: Staff recommends that the Board direct staff to return to the Board at the next meeting with recommendations prioritizing the Board's rule-making with an effort to avoid expiration of pending rules.

Staff is concerned that the procedure of requiring gubernatorial approval at two steps of the rule-making procedure, without any deadline for completion of the review, the extensive economic impact analysis requirements, and the elimination of the passive approval by the Legislature's standing committees will delay rule-making considerably.

To even get a rule-making off the ground, the Statement of Scope must first be submitted to the Governor for approval. If approved by the Governor, the Statement of Scope can be published in the administrative register; however, the Board cannot act on approval of the Statement of Scope until at least 10 days after it has been published in the administrative register. The statutes now specifically prohibit staff from working on any rule-making activity, until both the Governor and the Board have approved the Statement of Scope. The deadlines for submission of materials for publication in the register have generally been mid-month (for the publication released the first week of the following month) and the end of the month (for the publication released mid-month of the following month.) With the limited frequency of Board meetings and the need for the Board to approve the Statement of Scope at least 10 days after it is published in the register, the earliest staff could actually work on drafting a proposed rule for the Board's consideration is likely 2 months from submission of the statement of scope to the Governor's office, and this is assuming gubernatorial approval occurs within 14 days.

The same procedure for gubernatorial and Board approval of a statement of scope applies to proposed emergency rules, which would also result in the 2 month delay before staff could even begin activity drafting the proposed emergency rule for the Board's consideration.

Both proposed permanent rules and emergency rules must be submitted to the Governor for approval. For permanent rules, this step occurs after legislative council review of the rule and prior to submitting the proposed rule to the Legislature for review. A proposed permanent rule would have been approved by the Board prior to its submission to the Legislative Council, but there is no statutory deadline for the gubernatorial review period.

The emergency rule process will now be much lengthier than in the past. After the estimated 2 month period discussed above resulting in the Board approval of the Statement of Scope, staff may draft an emergency rule for the Board's consideration; however, the Board will still have to approve the draft emergency rule before it can be submitted to the Governor. In light of the frequency of Board meetings, this likely will add another month to the process of getting an emergency rule off the ground before it is even submitted to the Governor for approval. The emergency rule may only be published in the paper and filed with the Legislative Reference Bureau after the G.A.B. receives written approval of the emergency rule from the Governor.

In the future, these delays will make it very difficult for the Board to respond to immediate needs for rules.

Once a Statement of Scope is published in the administrative register, the rule-making process for that rule expires within 4 years and thereafter, the G.A.B. will have to start the rule-making from the beginning. The G.A.B. has many rule-makings pending and which will expire on various dates in 2012. It is possible some of these rule-makings will expire and have to be restarted.

B. Economic Impact Analyses Procedures

Recommendation: Staff recommends that the Board adopt a reasonable policy of soliciting information and advice from those that may be affected by a proposed rule-making - solicitations via an email notice directing the recipient to the G.A.B. website for detailed information, with a 10 day deadline to respond to G.A.B., and of only the following for the provided subjects:

1. All clerks for proposed election and campaign finance rules;
2. All campaign finance registrants for proposed campaign finance, ethics and lobbying rules;
3. Top state public officials who have filed a Statement of Economic Interests with the G.A.B. for proposed ethics rules;
4. Registered lobbyists and lobbying principals for proposed ethics rules;

- 5. Wisconsin Manufacturer's and Commerce for all campaign finance, ethics, and lobbying rules with a recommendation that it circulates the solicitation to all its members for comment directly to the G.A.B.;**
- 6. Wisconsin Democracy Campaign, League of Women Voters, Common Cause of Wisconsin, Disability Rights of Wisconsin, and the Wisconsin Board for Persons with Developmental Disabilities for proposed elections, campaign finance, ethics, and lobbying rules.**

The new procedures mandate that the G.A.B. prepare an economic impact analysis for any proposed rule that “shall contain information on the economic effect of the proposed rule on specific businesses, business sectors, public utility ratepayers, local government units, and the state’s economy as a whole.” Staff is very concerned about the onerous burdens on G.A.B. as a result of the mandates to solicit information and advice from businesses, associations representing businesses, local governmental units, and individuals that may be affected by the proposed rule and to prepare the economic impact analysis in coordination with local governmental units that may be affected by the proposed rule.

The new procedures do provide the G.A.B. with authority to “request information that is reasonably necessary for the preparation of the economic impact analysis from other businesses, associations, local governmental units, individuals, and from other agencies.” A combination of use of the G.A.B. website and email is the only effective way to solicit this information in a cost-effective and timely manner. Limiting the number of persons or entities is another reasonable way to manage this process. The recommendation above appears limited in nature, but depending upon the subject matter of the proposed rule actually would include solicitations from thousands of persons or entities, including a large percentage of Wisconsin businesses, every Legislator via his or her campaign committee, all political parties registered as such in Wisconsin, several non-partisan organizations particularly interested in the Board’s activities, and all 1,850 county and municipal clerks in Wisconsin.

With this more reasonable and manageable solicitation procedure and most importantly the deadline for a response, staff would more readily be able to review and consider incorporating responses into the economic impact analysis. In addition to the Board’s open meeting process which permits public comment by Wisconsin clerks, this procedure would complete compliance with the requirement to prepare an economic impact analysis in coordination with local governmental units that may be affected by the rule.

This process will still be onerous, particularly if there are hundreds or thousands of responses to a solicitation, as that information must be reviewed and somehow incorporated into the economic impact analysis.

IV. Proposed Motions

- A. **MOTION:** The Board directs staff to return to the Board at the next meeting with recommendations prioritizing the Board's rule-making with an effort to avoid expiration of pending rules.
- B. **MOTION:** The Board adopts a reasonable policy of soliciting information and advice from those that may be affected by a proposed rule-making - solicitations via an email notice directing the recipient to the G.A.B. website for detailed information, with a 10 day deadline to respond to G.A.B., and of only the following for the provided subjects:
1. **All clerks for proposed election and campaign finance rules;**
 2. **All campaign finance registrants for proposed campaign finance, ethics and lobbying rules;**
 3. **Top state public officials who have filed a Statement of Economic Interests with the G.A.B. for proposed ethics rules;**
 4. **Registered lobbyists and lobbying principals for proposed ethics rules;**
 5. **Wisconsin Manufacturer's and Commerce for all campaign finance, ethics, and lobbying rules with a recommendation that it circulates the solicitation to all its members for comment directly to the G.A.B.;**
 6. **Wisconsin Democracy Campaign, League of Women Voters, Common Cause of Wisconsin, Disability Rights of Wisconsin, and the Wisconsin Board for Persons with Developmental Disabilities for proposed elections, campaign finance, ethics, and lobbying rules.**

STATUS REPORT ON PENDING ADMINISTRATIVE RULE-MAKING

I. Pending Rule-Making Not Subject to 2011 Act 21

Create 1.91

Relating to: Organizations Making Independent Disbursements

Status: See separate Memorandum for the August 2, 2011 Meeting.

II. Pending Rule-Making Subject only to Act 21's Revision of Legislative Approval

The following rules are subject to several provisions of Act 21, but only as they relate to the new procedures for Legislative review because Legislative Council has already reviewed the following rules.

A. 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. Board reviewed the rule and took renewed action on September 13, 2010. Emergency Rule was published on September 24, 2010. Scope statement published and was approved by the Board at its October 11, 2010 meeting. The final version of Chapter 4 was submitted to Legislative Council for review and returned. A public hearing was held on December 13, 2010 at the Board's meeting. The rule awaits submittal to the Legislature before publication.

B. 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. Legislative Report will be submitted and upon return, publication.

C. 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.

D. 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.

E. 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. Legislative Report will be submitted and upon return, publication.

III. Pending Rule-Making Subject Act 21's Limitation of Rule-Making Authority, Economic Impact Analyses, and Revision of Legislative Approval

The following rules are subject to several provisions of Act 21, including the limitations on rule-making authority, requirement to submit an economic impact analysis, and the new procedures for Legislative review because the following rules have not yet been submitted to Legislative Council for review.

A. Revise 6.02

Relating to: Registration Statement Sufficiency.

Status: Board original action on March 30, 2009. Scope statement submitted for publication. Draft rule approved by the Board at the December 17, 2009 meeting. Must complete economic analysis and submit the rule to the Legislative Council for review to 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 the Governor and then the Legislature (unless someone petitions for a hearing.)

B. 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 approved by the Board at the December 17, 2009. Must complete economic analysis and submit it and the rule to the Legislative Council for review to 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 the Governor and then the Legislature (unless someone petitions for a hearing.)

C. Creation of Chapter 13

Relating to: Training Election Officials

Status: Board original action on January 28, 2008. Scope statement published on October 30, 2010. Board approved draft rule at the August 10, 2009 meeting. Must now complete economic impact analysis and submit it and the draft rule to Legislative Council for review. Thereafter, if not doing 30 day notice rule-making, will need public hearing and before approval by the Governor and submittal to Legislature.

D. Creation of Chapter 26

Relating to: Contract Sunshine

Status: Board original action at the July 21-22, 2010 meeting, at which the Board approved the scope statement. Staff published the scope statement. Proposed rule approved by the Board at the August 30, 2010 Board meeting. On September 10, 2010, staff distributed the rule to all agencies for preview and comment. Staff must now complete an economic impact analysis and submit it to Legislative Council for review. Likely will proceed with a public hearing upon return of the rule from Legislative Council. Then submit it for approval by the Governor before submission to the Legislature for review.

IV: Pending Rule-Making Subject to Act 21's Gubernatorial Approval, Limitation of Rule-Making Authority, Economic Impact Analyses, and Revision of Legislative Approval

The following rules are subject to all provisions of Act 21, including the limitations on rule-making authority, requirement to submit an economic impact analysis, gubernatorial approval of the scope statement and final draft rule, and the new procedures for Legislative review because the Statements of Scope for the following rules have not yet been published.

Economic impact analyses must be completed for all of the following rules, but staff is only authorized to begin work on that after the Board has approved the Statement of Scope.

A. 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 now must be submitted to the Governor for approval before publishing with the Legislative Reference Bureau. The scope statement must return to the Board for approval before staff can continue the 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 approval of the Governor and submittal to Legislature (unless someone petitions for a hearing.)

B. 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 now be submitted to the Governor for approval before publishing with the Legislative Reference Bureau. The scope statement must return to the Board for approval before staff can continue the 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 approval by the Governor and submittal to Legislature (unless someone petitions for a hearing.)

C. 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 now be submitted to the Governor for approval before publishing with the Legislative Reference Bureau. The scope statement must return to the Board for approval before staff can continue the 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 approval by the Governor and submittal to Legislature (unless someone petitions for a hearing.)

D. 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 now be submitted to the Governor for approval before publishing with the Legislative Reference Bureau. The scope statement must return to the Board for approval before staff can continue the rule-making process to create a rule addressing treatment of contributions from joint accounts. Upon approval of the scope statement by the Board, staff can begin to draft a rule and will return to the Board for approval. Likely will complete with 30 day notice rule-making, which will not require a public hearing before approval by the Governor and submittal to Legislature (unless someone petitions for a hearing.)

E. 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 now be submitted to the Governor for approval before publishing with the Legislative Reference Bureau. The scope statement must return to the Board for approval before staff can continue the rule-making process to correct grammatical error. Likely will complete with 30 day notice rule-making, which will

not require a public hearing before approval by the Governor and submittal to Legislature (unless someone petitions for a hearing.)

F. Revise 1.28

Relating to: Scope of Regulated Activity

Status: See separate Memorandum for the August 2, 2011 meeting.

G. 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 approved by the Board at the August 10, 2009 meeting, but must now be submitted to the Governor for approval before publishing with the Legislative Reference Bureau. The scope statement must return to the Board for approval before staff can continue the 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 approval by the Governor and submittal to Legislature (unless someone petitions for a hearing.)

H. 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 now be submitted to the Governor for approval before publishing with the Legislative Reference Bureau. The scope statement must return to the Board for approval before staff can continue the 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 approval by the Governor and submittal to Legislature (unless someone petitions for a hearing.)

I. 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 was approved by the Board at the March 23-24, 2010 meeting. The scope statement must now be submitted to the Governor for approval before publishing with the Legislative Reference Bureau. The scope statement must return to the Board for approval before staff can continue the rule-making process. Will likely have to hold public hearing, so following submittal to

Legislative Council will hold public hearing and then submittal to Governor for approval and Legislature before publication.

J. Revise Chapter 3

Relating to: Voter Registration, HAVA Checks

Status: Board original action August 27, 2008. Must draft scope statement, which must now be submitted to the Governor for approval before publishing with the Legislative Reference Bureau. The scope statement must return to the Board for approval before staff can continue the 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 approval of the Governor and submittal to Legislature (unless someone petitions for a hearing.)

K. Revise 3.01(6) and 12.01(2)

Relating to: Election Cycle Period for SRD and Municipal Clerk Training

Status: Board original action August 30, 2010. Scope Statement was approved by the Board at the August 30, 2010 meeting and must now be submitted to the Governor for approval before publishing with the Legislative Reference Bureau. The scope statement must return to the Board for approval before staff can continue the rule-making process to change the election cycle for special registration deputy and municipal clerk training so that the cycle begins on January 1 of an even-numbered year and continues through December 31 of the following odd-numbered year. Likely will complete with 30 day notice rule-making, which will not require a public hearing before approval by the Governor and submittal to Legislature (unless someone petitions for a hearing.)

L. Revise 6.03

Relating to: Assistance by Government Accountability Board Staff

Status: Board original action on March 30, 2009. Scope statement approved by the Board at the December 17, 2009 meeting, but must now be submitted to the Governor for approval before publishing with the Legislative Reference Bureau. The scope statement must return to the Board for approval before staff can continue 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 approval by the Governor and submittal to Legislature.

M. 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, which must now be submitted to the Governor for approval before publishing with the

Legislative Reference Bureau. The scope statement must return to the Board for approval before staff can continue the rule-making process. Will require public hearing, so following submittal to Legislative Council will have public hearing before approval by the Governor and submittal to Legislature.

N. Revise 9.03

Relating to: Voting Procedures for Challenged Electors

Status: Board original action on May 5, 2008. Scope statement approved by the Board at the December 17, 2009 meeting, but must now be submitted to the Governor for approval before publishing with the Legislative Reference Bureau. The scope statement must return to the Board for approval before staff can continue 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 approval by the Governor and submittal to Legislature.

O. Revise 12.01(2) See 3.01(6) above.



Falk, Shane - GAB

From: Kennedy, Kevin - GAB
Sent: Wednesday, June 08, 2011 7:45 AM
To: Becker, Jonathan - GAB; Robinson, Nathaniel E - GAB; Haas, Michael R - GAB; Falk, Shane - GAB
Subject: FW: Administrative Rules Changes
Attachments: Memo..pdf

Kevin J. Kennedy
Director and General Counsel
Wisconsin Government Accountability Board
608-266-8005
kevin.kennedy@wi.gov

From: Hock, Suzanne - DOA
Sent: Tuesday, June 07, 2011 3:10 PM
To: Abrahamson, Shirley S - COURTS; Alexander, James C - COURTS; Anderson, Eloise - DCF; Anderson, Terry - LEGIS; Baumbach, Scott C - DWD; Bildsten, Peter J - DFI; Bolger, T. Michael - MWC; Bozarth, Keith S - SWIB; Brancel, Ben - DATCP; Brown, Ellsworth H - WHS; Bruemmer, Heather - BOALTC; Buhl, Michael - UWHC; Chandler, Richard G - DOR; Clancy, Dan - WTCS; Cupp, Mark E - LWR; Dunbar, Donald P - DMA; Ellis, Mike - LEGIS; Evers, Anthony S - DPI; Fitzgerald, Jeff - LEGIS; Frenette, Rick P - SFP; Fuller, Patrick - LEGIS; Gilkes, Keith - GOV; Gottlieb, Mark - DOT; Gracz, Greg L - OSER; Hamblin, Gary H - DOC; Huebsch, Mike - DOA; Jadin, Paul F - COMMERCE; Kennedy, Kevin - GAB; Kiesow, Harlan - FRNSA; Reed, Margaret - DOA; Klett, Stephanie - TOURISM; La Follette, Doug J - SOS; Lang, Bob - LFB; Marchant, Robert - LEGIS; Miller, Steve - LEGIS; Montgomery, Phil - PSC; Mueller, Janice L - LAB; Nelson, Sherrie A - HEAB; Nelson, Tia - BCPL; Neumann, Paul F - DNR; Nickel, Ted - OCI; Nines, Larry - WHEFA; Piliouras, Elizabeth - OCR; Plale, Jeff - DOA; Purcell, Gene P - ECB; Reilly, Kevin - UWS; Ross, Dave - DRL; Schuller, Kurt - OST; Scott, James R - WERC; Smith, Dennis G - DHS; Snyder, MaryAnne - CTF; Southwick, April - COURTS; Stella, Dave - ETF; Stepp, Cathy L - DNR; Swede, Beth - BPDD; Thompson, Kelli - OSPD; Tzougros, George - WAB; Van Hollen, John B - DOJ; Voelker, A. John - COURTS; Werner, Phil W - DOA; Wild, Rev. Robert - Marquette University; Williams, Donna L - DVA; Winston, Wyman; Ylvisaker, Jeff - LEGIS
Subject: FW: Administrative Rules Changes

All: Please see attachment and message below.

From: Hitt, Andrew A - GOV
Sent: Tuesday, June 07, 2011 3:08 PM
To: Hock, Suzanne - DOA
Subject: Administrative Rules Changes

To: All State Agencies
From: Brian K. Hagedorn, Chief Legal Counsel
Subject: Act 21, changes to the administrative rules process

Reforms to Wisconsin's administrative rulemaking procedures (Act 21) are effective on Wednesday, June 8, 2011. Agencies beginning the process of drafting new or amended rules, including emergency

A-2

rules, must first submit a scope statement to the Governor for approval. The scope statement must include the information set forth in Wis. Stat. § 227.135.

All scope statements should be submitted to the Governor's Office in PDF format via e-mail at administrativerules@wisconsin.gov, which can be found on the contact page of the Office of Governor Scott Walker at <http://www.wisgov.state.wi.us/>. Following a review of the materials submitted, the Governor will notify the agency in writing whether the scope statement is approved, should be modified before the rulemaking proceeds, or is rejected. The Governor's Office may be in contact with agencies during the Governor's review of the scope statement in order to request any additional information, clarification, or documentation necessary for evaluation and to discuss any concerns. The above procedure will also be utilized for submission of proposed rules.

Please remember that until approval of the scope statement by the Governor and individual or body with policy-making powers, agency staff may not work on any activity in connection with the drafting of the proposed rule.

As the rulemaking process goes forward, please note that "any meaningful or measurable change" in the proposed rule's scope requires the submission of a revised scope statement. Such changes include, but are not limited to, adding any activity, business, material, or product that is not specifically included in the original scope statement.

The Governor's Office is committed to efficient and timely review of the scope statement and proposed rules. If your request is time sensitive, please provide details and we will try to accommodate those requests.

Additional guidance will be provided going forward as we begin to implement the Act 21 process. In the meantime, questions should be directed to Jodi Jensen.



SCOTT WALKER
OFFICE OF THE GOVERNOR
STATE OF WISCONSIN

P.O. Box 7863
MADISON, WI 53707

To: All State Agencies
From: Brian K. Hagedorn, Chief Legal Counsel
Subject: Act 21, changes to the administrative rules process

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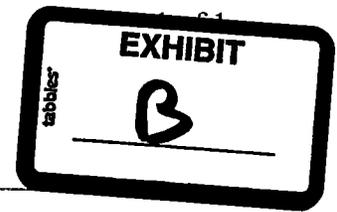
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Falk, Shane - GAB

From: Nelson, Linda S - DOA
Sent: Wednesday, June 08, 2011 11:01 AM
To: Nelson, Linda S - DOA; Sweet, Richard - LEGIS; Sorenson, Donna - DOA; Matson, James K - DATCP; Schultz, Karen E - DATCP; Tzougros, George - WAB; Schlei, Mark S - DFI; Anderson, Kathryn R - DOC; Rockweiler, Sam - COMMERCE; Quast, Jim - COMMERCE; Dies, David C - EAB; Haas, Michael R - GAB; Falk, Shane - GAB; Nispel, David - ETF; McClure, Mike - DOA; Schwarz, David - DOA; Nepple, Fred - OCI; Luck, Robert R - OCI; Walsh, Julie E - OCI; Williams, Quinn L - DNR; Eckdale, Robert B - DNR; Loomans, Scott D - DNR; Krake, Kellie - OSPD; Connelly, Johnston P - DNR; Riley, Julia B - DNR; Nelson, Kathryn J - DNR; Slauson, Lori L - DPI; Lorence, John - PSC; Wood, Doug - OCR; Haack, Pamela - DRL; Kleven, Dale S - DOR; Stewart, Jimmy A - DVA; Foy, Morna - WTCS; Parker, Deborah - WTCS; Bernstein, Howard I - DWD; Pridgen, Elaine - DCF; Radue, Jane S - UW; Greer, Rosie J - DHS; Davis, Peter G - WERC; Miller, Steve - LEGIS; Kennedy, Kevin - GAB; Hutchison, Connie L - HEAB; Hamblen, L Jane - SWIB; O'Donnell, Jessica L - OSER; Williams, Inger J - OCI; Alexander, James C - COURTS; Leatherwood, Shancethea N - DRL; Haag, Marianne - DOT; Alexander, James C - COURTS; 'Altenburg, Rana - Marquette University'; Anderson, Bonnie R - DOJ; Annen, Kathy - LEGIS; Banoul, Arlene - OPD; Barkelar, Craig D - SFP; Barkelar, Deb K - LAB; Benisch, Pam - LEGIS; Bormett, Michael R - DPI; Brescoll, Deborah E - COURTS; Bruemmer, Heather - BOALTC; Brunker, Maureen - WHEDA; 'Buechner, Mark - SLOH'; 'Buhl, Michael - UWHC'; 'Christiansen, Megan - SPD'; Collins, Mike - OST; Coomber, Brett - DMA; Cornelius, Louie - COMMERCE; Couey, Roland - DOC; Cupp, Mark E - LWR; Dietzel, Susan J - DFI; Dokken, Larry L - ECB; Emery, Lynn - LEGIS; Forsaith, Andrew C - DHS; Frank, Gina M - OCI; Fuller, Patrick - LEGIS; Gilkes, Keith - GOV; Hammer, Paul - DOT; Hanaman, Cathlene - LEGIS; Harris, Freda J - UW; Hauge, Sharrie - GAB; Holtan, Colleen - DVA; 'Holtan, Vicki - LFB'; Hoyt, Cindy L - DOJ; Kennedy, Kelly J - DOJ; Kerner, Martha - DOA; 'Kiesow, Harlan - FRNSA'; Kramer, Georgann F - WERC; Kranz, Jon - ETF; 'Kuhn, Kathryn - MCW'; Lang, Bob - LEGIS; Lashore, Patricia M - DOR (Pat); Linton, Suzanne L - DPI; Loniello, Sue A - WAB; Marchant, Robert - LEGIS; Mero, Tim R - OCI; Muenich, Laura A - TOURISM; Nechvatal, Denise - BCPL; Nelson, Sherrie A - HEAB; Nelson, Tia - BCPL; Neumann, Paul F - DNR; Nikolay, Robert A - DCF; 'Nines, Larry - WHEFA'; Nooyen, Cindy - DOT; Olson, Anne C - PSC; Opsahl, Richard - WTCS; Parker, James A - DRL; Parkinson, Greg T - WHS; Piliouras, Elizabeth - OCR; Polasek Jr, Joseph P - DNR; Purcell, Gene P - ECB; Rajani, Has Mukh - SOS; Running, Tom - OCR; Schmalle, Verlynn C - DWD; Schutt, Eric - GOV; Snyder, MaryAnne - CTF; Southwick, April - COURTS; Stephenson, Renee M - UW; Swedeen, Beth - BPDD; Timmons, Anthony A - DOR; VanSchoonhoven, Karen A - DATCP; Walker, William D - DATCP; Wendt, Shannon - WHS; Werner, Phil W - DOA; Wersal, Lori A - SWIB; Wierzba, Aimee M - ECB; Ylvisaker, Jeff - LEGIS; Zylstra, James E - WTCS; Neumann, Paul F - DNR
Cc: DOA DL Budget TL; DOA DL Budget AN
Subject: RE: UPDATED Administrative Rules Fiscal Estimate Form
Attachments: Administrative Rules Fiscal Estimate - DOA-2049.doc

Attached is an updated form DOA-2049 (REV 05/2011) which replaces the form revised 04/2011. The field limits on #11 and #12 have been removed so that the form will expand to two pages as you type so that you can add as much as you want in #11 and #12.

The link is: <http://doa.wi.gov/refcenter.asp?locid=0#list> and type in fiscal estimate in the keyword box to access the Administrative Rules Fiscal Estimate Form.

Linda S. Nelson
Department of Administration
Division of Executive Budget and Finance
101 East Wilson Street, 10th Floor
P.O. Box 7864
Madison, WI 53707-7864
Telephone Number: (608) 266-3330
Fax Number: (608) 267-0372
E-Mail: linda.nelson@wisconsin.gov

B-2

ADMINISTRATIVE RULES – FISCAL ESTIMATE

1. Fiscal Estimate Version

Original Updated Corrected

2. Administrative Rule Chapter Title and Number

3. Subject

4. State Fiscal Effect:

<input type="checkbox"/> No Fiscal Effect	<input type="checkbox"/> Increase Existing Revenues	<input type="checkbox"/> Increase Costs
<input type="checkbox"/> Indeterminate	<input type="checkbox"/> Decrease Existing Revenues	<input type="checkbox"/> Yes <input type="checkbox"/> No May be possible to absorb within agency's budget.
		<input type="checkbox"/> Decrease Costs

5. Fund Sources Affected:

GPR FED PRO PRS SEG SEG-S

6. Affected Ch. 20, Stats. Appropriations:

7. Local Government Fiscal Effect:

<input type="checkbox"/> No Fiscal Effect	<input type="checkbox"/> Increase Revenues	<input type="checkbox"/> Increase Costs
<input type="checkbox"/> Indeterminate	<input type="checkbox"/> Decrease Revenues	<input type="checkbox"/> Decrease Costs

8. Local Government Units Affected:

Towns Villages Cities Counties School Districts WTCS Districts Others:

9. Private Sector Fiscal Effect (small businesses only):

<input type="checkbox"/> No Fiscal Effect	<input type="checkbox"/> Increase Revenues	<input type="checkbox"/> Increase Costs
<input type="checkbox"/> Indeterminate	<input type="checkbox"/> Decrease Revenues	<input type="checkbox"/> Yes <input type="checkbox"/> No May have significant economic impact on a substantial number of small businesses
	<input type="checkbox"/> Yes <input type="checkbox"/> No May have significant economic impact on a substantial number of small businesses	<input type="checkbox"/> Decrease Costs

10. Types of Small Businesses Affected:

11. Fiscal Analysis Summary

12. Long-Range Fiscal Implications

13. Name - Prepared by	Telephone Number	Date
14. Name – Analyst Reviewer	Telephone Number	Date
Signature –Secretary or Designee	Telephone Number	Date

This document can be made available in alternate formats to individuals with disabilities upon request.



From: Hoesly, Bruce [Bruce.Hoesly@legis.wisconsin.gov]
Sent: Tuesday, June 07, 2011 1:51 PM
To: Sorenson, Donna - DOA; Schultz, Karen E - DATCP; Tzougros, George - WAB; Pridgen, Elaine - DCF; Rockweiler, Sam - COMMERCE; Quast, Jim - COMMERCE; McReynolds, Norma J - COMMERCE; Anderson, Kathryn R - DOC; Dies, David C - EAB; Davis, Peter G - WERC; Nispel, David - ETF; Schlei, Mark S - DFI; Subach, Dan - DOA; Falk, Shane - GAB; Haas, Michael R - GAB; Greer, Rosie J - DHS; Schwarz, David - DOA; Welsh-Steinmeyer, Lynn A - OCI; Luck, Robert R - OCI; Walsh, Julie E - OCI; Haddix, Linda L - DNR; Pakes, Kathleen - OSPD; Slauson, Lori L. DPI; Lorence, John - PSC; Wood, Doug - OCR; Anderson, Kristine - DRL; Leatherwood, Shancethea N - DRL; Henes, Sharon - DRL; Kleven, Dale S - DOR; Foy, Morna - WTCS; Parker, Debbie; Muenich, Laura A - TOURISM; LaSage, Stephanie A - DOT; Nilsen, Paul - DOT; Radue, Jane S - UW; Stewart, Jimmy A - DVA; Diaz-Martinez, Micabil - DVA; Bernstein, Howard I - DWD
Cc: Sweet, Richard - LEGIS; Shannon, Pam - LEGIS
Subject: Administrative Rules and Act 21

Greetings all:

Please take note that effective TOMORROW, June 8, no Scope Statement can be submitted for publication in the Register unless it has been approved in writing by the governor under s. 227.135 (2), as affected by 2011 Act 21. Also please note that commencing tomorrow there is no longer default approval of a Scope Statement by the agency policy-maker. This means that no activity in connection with the rule, except for drafting the scope statement itself, can take place until affirmative approval of the scope statement by the agency's policy maker. The policy maker cannot approve until at least 10 days after publication in the Register.

Also please take note that effective tomorrow, June 8, no emergency rule may be filed and published unless a scope statement for the rule has been approved as discussed above and the proposed rule has been approved in writing by the governor.

Finally, I want to call your attention to what has been identified as a problem in the new emergency rules procedure in Act 21. Section 227.24 (1) (e) 1d. as created by section 60 of Act 23 provides that an agency adopting an emergency rule must:

"Prepare a statement of the scope of the proposed emergency rule as provided in s. 227.135 (1), obtain approval of the statement as provided in s. 227.135 (2), and send the statement to the legislative reference bureau for publication in the register under s. 227.135 (3) at the same time that the proposed emergency rule is published."

Approval under s. 227.135 (2) requires both governor and policy-maker approval. Policy-maker approval cannot occur until at least 10 days after publication of the scope statement in the register, which arguably contradicts the provision that says the scope must be sent to LRB for publication in the register at the same time the proposed emergency rule is published. It also appears unclear whether the requirements in s. 227.135 (2) for approval referred to in the new provision includes the provision in s. 227.135 (2) that the rule cannot be worked on until both approvals have been obtained are applicable to the emergency rule scope procedure.

I have consulted with Legislative Council Staff and we have concluded that while the procedural requirements are unclear, we recommend the following steps as the safest path to follow in enacting emergency rules.

1. Draft a scope statement in accordance with s. 227.135 (1) and submit it to the governor for approval under s. 227.135 (2).
2. Upon receiving approval of the governor, publish the scope statement in the register in accordance with 227.135 (2) and its reference to publication upon the governor's approval and cross-reference to s. 227.135 (3).
3. Obtain the affirmative approval of the scope statement by the agency policy maker at least 10 days after the publication of the scope statement in the Register, not doing any work on the rule until after having obtained the policy-maker's approval.
4. Upon approval by the policy-maker, draft the emergency rule and submit it to the governor for written approval.
5. Upon receipt of written approval by the governor publish the emergency rule and at the same time resubmit the scope statement for republication in the Register so that the requirement is met that requires the scope be submitted for publication in the Register at the same time as the rule is published.

C-2

While double publication seems redundant and probably unintended it is the only method that seems to allow meeting all the requirements s., 227.24 (1) (e) 1d.

Bruce J. Hoesly
Revising Attorney/Code Editor
Legislative Reference Bureau

From: Hoesly, Bruce [Bruce.Hoesly@legis.wisconsin.gov]
Sent: Monday, June 13, 2011 7:46 AM
To: Sorenson, Donna - DOA; Schultz, Karen E - DATCP; Tzougros, George - WAB; Pridgen, Elaine - DCF; Rockweiler, Sam - COMMERCE; Quast, Jim - COMMERCE; McReynolds, Norma J - COMMERCE; Anderson, Kathryn R - DOC; Dies, David C - EAB; Davis, Peter G - WERC; Nispel, David - ETF; Schlei, Mark S - DFI; Subach, Dan - DOA; Falk, Shane - GAB; Haas, Michael R - GAB; Greer, Rosie J - DHS; Schwarz, David - DOA; Welsh-Steinmeyer, Lynn A - OCI; Luck, Robert R - OCI; Walsh, Julie E - OCI; Haddix, Linda L - DNR; Pakes, Kathleen - OSPD; Slauson, Lori L. DPI; Lorence, John - PSC; Wood, Doug - OCR; Anderson, Kristine - DRL; Leatherwood, Shancethea N - DRL; Henes, Sharon - DRL; Kleven, Dale S - DOR; Foy, Morna - WTCS; Parker, Debbie; Muenich, Laura A - TOURISM; LaSage, Stephanie A - DOT; Nilsen, Paul - DOT; Radue, Jane S - UW; Stewart, Jimmy A - DVA; Diaz-Martinez, Micabil - DVA; Bernstein, Howard I - DWD
Cc: Sweet, Richard - LEGIS; Shannon, Pam - LEGIS; Grosz, Scott - LEGIS; Renk, Jeffrey - LEGIS; Inabnet, Kay - LEGIS
Subject: RE: Administrative Rules and Act 21 Follow-up

After reviewing Act 21 and consulting with Legislative Council Staff, we are asking that the following additions be made to the following documents in order that the required approvals can be traced. Also, beginning with Scope Statements filed after June 8, being those that will be affected by Act 21, LRB will assign a discrete identifying number to the Scope statement in the following format: SS 001-11. By including this information in these filings, all of the approvals will be noted in the register and also will be shown in the permanent electronic history for each rule that is maintained on the Internet.

1. Scope Statements under s. 227.135 (including scope statements for emergency rules under s. 227.24 (1) (e) 1d.): Insert the date of the governor's approval of the statement prior to sending for publication by LRB.
2. Notice of submittal to legislative council staff under s. 227.14 (4m): For rules submitted to Leg. Council for which the rule's scope statement is subject to Act 21, insert the following:

The statement of scope for this rule, SS ____, was approved by the governor on ____ (date), published in Register ____ (Register Number), on ____ (Register publication date), and approved by ____ (name of policy making body or individual for the agency as required by s. 227.135 (2)) on ____ (date).

Example: The statement of scope for this rule, SS 001-11, was approved by the governor on July 20, 2011, published in Register 668, on August 14, 2011, and approved by the Natural Resources Board on August 28, 2011.

For rules submitted to Leg. Council for which the rule's scope statement is not subject to Act 21, insert the following:

This rule is not subject to s. 227.135 (2), as affected by 2011 Wis. Act 21. The statement of scope for this rule, published in Register ____ (Register Number), on ____ (Register publication date), was sent to LRB prior to the effective date of 2011 Wis. Act 21.

(For scopes subject to Act 21, the information allows a reader to see that both required approvals were obtained and that the agency approval was within the timing requirements of Act 21. For those rules with a pre Act 21 scope a pre June 8 publication will show Act 21 did not apply. There will be a few scopes that will be published after June 8 that were filed before June 8 and are not subject to Act 21 as well.)

3. Notices to the chief clerk of each house of the legislature when a proposed rule is in final draft form and to LRB that the rule has been submitted to the chief clerks under s. 227.19 (2). For rules for which the scope statement required governor's approval under Act 21, insert the date of the governor's approval of the rule under s. 227.185.

For rules for which there was a pre-Act 21 scope statement, insert the following:

This rule is not subject to s. 227.185. The statement of scope for this rule, published in Register ____ (Register Number), on ____ (Register publication date), was sent to LRB prior to the effective date of 2011 Wis. Act 21.

4. Emergency rules filed with LRB under s. 227.24. Insert the date of the governor's approval required under s.

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All of these items will be included in the Rules Procedure Manual that will be updated and distributed this fall. Feel free to contact me with any concerns.

Bruce Hoesly

From: Hoesly, Bruce

Sent: Tuesday, June 07, 2011 1:51 PM

To: Sorenson, Donna - DOA; Schultz, Karen E - DATCP; Tzougros, George - WAB; Pridgen, Elaine - DCF; Rockweiler, Sam - COMMERCE; Quast, Jim - COMMERCE; McReynolds, Norma J - COMMERCE; Anderson, Kathryn R - DOC; Dies, David C - EAB; Davis, Peter G - WERC; Nispel, David - ETF; Schlei, Mark S - DFI; Subach, Dan - DOA; Falk, Shane - GAB; Haas, Michael R - GAB; Greer, Rosie J - DHS; Schwarz, David - DOA; Welsh-Steinmeyer, Lynn A - OCI; Luck, Robert R - OCI; Walsh, Julie E - OCI; Haddix, Linda L - DNR; Pakes, Kathleen - OSPD; 'Slauson, Lori L. DPI'; 'Lorence, John PSC'; Wood, Doug - OCR; Anderson, Kristine - DRL; Leatherwood, Shancethea N - DRL; Henes, Sharon - DRL; Kleven, Dale S - DOR; Foy, Morna - WTCS; 'Parker, Debbie'; Muenich, Laura A - TOURISM; LaSage, Stephanie A - DOT; Nilsen, Paul - DOT; Radue, Jane S - UW; Stewart, Jimmy A - DVA; Diaz-Martinez, Micabil - DVA; Bernstein, Howard I - DWD

Cc: Sweet, Richard; Shannon, Pam

Subject: Administrative Rules and Act 21

Greetings all:

Please take note that effective TOMORROW, June 8, no Scope Statement can be submitted for publication in the Register unless it has been approved in writing by the governor under s. 227.135 (2), as affected by 2011 Act 21. Also please note that commencing tomorrow there is no longer default approval of a Scope Statement by the agency policy-maker. This means that no activity in connection with the rule, except for drafting the scope statement itself, can take place until affirmative approval of the scope statement by the agency's policy maker. The policy maker cannot approve until at least 10 days after publication in the Register.

Also please take note that effective tomorrow, June 8, no emergency rule may be filed and published unless a scope statement for the rule has been approved as discussed above and the proposed rule has been approved in writing by the governor.

Finally, I want to call your attention to what has been identified as a problem in the new emergency rules procedure in Act 21. Section 227.24 (1) (e) 1d. as created by section 60 of Act 23 provides that an agency adopting an emergency rule must:

"Prepare a statement of the scope of the proposed emergency rule as provided in s. 227.135 (1), obtain approval of the statement as provided in s. 227.135 (2), and send the statement to the legislative reference bureau for publication in the register under s. 227.135 (3) at the same time that the proposed emergency rule is published."

Approval under s. 227.135 (2) requires both governor and policy-maker approval. Policy-maker approval cannot occur until at least 10 days after publication of the scope statement in the register, which arguably contradicts the provision that says the scope must be sent to LRB for publication in the register at the same time the proposed emergency rule is published. It also appears unclear whether the requirements in s. 227.135 (2) for approval referred to in the new provision includes the provision in s. 227.135 (2) that the rule cannot be worked on until both approvals have been obtained are applicable to the emergency rule scope procedure.

I have consulted with Legislative Council Staff and we have concluded that while the procedural requirements are unclear, we recommend the following steps as the safest path to follow in enacting emergency rules.

1. Draft a scope statement in accordance with s. 227.135 (1) and submit it to the governor for approval under s. 227.135 (2).
2. Upon receiving approval of the governor, publish the scope statement in the register in accordance with 227.135 (2) and its reference to publication upon the governor's approval and cross-reference to s. 227.135 (3).
3. Obtain the affirmative approval of the scope statement by the agency policy maker at least 10 days after the publication of the scope statement in the Register, not doing any work on the rule until after having obtained the policy-maker's approval.
4. Upon approval by the policy-maker, draft the emergency rule and submit it to the governor for written approval.

C-5

5. Upon receipt of written approval by the governor publish the emergency rule and at the same time resubmit the scope statement for republication in the Register so that the requirement is met that requires the scope be submitted for publication in the Register at the same time as the rule is published.

While double publication seems redundant and probably unintended it is the only method that seems to allow meeting all the requirements s., 227.24 (1) (e) 1d.

Bruce J. Hoesly
Revising Attorney/Code Editor
Legislative Reference Bureau

Falk, Shane - GAB

From: Hoesly, Bruce [Bruce.Hoesly@legis.wisconsin.gov]
Sent: Friday, July 01, 2011 7:08 AM
To: Hoesly, Bruce - LEGIS; Sorenson, Donna - DOA; Schultz, Karen E - DATCP; Tzougros, George - WAB; Pridgen, Elaine - DCF; Rockweiler, Sam - COMMERCE; Quast, Jim - COMMERCE; McReynolds, Norma J - COMMERCE; Anderson, Kathryn R - DOC; Dies, David C - EAB; Davis, Peter G - WERC; Nispel, David - ETF; Schlei, Mark S - DFI; Subach, Dan - DOA; Falk, Shane - GAB; Haas, Michael R - GAB; Greer, Rosie J - DHS; Schwarz, David - DOA; Welsh-Steinmeyer, Lynn A - OCI; Luck, Robert R - OCI; Walsh, Julie E - OCI; Haddix, Linda L - DNR; Pakes, Kathleen - OSPD; Slauson, Lori L. DPI; Lorence, John - PSC; Wood, Doug - OCR; Anderson, Kristine - DRL; Leatherwood, Shancethea N - DRL; Henes, Sharon - DRL; Kleven, Dale S - DOR; Foy, Morna - WTCS; Parker, Debbie; Muenich, Laura A - TOURISM; LaSage, Stephanie A - DOT; Nilsen, Paul - DOT; Radue, Jane S - UW; Stewart, Jimmy A - DVA; Diaz-Martinez, Micabil - DVA; Bernstein, Howard I - DWD
Cc: Sweet, Richard - LEGIS; Shannon, Pam - LEGIS; Grosz, Scott - LEGIS
Subject: RE: Administrative Rules and Act 21 Follow-up to Follow-up

Please affix to any emergency rules to allow for tracking of the necessary approvals.

The statement of scope for this rule, SS _____, was approved by the governor on _____ (date), published in Register _____ (Register Number), on _____ (Register publication date), and approved by _____ (name of policy making body or individual for the agency as required by s. 227.135 (2)) on _____ (date). This emergency rule was approved by the governor on _____ (date).

Thanks.

Bruce

From: Hoesly, Bruce
Sent: Thursday, June 30, 2011 8:30 AM
To: Hoesly, Bruce; Sorenson, Donna - DOA; Schultz, Karen E - DATCP; Tzougros, George - WAB; Pridgen, Elaine - DCF; Rockweiler, Sam - COMMERCE; Quast, Jim - COMMERCE; McReynolds, Norma J - COMMERCE; Anderson, Kathryn R - DOC; Dies, David C - EAB; Davis, Peter G - WERC; Nispel, David - ETF; Schlei, Mark S - DFI; Subach, Dan - DOA; Falk, Shane - GAB; Haas, Michael R - GAB; Greer, Rosie J - DHS; Schwarz, David - DOA; Welsh-Steinmeyer, Lynn A - OCI; Luck, Robert R - OCI; Walsh, Julie E - OCI; Haddix, Linda L - DNR; Pakes, Kathleen - OSPD; 'Slauson, Lori L. DPI'; 'Lorence, John PSC'; Wood, Doug - OCR; Anderson, Kristine - DRL; Leatherwood, Shancethea N - DRL; Henes, Sharon - DRL; Kleven, Dale S - DOR; Foy, Morna - WTCS; 'Parker, Debbie'; Muenich, Laura A - TOURISM; LaSage, Stephanie A - DOT; Nilsen, Paul - DOT; Radue, Jane S - UW; Stewart, Jimmy A - DVA; Diaz-Martinez, Micabil - DVA; Bernstein, Howard I - DWD
Cc: Sweet, Richard; Shannon, Pam; Grosz, Scott
Subject: RE: Administrative Rules and Act 21 Follow-up

The problem identified in my earleir memo below regarding emergency rule procedure has been clarified in the budget. Effective July 1, 2011, the process is amended in s. 227.24 so that it incorporates the scope statement requirements in s. 227.135 for proposed permanent rules and the language regarding publication of the rule at the same time as the scope statement is removed. Now, like a permanent rule, the scope must be submitted to the governor for approval, then published in the Register, then affirmatively approved by the agency policy maker, which approval cannot be given until at least 10 days after the Register publication. No work on the rule can be undertaken until the agency approval is obtained. The completed emergency rule is then submitted to the governor for approval, and upon receiving the governor's approval the rule can be filed with LRB and published in the paper.

Since the procedures now match, I see no impediment to combining a proposed permanent rule and emergency rule in the same scope as long as the scope idntifies that both rules are covered by the scope.

Bruce

From: Hoesly, Bruce

Sent: Tuesday, June 07, 2011 1:51 PM

To: Sorenson, Donna - DOA; Schultz, Karen E - DATCP; Tzougros, George - WAB; Pridgen, Elaine - DCF; Rockweiler, Sam - COMMERCE; Quast, Jim - COMMERCE; McReynolds, Norma J - COMMERCE; Anderson, Kathryn R - DOC; Dies, David C - EAB; Davis, Peter G - WERC; Nispel, David - ETF; Schlei, Mark S - DFI; Subach, Dan - DOA; Falk, Shane - GAB; Haas, Michael R - GAB; Greer, Rosie J - DHS; Schwarz, David - DOA; Welsh-Steinmeyer, Lynn A - OCI; Luck, Robert R - OCI; Walsh, Julie E - OCI; Haddix, Linda L - DNR; Pakes, Kathleen - OSPD; 'Slauson, Lori L. DPI'; 'Lorence, John PSC'; Wood, Doug - OCR; Anderson, Kristine - DRL; Leatherwood, Shancethea N - DRL; Henes, Sharon - DRL; Kleven, Dale S - DOR; Foy, Morna - WTCS; 'Parker, Debbie'; Muenich, Laura A - TOURISM; LaSage, Stephanie A - DOT; Nilsen, Paul - DOT; Radue, Jane S - UW; Stewart, Jimmy A - DVA; Diaz-Martinez, Micabil - DVA; Bernstein, Howard I - DWD

Cc: Sweet, Richard; Shannon, Pam

Subject: Administrative Rules and Act 21

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I have consulted with Legislative Council Staff and we have concluded that while the procedural requirements are unclear, we recommend the following steps as the safest path to follow in enacting emergency rules.

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5. Upon receipt of written approval by the governor publish the emergency rule and at the same time resubmit the scope statement for republication in the Register so that the requirement is met that requires the scope be submitted for publication in the Register at the same time as the rule is published.

While double publication seems redundant and probably unintended it is the only method that seems to allow meeting all the requirements s., 227.24 (1) (e) 1d.

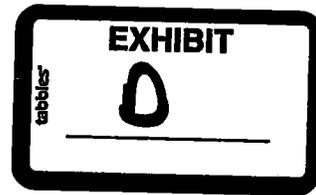
Bruce J. Hoesly
Revising Attorney/Code Editor
Legislative Reference Bureau

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**WISCONSIN DEPARTMENT OF
ADMINISTRATION**

SCOTT WALKER
GOVERNOR
MIKE HUEBSCH
SECRETARY
Office of the Secretary
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Date: July 19, 2011
To: State Agency Heads
From: Mike Huebsch *MDH*
Secretary of Administration
Subject: Guidance for Administrative Rules under 2011 Wisconsin Act 21

2011 Wisconsin Act 21 establishes new requirements on state agencies in promulgation of administrative rules, including emergency rules. Chapter 227 of the Wisconsin Statutes governs the process and requirements for promulgation of administrative rules.

The information below provides initial process guidance as to requirements for completing statements of scope for administrative rules, including emergency rules, as well as guidance for completing economic impact analyses and transmitting proposed rules for review.

As authorized under Act 21, the Governor will be issuing an executive order soon to provide comprehensive guidance to agencies regarding compliance with the requirements of Chapter 227.

The Governor's Office and State Budget Office will act expeditiously to review agency submittals. Most submittals will be acted upon with a few days. More complex rules may require additional follow-up and information.

Agencies should also continue to follow the instructions provided by the Legislative Reference Bureau and Legislative Council regarding preparation and transmittal of documents involved in the administrative rule promulgation process.

Questions regarding the administrative rule review process should be addressed to Jodi Jensen in the Governor's Office (266-7493), or your assigned state budget analyst.

These instructions and templates for agency scope statements and economic impact analyses are available on the State Budget Office SharePoint Site: <http://wisapps.wi.gov/sites/sbo/default.aspx>. Agencies should follow the document naming conventions contained in these instructions and E-mail all documents to the State Budget Office at SBOAdminRules@APWMADOP1025.forward.us. There is a link

to this address on SharePoint. Technical questions regarding the SharePoint site should be directed to Scott Thornton in the State Budget Office (266-5051). Agencies are no longer required to submit documents via the GovAdministrativeRules@wisconsin.gov as directed by a June 7, 2011, memo from the Governor's Office. However, agencies may continue to use the address to communicate with the Governor's Office about issues related to the promulgation of rules.

Statement of Scope

Provisions of Act 21

- An agency is required to prepare a statement of scope of any rule it plans to promulgate, including emergency rules, that must contain all of the following:
 1. Description of the objective of the rule;
 2. Description of existing policies relevant to the rule and of new policies proposed to be included in the rule and an analysis of policy alternatives;
 3. Statutory authority for the rule;
 4. Estimates of the amount of time and other resources required to develop the rule;
 5. Description of all of the entities that may be affected by the rule; and
 6. Summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule.

- The statement of scope must be submitted to the Governor and to the individual or board with policy-making powers over the subject matter of the proposed rule for approval.
 1. The agency may not send the statement to the Legislative Reference Bureau for publication until the Governor issues a written notice of approval of the statement.
 2. The individual or body with policy-making powers may not approve the statement until at least 10 days after publication of the statement.
 3. No state employee or official may perform any activity in connection with the drafting of a proposed rule except for an activity necessary to prepare the statement of scope until the Governor and the individual or body with policy-making powers over the subject matter of the proposed rule approve the statement.

- If the Governor approves a statement of scope, the agency then sends the statement to the Department of Administration (DOA) Secretary and to the Legislative Reference Bureau for publication in the Wisconsin Administrative Register. If the scope of a proposed rule is subsequently modified, the agency must prepare and obtain approval of a revised statement of scope and have it approved in the same manner as for the original statement.

Implementation Guidance

The scope statement is one of the most critical elements of the rule review and promulgation process. In the interest of ensuring timely review, please be as thorough as possible in completing the scope statements. This should include an explanation of the statutory authority for the rule; key background information on the need for the rule, including any historical context of prior rules; interrelationship with other rules; and the objective of the rule.

In the interest of creating a streamlined review process, a template for completing scope statements has been prepared. The State Budget Office and Governor's Office will review scope statements and may follow-up with agencies for additional information.

Instructions and templates are available on the State Budget Office SharePoint Site: <http://wisapps.wi.gov/sites/sbo/default.aspx>. Completed documents should be E-mailed to the State Budget Office at SBOAdminRules@APWMADOP1025.forward.us.

Agencies should follow the following conventions for naming files:

The Statement of Scope should be named "Agency # - Rule or Chapter - Short Name".
E.g. 505-16-Agency Budget Requests

Economic Impact Analyses

Provisions of Act 21

- An agency must prepare an economic impact analysis for a proposed rule before submitting the proposed rule to the Legislative Council.
- The analysis must contain information on the economic effect of the proposed rule on specific businesses, business sectors, public utility ratepayers, local governmental units, and the state's economy as a whole.
- The analysis must be prepared in coordination with local governmental units that may be affected by the proposed rule and must solicit information and advice from businesses, associations representing business, local governmental units, and individuals that may be affected by the proposed rule.
- The analysis must include all of the following:
 1. An analysis and quantification of the policy problem the proposed rule is intending to address, including comparisons with the approaches used by the federal government and by Illinois, Iowa, Michigan, and Minnesota to address that policy problem and, if the approach chosen by the agency is different from those approaches, a statement as to why the agency chose a different approach.

2. An analysis and detailed quantification of the economic impact of the proposed rule, including the implementation and compliance costs that are reasonably expected to be incurred by or passed along to the businesses, local governmental units, and individuals that may be affected by the proposed rule.
 3. An analysis of the actual and quantifiable benefits of the proposed rule, including an assessment of how effective the proposed rule will be in addressing the policy problem that the rule is intended to address.
 4. An analysis of alternatives to the proposed rule, including the alternative of not promulgating the proposed rule.
 5. A determination made in consultation with the businesses, local governmental units, and individuals that may be affected by the proposed rules as to whether the proposed rule would adversely affect in a material way the economy, a sector of the economy, productivity, jobs, or the overall economic competitiveness of this state.
- The agency must submit the economic impact analysis to the Legislative Council when the analysis is submitted to DOA, the Governor, and the chief clerks of each house of the Legislature. If the rule is subsequently modified so that the economic impact is significantly changed, a revised economic impact analysis must be prepared.
 - If an economic analysis indicates that \$20 million or more in implementation and compliance costs are reasonably expected to be incurred by or passed along to businesses, local governmental units, and individuals as a result of the proposed rule, DOA must review the proposed rule and issue a report. The rule may not be submitted to the Legislature for review until the agency receives a copy of DOA's report and approval of the DOA Secretary.

Implementation Guidance

In the interest of creating a streamlined review process, a new single template for completing economic impact analyses and fiscal estimates has been prepared. Instructions and templates are available on the State Budget Office SharePoint Site: <http://wisapps.wi.gov/sites/sbo/default.aspx>. Completed documents should be E-mailed to the State Budget Office at SBOAdminRules@APWMAD0P1025.forward.us.

The State Budget Office will review the economic impact analysis and may follow-up with agencies for additional information.

Agencies should follow the following conventions for naming files:

The Economic Impact Analysis should be named "Agency # - Rule or Chapter - 'EIA' Short Name". E.g. 505-16-EIA Agency Budget Requests

Gubernatorial Approval of Proposed Rules

Provisions of Act 21

- Agencies must submit all proposed rules and emergency rules to the Governor for review and approval.
- Prior to a public hearing on a proposed rule, or if no hearing is required prior to notice, an agency must submit the proposed rule to the Legislative Council for review. A notice of a public hearing must include the economic impact analysis and any report prepared by DOA, or a summary and a description of how the full analysis and report may be obtained at no charge.
- Once a proposed rule is in final draft form, the agency must submit the proposed rule to the Governor for approval.
- The Governor may approve or reject the proposed rule.
 - If the Governor approves a proposed rule, the Governor shall provide the agency with a written notice of that approval.
 - No proposed rule may be submitted to the Legislature for review unless the Governor has approved the proposed rule in writing.

Implementation Guidance

Agencies should E-mail proposed rules and emergency rules and final draft rules to the State Budget Office. Instructions and templates are available on the State Budget Office SharePoint Site: <http://wisapps.wi.gov/sites/sbo/default.aspx>. Completed documents should be E-mailed to the State Budget Office at SBOAdminRules@APWMADOP1025.forward.us. The State Budget Office and Governor's Office will notify agencies of the status of proposed rules in final draft form that require the Governor's review and approval.

Agencies should follow the following conventions for naming files:

The form of the proposed rule after Legislative Council review but prior to the public hearing should be named "Agency # - Rule or Chapter - 'Pre-Hearing Draft' Short Name". E.g. 505-16-Pre Hearing Draft Agency Budget Requests Rule

The Proposed Rule in final draft form should be named "Agency # - Rule or Chapter - 'Final Draft Form' Short Name". E.g., 505-16-Final Draft Form Agency Budget Requests Rule

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State Agency Heads
July 19, 2011
Page 6

Thank you in advance for your efforts in implementing this important review and transparency legislation.

cc: State Budget Office
Governor's Legal Counsel Staff
Agency Deputy Secretaries
Agency Budget Directors
Agency Administrative Rule Coordinators
Agency Administrative Officers
Legislative Reference Bureau
Legislative Council

State of Wisconsin \ Government Accountability Board

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JUDGE THOMAS H. BARLAND
Chairperson

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For the August 2, 2011 Meeting

TO: Members, Wisconsin Government Accountability Board

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

Prepared by:

Shane W. Falk, Staff Counsel

SUBJECT: Status--Promulgation of Amended ch. GAB §1.28(3)(b), Wis. Adm. Code

Introduction:

This Memorandum is provided to the Board for informational purposes only and no immediate action is recommended or necessary.

The proposed Statement of Scope, Notice of Proposed Order Adopting Rule, and proposed Notice of Hearing was approved by the Board at the March 22-23, 2011 meeting; however, staff's work on the permanent rule was subject to any new rule-making procedures adopted by the Legislature. Also at the same meeting, the Board directed staff to seek all available extensions of EmR 1049 (GAB 1.28) from the Joint Committee for Administrative Rules.

Emergency Rule 1049 (GAB 1.28) was adopted by the Board at the December 22, 2010 meeting and published on January 7, 2011. This Emergency Rule was effective for 150 days and would have expired at the end of the day on June 5, 2011. A public hearing occurred on Emergency Rule 1049 (GAB 1.28) on February 16, 2011, with only Attorney Matt O'Neil reasserting the same written comments the Board received at its December 22, 2010 meeting. Litigation is pending and the Wisconsin Supreme Court continues an injunction of the permanent Rule 1.28 that was effective on August 1, 2010, expanding the definition of political purpose. Upon advice of DOJ counsel the Board adopted an Emergency Rule 1.28 to remove the second sentence of Rule 1.28(3)(b).

On May 6, 2011, staff delivered a request to the Joint Committee for Review of Administrative Rules seeking to extend EmR 1049 (GAB 1.28) for 60 days. JCRAR revised the request in executive session on June 2, 2010, voting unanimously to grant the 60 day extension. The Emergency Rule is scheduled to expire at the end of the day on August 4, 2011. Pursuant to the Board's direction from the March 22-23, 2011 meeting, staff delivered a request to JCRAR

on July 14, 2011, seeking to extend EmR 1049 (GAB 1.28) for the second and final 60 day period. This request is scheduled to be considered in a JCRAR executive session on July 20. If the extension is granted, this will at least extend the Emergency Rule past the September 6, 2011 oral arguments before the Wisconsin Supreme Court.

The Supreme Court was originally scheduled to hear oral arguments on challenges to permanent Rule GAB 1.28, effective August 1, 2010, in March 2011 with an expected decision prior to the expiration of the Emergency Rule 1049 (GAB 1.28); however, the Supreme Court canceled oral the Spring oral arguments and only recently rescheduled them to occur on September 6, 2011. Since the Emergency Rule 1049 (GAB 1.28) was likely to expire prior to oral arguments or a decision by the Supreme Court, DOJ counsel advised staff that the Board should proceed with permanent rule-making. However, in the interim, 2011 Act 21 (as amended by 2011 Act 32) was adopted, which significantly altered the administrative rule-making procedure as is more fully explained in a separate Memorandum to the Board for the August 2, 2011 meeting.

Status:

Pursuant to the new administrative rule-making procedures prescribed by 2011 Act 21 (as amended by 2011 Act 32) and a communication outlining the gubernatorial procedures from the Governor's Chief Legal Counsel, staff submitted a Statement of Scope for the proposed permanent Rule 1.28 to the Governor's office on July 14, 2011. This submission in its entirety follows this Memorandum. At the time of preparing this Memorandum, staff had not yet received a written rejection or approval from the Governor.

A memo released by the Department of Administration on July 19, 2011 notes that the Governor's office intends to reject or approve statements of scope and proposed administrative rules in writing within a few days of submission, unless further follow up with an agency is needed for more complex rules. The same memo from DOA advises that the Governor intends to issue an Executive Order that will provide more comprehensive guidance on the new rule-making procedures.

Upon receipt of an approval by the Governor, staff will submit the Statement of Scope to the Legislative Reference Bureau for publication in the Administrative Register. Staff hopes to have the Statement of Scope before the Board for approval at its September 12, 2011 meeting, assuming the Governor's written approval arrives soon and staff can meet the publication deadline for the Register such that the Statement of Scope has been in the Register for at least 10 days before the meeting.

Technically, staff is prohibited from any activities on the proposed rule until after the Board approves the Statement of Scope; however, since this is permanent rule mirrors an Emergency Rule already in effect and since the Board approved the form of both the Emergency Rule and proposed permanent rule prior to the effective date of Act 21, perhaps the Board may also re-affirm the proposed rule at the September 12, 2011 meeting, so that staff may then complete an economic impact analysis and submit both it and the proposed rule to the Legislative Council for review.

State of Wisconsin\Government Accountability Board

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JUDGE THOMAS H. BARLAND
Chair

KEVIN J. KENNEDY
Director and General Counsel

July 14, 2011

Governor Scott Walker
Room 115 East
State Capitol
Madison, WI 53702

Via Email Only (administrativerules@wisconsin.gov)

Re: Administrative Rules of the Government Accountability Board: GAB 1.28
Ch. GAB 1.28, relating to the definition of the term "political purpose"

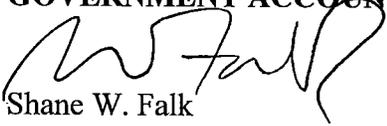
Dear Governor Walker:

Pursuant to 2011 Wisconsin Act 21 (amended 2011 Wisconsin Act 32) and §227.135(2), Wis. Stats., please find enclosed with this correspondence the Government Accountability Board's Statement of Scope for proposed permanent rule GAB 1.28, relating to the definition of the term "political purpose." Please review and provide the written approval required by §227.135(2), Wis. Stats., at your earliest convenience so that this rulemaking may continue. This rule is in compliance with a Federal Court recommendation, statements to the Wisconsin Supreme Court in pending litigation, and was recommended by our counsel, the Wisconsin Attorney General. Further explanation is provided in the analysis for the Emergency Rule 1049 (GAB 1.28).

Please note that prior to the enactment of 2011 Wisconsin Act 21, Emergency Rule 1049 (GAB 1.28) was published and became effective on January 7, 2011. The Joint Committee for Review of Administrative Rules has extended EmR 1049 through August 4, 2011 and the GAB has requested a second and final 60 day extension. Please find attached a copy of EmR 1049, currently in effect, to supplement your review of the Statement of Scope for the proposed permanent rule GAB 1.28.

In closing, the Government Accountability Board respectfully requests written approval to proceed with publishing the Statement of Scope for the proposed permanent rule GAB 1.28. If you have any questions about this matter, or if I can be of any other assistance, please feel free to contact me.

Sincerely,
GOVERNMENT ACCOUNTABILITY BOARD


Shane W. Falk
Staff Counsel

Enclosures

cc: Bruce Hoesly, Legislative Reference Bureau (via email only)
Via Email: adminrules@wisconsin.gov

Statement of Scope
Government Accountability Board
The definition of the term “political purpose,” s. GAB 1.28(3)(b)

Subject

Amend s. GAB 1.28(3)(b) relating to the definition of the term “political purpose.”

Objective of the Rule

The present amendment involves only the repeal of the second sentence of s. GAB 1.28(3)(b). All other portions of GAB 1.28 effected on August 1, 2010, including the first sentence of s. GAB 1.28(3)(b), are unchanged.

The first sentence of s. GAB 1.28(3)(b), provides that any communication that “is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate” is a communication “for political purposes” within the meaning of s. 11.01(16), Stats., and hence is subject to all of the campaign finance regulations under ch. 11 of the Wisconsin Statutes that apply to communications for a political purpose — subject, of course, to any additional requirements or limitations contained in particular statutes.

The second sentence of s. GAB 1.28(3)(b) additionally identifies communications which are susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. That is, any communications that possess the characteristics enumerated in the second sentence of s. GAB 1.28(3)(b) would automatically be deemed communications for a political purpose and, as a result, would automatically be subject to the applicable campaign finance regulations under ch. 11 of the Wisconsin Statutes.

As a result of litigation challenging the validity of the August 1, 2010, amendments to s. GAB 1.28, the Board has entered into a stipulation to refrain from enforcing the second sentence of s. GAB 1.28(3)(b). The Board, through its litigation counsel, has also represented that it does not intend to defend the validity of that sentence and has sought judicial orders permanently enjoining its application or enforcement. This sentence is removed by this rule.

Policy 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 criterion 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.

Statutory Authority

Sections 5.05(1)(f) and 227.11(2)(a), Stats.

Comparison with 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.06-969 and 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 contributions 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 election 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.”

Entities Affected by the Rules

Any person, committee, individual or political group that will sponsor communications “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”

Estimate of Time Needed to Develop the Rules

20 hours.

NOTICE OF ORDER OF THE GOVERNMENT ACCOUNTABILITY BOARD

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

STATEMENT OF EMERGENCY FINDING:

The Government Accountability Board amends s. GAB 1.28(3)(b), Wis. Adm. Code, relating to the definition of the term “political purpose.” Section GAB 1.28 as a whole continues to clarify the definition of “political purposes” found in s. 11.01(16)(a)1., Stats., but repeals the second sentence of s. GAB 1.28(3)(b) which prescribes communications presumptively susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.

This amendment to s. GAB 1.28(3)(b) is to the rule that was published on July 31, 2010 and effective on August 1, 2010, following a lengthy two year period of drafting, internal review and study, public comment, Legislative review, and consideration of U.S. Supreme Court decisions. Within the context of ch. 11, Stats, s. GAB 1.28 provides direction to persons intending to engage in activities for political purposes with respect to triggering registering and reporting obligations under campaign financing statutes and regulations. In addition, the rule provides more information for the public so that it may have a more complete understanding as to who is supporting or opposing which candidate or cause and to what extent, whether directly or indirectly.

Pursuant to §227.24, Stats., the Government Accountability Board finds an emergency exists as a result of pending litigation against the Board and two decisions by the United States Supreme Court: *Federal Election Commission (FEC) v. Wisconsin Right to Life, Inc. (WRTL II)*, 550 U.S. 549 (2007) and *Citizens United v. FEC*, 558 U.S. ___, (No. 08-205)(January 21, 2010). Following the effective date of the August 1, 2010 rule, three lawsuits were filed seeking a declaration that the rule was unconstitutional and beyond the Board’s statutory authority: one in the U.S. District Court for the Western District of Wisconsin, one in the U.S. District Court for the Eastern District of Wisconsin, and one in the Wisconsin Supreme Court. On August 13, 2010, the Wisconsin Supreme Court temporarily enjoined enforcement of the August 1, 2010 rule, pending further order by the Court.

In the lawsuit in the U.S. District Court for the Western District of Wisconsin, the parties previously executed a joint stipulation asking the Court to permanently enjoin application and enforcement of the second sentence of s. GAB 1.28(3)(b). On October 13, 2010, the Court issued an Opinion and Order denying that injunction request. In denying the injunction, the Court noted that “G.A.B. has within its own power the ability to refrain from enforcing, or removing altogether, the offending sentence from a regulation G.A.B. itself created” and emphasized that “removing the language—for example, by G.A.B. issuing an emergency rule—would be far more ‘simple and expeditious’ than asking a federal court to permanently enjoin enforcement of the offending regulation.” *Wisconsin Club for Growth, Inc. v. Myse*, No. 10-CV-427, slip op. at 2 (W.D. Wis. Oct. 13, 2010). The Court further

noted that staying the case would give the Board time to resolve some or all of the pending issues through further rulemaking. *Id.*, slip op. at 14.

In addition, the Board, through its litigation counsel, has represented to the Wisconsin Supreme Court that it does not intend to defend the validity of the second sentence of s. GAB 1.28(3)(b) and that it would stipulate to the entry of an order by that Court permanently enjoining the application or enforcement of that sentence.

This amendment brings s. GAB 1.28(3)(b) into conformity with the above stipulation, with the representations that have been made to the Wisconsin Supreme Court, and with the suggestions made in the October 13, 2010, Opinion and Order of the U.S. District Court for the Western District of Wisconsin. The Board finds that the immediate adoption of this amendment will preserve the public peace and welfare by providing a simple and expeditious clarification of the meaning of s. GAB 1.28 for litigants, for the regulated community, and for the general public and by doing so in advance of the 2011 Spring Election and any other future elections.

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.

Under s. 5.05(1), Stats., the Board is expressly vested with responsibility for the administration of all Wisconsin laws relating to elections and election campaigns, specifically including chapters 5 through 12 of the Wisconsin Statutes. Pursuant to that responsibility, s. 5.05(1)(f), Stats., gives the Board express statutory authority to promulgate administrative rules “for the purpose of interpreting or implementing the laws regulating the conduct of elections or elections campaigns or ensuring their proper administration.” Similarly, s. 227.11(2)(a), Stats., grants state agencies—including the Board—the authority to “promulgate rules interpreting the provisions of any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute,” as long as the rule does not “exceed[] the bounds of correct interpretation.” Sections 5.05(1)(f) and 227.11(2)(a), Stats., thus give the Board clear and express authority to promulgate rules that interpret and implement the meaning of all Wisconsin laws that regulate or govern the proper administration of election campaigns in this state, including s. 11.01(16), Stats.

Section GAB 1.28, as promulgated on August 1, 2010, made a number of changes to the Board's interpretation and implementation of the statutory definition of an act "for political purposes" under s. 11.01(16), Stats. Those changes were fully analyzed and explained in the July 13, 2010, Order of the Government Accountability Board, CR 09-013.

The present amendment involves only the repeal of the second sentence of s. GAB 1.28(3)(b). All other portions of GAB 1.28, including the first sentence of s. GAB 1.28(3)(b), are unchanged. Moreover, all of the revisions to GAB 1.28 that were effected on August 1, 2010, remain temporarily enjoined pending further order of the Wisconsin Supreme Court. The present amendment has no effect on the continued effectiveness of that injunction.

The first sentence of s. GAB 1.28(3)(b), provides that any communication that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate" is a communication "for political purposes" within the meaning of s. 11.01(16), Stats., and hence is subject to all of the campaign finance regulations under ch. 11 of the Wisconsin Statutes that apply to communications for a political purpose—subject, of course, to any additional requirements or limitations contained in particular statutes.

The second sentence of s. GAB 1.28(3)(b) additionally identifies communications which are susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. That is, any communications that possess the characteristics enumerated in the second sentence of s. GAB 1.28(3)(b) would automatically be deemed communications for a political purpose and, as a result, would automatically be subject to the applicable campaign finance regulations under ch. 11 of the Wisconsin Statutes.

As a result of litigation challenging the validity of the August 1, 2010, amendments to s. GAB 1.28, the Board has entered into a stipulation to refrain from enforcing the second sentence of s. GAB 1.28(3)(b). The Board, through its litigation counsel, has also represented that it does not intend to defend the validity of that sentence and has sought judicial orders permanently enjoining its application or enforcement. This sentence is removed by this emergency rule.

This amendment does not affect the first sentence of s. GAB 1.28(3)(b), under which individuals and organizations that raise or spend money to make communications that are susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate, are subject to campaign finance regulation under ch. 11 of the Wisconsin Statutes. As previously noted however, all of the August 1, 2010, amendments to s. GAB 1.28—including the first sentence of s. GAB 1.28(3)(b)—are currently subject to the August 13, 2010, temporary injunction by the Wisconsin Supreme Court.

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 criterion 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 contributions 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:

Pursuant to Public Act 96-0832, Illinois revised its “electioneering communication” statute in 2009, effective July 1, 2010, to include the “no reasonable interpretation other than an appeal to vote for or against” test, among other revisions. Subject to some delineated exemptions found in 10 ILCS 5/9-

1.14, the statute now defines an “electioneering communication” as any broadcast, cable or satellite communication, including radio, television, or internet communication, that:

- 1) refers to a clearly identified candidate or candidates who will appear on the ballot, a clearly identified political party, or a clearly identified question of public policy that will appear on the ballot,
- 2) is made within 60 days before a general election or 30 days before a primary election,
- 3) is targeted to the relevant electorate, and
- 4) is susceptible to no reasonable interpretation other than an appeal to vote for or against a clearly identified candidate, a political party, or a question of public policy.

As a result of the adoption of Public Act 96-0832, Illinois is undergoing a substantial revision of its administrative code with respect to campaign finance and disclosure rules. (See proposed Illinois Administrative Code, Title 26, Chapter 1, Part 100, Campaign Financing, JCAR260100-101389r01). In the context of excluding “independent expenditures” from the term “contribution,” Section 100.10(b)(3)G., of the proposed rules include both electioneering and express advocacy communications as forms of independent expenditures.

Iowa’s Administrative Code defines “express advocacy” as including a communication that uses any word, term, phrase, or symbol that exhorts an individual to vote for or against a clearly identified candidate or the passage or defeat of a clearly identified ballot issue. (Chapter 351—4.53(1), Iowa Administrative Code.)

Michigan statutes define a “contribution” as anything of monetary value made for the purpose of influencing the nomination or election of a candidate or the qualification, passage or defeat of a ballot question. (s. 169.204(1), Mich. Stats.) “Expenditure” is defined as a payment of anything of monetary value in assistance of or opposition to the nomination or election of a candidate or the qualification, passage or defeat of a ballot question. (s. 169.206(1), Mich. Stats.) Michigan does not have any additional rules defining political purposes.

Minnesota statutes define a “campaign expenditure” or “expenditure” as the purchase or payment of money or anything of value, or an advance of credit, made or incurred for the purpose of influencing the nomination or election of a candidate or for the purpose of promoting or defeating a ballot question. (s. 10A.01, Subd. 9, Minn. Stats.) “Independent expenditure” is defined as an expenditure expressly advocating the election or defeat of a clearly identified candidate, if the expenditure is not coordinated with any candidate or any candidate’s principal campaign committee or agent. (s. 10A.01, Subd. 18, Minn. Stats.) Minnesota does not have any additional rules defining political purposes.

8. Summary of factual data and analytical methodologies: The factual data and analytical methodologies underlying the adoption of the August 1, 2010 amendments to s. GAB 1.28 have been described in the July 13, 2010, Order of the Government Accountability Board, CR 09-013. The adoption of the present amendment to s. GAB 1.28(3)(b) is predicated on the same data and methodologies and also on developments related to several court cases challenging the validity of the August 1, 2010 amendments to s. GAB 1.28. These developments were discussed by the Board in a closed session meeting with its litigation counsel on December 14, 2010. These developments are also being discussed in an open session, public meeting of the Board on December 22, 2010.
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, Attn: Shane W. Falk, 212 E. Washington Avenue, 3rd Floor, P.O. Box 7984, Madison, Wisconsin 53707-7984, no later than January 28, 2011.

FISCAL ESTIMATE: The creation of this rule has minimal fiscal effect. There may be additional registrants filing reports with the Board and potentially additional enforcement actions that may require staff action. The extent of this potential fiscal impact is undetermined.

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

TEXT OF PROPOSED RULE:

Pursuant to the authority vested in the State of Wisconsin Government Accountability Board by ss. 5.05(1)(f), 227.11(2)(a) and 227.24, Stats., the Government Accountability Board hereby adopts an emergency rule amending GAB 1.28, Wis. Adm. Code, interpreting ch. 11, Stats., as follows:

SECTION 1. GAB 1.28(3)(b) is amended to read:

(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.~~

This rule shall take effect upon its publication in the official state newspaper, the Wisconsin State Journal, pursuant to s. 227.24, Stats.

Dated this 22nd day of December, 2010.



Kevin J. Kennedy
Director and General Counsel
Government Accountability Board

State of Wisconsin \ Government Accountability Board

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JUDGE THOMAS H. BARLAND
Chairperson

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For the August 2, 2011 Meeting

TO: Members, Wisconsin Government Accountability Board

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

Prepared by:

Shane W. Falk, Staff Counsel

SUBJECT: Status—Promulgation and Creation of ch. GAB §1.91, Wis. Adm. Code
Guidance—Relating to “person(s) making independent disbursements”

I. Introduction and Recommendations:

The promulgation and creation of ch. GAB §1.91, Wis. Adm. Code, is in the final stages of legislative review. None of the provisions of 2011 Act 21 (as amended by 2011 Act 32) impact the promulgation of ch. GAB §1.91, Wis. Adm. Code, as the new Act is not applicable due to the late stage of the rule’s promulgation. All statutes referenced in Section II of this Memorandum and describing the status of the rule-making reference the Wisconsin Statutes 2009-2010 version.

The Assembly Committee on Election and Campaign Reform objected to the promulgation of the rule, as has the Joint Committee for Review of Administrative Rules. Legislation has been introduced in both houses of the Legislature attempting to prohibit the Board’s promulgation of any rule addressing reporting requirements of organizations making independent disbursements as well as rules regarding attributions on communications by such organizations.

If the Legislature prohibits promulgation of s. GAB §1.91, Wis. Adm. Code, or any other rule affecting persons making independent disbursements and applying attribution requirements for communications, the Board may consider implementation of a guideline interpreting and applying existing campaign finance statutes and Attorney General J.B. Van Hollen’s formal opinion (OAG 05-10) to persons making independent disbursements.

Recommendations:

1. Staff recommends that the Board direct staff to continue communications with members of the Legislature and the Governor’s office to clarify the provisions of s. GAB §1.91, Wis. Adm. Code, in an effort to successfully complete its promulgation.
2. If the Legislature and Governor prohibits promulgation of s. GAB §1.91, Wis. Adm. Code, staff recommends that the Board adopt a guideline interpreting and applying existing campaign finance statutes and Attorney General J.B. Van Hollen’s formal opinion (OAG 05-10) to persons making independent disbursements in the context of and compliance with the *Citizens United* decision.

II. Status of GAB §1.91, relating to organizations. making independent disbursements:

A. Board Adoption of Emergency and Permanent Rule 1.91

At the March 23-24, 2010 Board meeting, the Board considered the ramifications of the U.S. Supreme Court decision, *Citizens United v. FEC*. The Board adopted an interim policy regarding corporate independent expenditures. Staff was directed to draft an emergency rule which was adopted by the Board at the May 10, 2010 meeting. In addition, the Board directed staff to promulgate a permanent rule mirroring the emergency rule to address independent expenditures in the context of *Citizens United*.

The emergency rule was published and effective May 20, 2010, but was only effective for 150 days and would have expired on October 16, 2010. At the Board’s direction, staff requested a 60 day extension so that the emergency rule would be in effect throughout the Fall Election. On August 24, 2010, the Joint Committee for the Review of Administrative Rules granted the 60 day extension. The Emergency Rule was continued until an expiration date of December 15, 2010. At the Board’s direction, staff requested an additional 60 day extension from the Joint Committee for the Review of Administrative Rules. This is the last extension permitted and it was granted; however, the emergency rule expired on February 15, 2011.

Staff published the scope statement on the permanent rule and on July 7, 2010 and also submitted the proposed permanent rule to Legislative Council for review. The Legislative Council Report was received by staff on August 3, 2010. The public hearing on both the emergency and permanent rules was held on August 30, 2010. The Wisconsin Democracy Campaign spoke in favor of the rule, but stated that it wished the rule could require more disclosure of original source donations to organizations making independent disbursements. Attorney Wittenwyler appeared and spoke in favor of the rule as a reasonable way to address the uncertain reporting requirements for organizations making independent disbursements. No person spoke in opposition to the rule.

B. Legislative Review of Rule 1.91

Staff filed a Legislative Report and the Senate standing committee’s 30 day review period expired on February 14, 2011. Included within staff’s Legislative Report, staff answered several questions posed by Legislative Council. A copy of staff’s Legislative Report and the final draft rule follow this Memorandum. See exhibits A and B, respectively.

The Assembly standing committee’s 30 day review period was set to expire on February 25, 2011; however, prior to the committee’s loss of jurisdiction, it requested a meeting which automatically extended its review period an additional 30 days. Staff was not contacted to schedule a meeting with the committee, but staff did receive notice that the committee objected to the proposed permanent rule on March 24, 2011, following a public hearing before the Assembly Committee. The Assembly standing committee’s objection was made prior to the expiration of its jurisdiction on March 28, 2011.

C. JCRAR Review of Rule 1.91

The Assembly Committee referred the proposed permanent rule to the Joint Committee for Review of Administrative Rules, which held a public hearing on April 27, 2011. Staff attended the hearing and spoke in favor of the proposed permanent rule. At the request of the Joint Committee, staff also submitted written testimony to the Joint Committee on April 28, 2011. See exhibit C. Only a single organization spoke against the rule and provided JCRAR with a copy of its written statement that had been submitted to the Assembly Committee at its public hearing on March 24, 2011. See exhibit D.

Pursuant to §227.19(5)(b), Wis. Stats., the Joint Committee for Review of Administrative Rules would have had a 30 day review period from the date that the proposed permanent rule was referred to it with the Assembly Committee’s objection. The Joint Committee for Review of Administrative Rules noticed a public hearing to consider the proposed permanent rule, which automatically extended its jurisdiction and review period another 30 days. Since the original referral to the Joint Committee for Review of Administrative Rules was made on April 7, 2011 and including the 30 day extension, the review period would have expired on June 6, 2011. On June 2, 2011, the Joint Committee for Review of Administrative Rules held an executive session on the rule and voted to object to it.

Pursuant to §227.19(5)(c), Wis. Stats., the G.A.B. is prohibited from promulgating the proposed permanent rule unless the Joint Committee for Review of Administrative Rules nonconcur in the Assembly Committee’s objection or an introduced bill objecting to the rule fails to be enacted. If the Joint Committee objects to the proposed permanent rule, it must take executive action to introduce a bill in each house of the Legislature supporting the objection. These bills must be introduced within 30 days of the Joint Committee’s objection. If the Joint Committee objects to the proposed permanent rule, pursuant to §227.19(6)(a), Wis. Stats., it will have to append a written

report to the bills which include an explanation of any issue with the rule, arguments for and against the rule, and the grounds upon which the Joint Committee relies for the objection.

D. Introduced Legislation Prohibiting Promulgation of Rules

On June 28, 2011, JCRAR introduced AB 196 prohibiting the G.A.B. from promulgating any rule affecting the authority of a corporation or association organized under ch. 185 or 193 to make independent disbursements or regarding attribution requirements in making communications. See exhibit E. JCRAR referred AB 196 to the Assembly Committee on Election and Campaign Reform. On June 30, 2011, JCRAR introduced SB 139 (same language as AB 196) and referred it to the Senate Committee on Transportation and Elections. See exhibit F. The required written report was filed with both standing committees on July 6, 2011. See exhibit G.

Unfortunately, the basis for JCRAR’s objection appears to arise from a misunderstanding of the definition of “organization” found in the rule. The report authored by the Co-Chairs of JCRAR focuses on a belief that the rule “is the expansion of the term organization to include any individual.” In addition, the Co-Chairs of JCRAR report that “a person who makes a handful of buttons or a couple signs should not be treated the same as a political action committee spending millions of dollars to sway an election.” Finally, the Co-Chairs of JCRAR assert that “The *Citizens United* case did not authorize the government to place registration burdens on all individuals as the GAB rule attempts.” In fact, the definition of “organization” used in Rule 1.91 specifically **excludes individuals** from compliance with the rule. The definition of “organization” is found in GAB 1.91(1)(g), which provides: “Organization means any person **other than an individual, committee, or political group** subject to registration under s. 11.23, Stats.” “Individuals” are required to register, not under Rule 1.91, but rather under §11.05(2), Wis. Stats., a statute on the books since at least 1973.

E. Staff Activities

Staff has worked diligently to attempt to clarify any confusion about the rule’s application so as to allow promulgation of Rule 1.91, preventing uncertainty in the regulated community and appropriate disclosure required by statute. The Ethics and Accountability Division Administrator Jonathan Becker submitted letters to each member of JCRAR on June 1, 2011 and to each member of the two standing committees on July 12, 2011 in an attempt to clarify some provisions of the rule; however, did not specifically address the exclusion of “individuals” from the rule’s application. See exhibits H and I, respectively.

III. Guideline:

Attorney General J.B. Van Hollen issued formal opinion OAG 05-10 on August 9, 2010 and acknowledged that Wisconsin statutes can be construed to provide a mechanism by which a corporation (person) may register under §11.05, Wis. Stats., and file an independent oath under §11.06(7), Wis. Stats., if such corporation (person) wishes to engage in independent

disbursements. See exhibit J. The Board may similarly construe the Wisconsin statutes to issue a guideline interpreting and applying existing campaign finance statutes and Attorney General J.B. Van Hollen’s formal opinion (OAG 05-10) to persons making independent disbursements in the context of and compliance with the *Citizens United* decision. In fact, Attorney General J.B. Van Hollen concluded that his office had in the past “determined that the State Elections Board had the authority to decline to enforce those portions of ch. 11, Wis. Stats., that were unconstitutional and to interpret and apply other parts of ch. 11, Wis. Stats., so as to avoid unconstitutionality.” See OAG 05-10, ¶41 (citing 65 Op. Atty. Gen. 145.) Furthermore, Attorney General J.B. Van Hollen concluded and agreed that the G.A.B. should suspend enforcement of the corporate disbursement prohibition in §11.38(1)(a)1. and (b), Wis. Stats., in a manner consistent with the views set forth in formal opinion OAG 05-10. See OAG 05-10, ¶42.

In light of Attorney General J.B. Van Hollen’s acknowledgement that the G.A.B. has authority to decline to enforce those portions of ch. 11, Wis. Stats., that are unconstitutional and to interpret and apply other parts of ch. 11, Wis. Stats., so as to avoid unconstitutionality, as well as providing guidance to the general public of Wisconsin, staff recommends that the Board adopt the following guideline relating to a “person(s) making independent disbursements.”

Guideline Relating to “Person(s) making independent disbursements.”

Introduction:

"Committees" or "political committees" are defined to include "any person other than an individual and any combination of 2 or more persons, permanent or temporary, which makes or accepts contributions or makes disbursements, whether or not engaged in activities which are exclusively political, except that a `committee' does not include a political `group" Wis. Stat. § 11.01(4). Absent an indication of contrary legislative intent, the word "person," as used in Wisconsin law, "includes all partnerships, associations and bodies politic or corporate." Wis. Stat. § 990.01(26). A corporation is, therefore, a "person" within the meaning of Wis. Stat. § 11.12(1)(a). Because a corporation is a person by virtue of Wis. Stat. § 990.01(26), it also, therefore, meets the statutory definition of a committee. Thus, . . . Wis. Stat. § 11.12(1)(a) applies to corporations. See OAG 05-10, ¶30.

* * *

The registration requirements in Wis. Stat. § 11.05(1) expressly apply, among other things, to "every committee other than a personal campaign committee which ... makes disbursements in a calendar year in an aggregate amount in excess of \$25" Other provisions in Wis. Stat. ch. 11 provide how registration is to occur and what must be reported. Likewise, the filing requirements in Wis. Stat. § 11.06(7) expressly apply, among other things, to "[e]very committee, other than a personal campaign committee, which ... desires to make disbursements during any calendar year, which are to be used to advocate the election or defeat of any clearly

identified candidate or candidates in any election" Because, as already discussed, a corporation is within the statutory definition of a committee, it follows that, like other committees, corporations may register and file under Wis. Stat. §§ 11.05 and 11.06(7). See OAG 05-10, ¶31.

Registration and Reporting Obligations of “person(s) making independent disbursements”:

- (1) For the purposes of this Guideline:
 - (a) "Contribution" has the meaning given in s. 11.01(6), Stats.
 - (b) “Designated depository account” means a depository account specifically established by a committee to receive contributions and from which to make independent disbursements.
 - (c) "Disbursement" has the meaning given in s. 11.01(7), Stats.
 - (d) "Filing officer" has the meaning given in s. 11.01(8), Stats.
 - (e) "Incurred obligation" has the meaning given in s. 11.01(11), Stats.
 - (f) “Independent” means the absence of acting in cooperation or consultation with any candidate or authorized committee of a candidate who is supported or opposed, and is not made in concert with, or at the request or suggestion of, any candidate or any agent or authorized committee of a candidate who is supported or opposed and as provided in s. 11.06(7), Stats.
 - (g) “Committee” means any person and any combination of 2 or more persons, permanent or temporary, which makes or accepts contributions or makes disbursements, whether or not engaged in activities which are exclusively political, except that a “committee” does not include an individual or a political group which is subject to registration under s. 11.23, Stats.
 - (h) “Person” includes the meaning given in s. 990.01(26), Stats.
- (2) A corporation, or association organized under ch. 185 or 193, Stats., is a person and qualifies as an committee (person) that is not prohibited by s. 11.38(1)(a)1., Stats., from making independent disbursements until such time as a court having jurisdiction in the State of Wisconsin rules that a corporation, or association organized under ch. 185

or 193, Stats., may constitutionally be restricted from making an independent disbursement.

(3) Upon accepting contributions made for, incurring obligations for, or making an independent disbursement exceeding \$25 in aggregate during a calendar year, any committee (person) shall establish a designated depository account in the name of the committee (person). Any contributions to and all disbursements of the committee (person) shall be deposited in and disbursed from this designated depository account. The committee (person) shall select a treasurer for the designated depository account and no disbursement may be made or obligation incurred by or on behalf of a committee (person) without the authorization of the treasurer or designated agents. The committee (person) shall register with the board and comply with s. 11.09, Stats., when applicable.

(4) The committee (person) shall file a registration statement with the appropriate filing officer and it shall include, where applicable:

(a) The name, street address, and mailing address of the committee (person).

(b) The name and mailing address of the treasurer for the designated depository account of the committee (person) and any other custodian of books and accounts for the designated depository account.

(c) The name, mailing address, and position of other principal officers of the committee (person), including officers and members of the finance committee, if any.

(d) The name, street address, mailing address, and account number of the designated depository account.

(e) A signature of the treasurer for the designated depository account of the committee (person) and a certification that all information contained in the registration statement is true, correct and complete.

(5) The designated depository account for a committee (person) required to register with the Board shall annually pay a filing fee of \$100.00 to the Board as provided in s. 11.055, Stats.

(6) The committee (person) shall comply with s. 11.05(5), Stats., and notify the appropriate filing officer within 10 days of any change in information previously submitted in a statement of registration.

(7) A committee (person) making independent disbursements shall file the oath for independent disbursements required by s. 11.06(7), Stats.

(8) A committee (person) receiving contributions for independent disbursements or making independent disbursements shall file periodic reports as provided ss. 11.06, 11.12, 11.19, 11.20 and 11.21(16), Stats., and include all contributions received for independent disbursements, incurred obligations for independent disbursements, and independent disbursements made. When applicable, a committee (person) shall also file periodic reports as provided in s. 11.513, Stats.

(9) A committee (person) making independent disbursements shall comply with the requirements of s. 11.30(1) and (2)(a) and (d), Stats., and include an attribution identifying the committee (person) paying for any communication, arising out of independent disbursements on behalf of or in opposition to candidates, with the following words: “Paid for by” followed by the name of the committee (person) and the name of the treasurer or other authorized agent of the committee (person) followed by “Not authorized by any candidate or candidate’s agent or committee.”

Statutes Interpreted: ss. 11.01(4) and (18m), 11.05, 11.055, 11.06, 11.09, 11.10, 11.12, 11.14, 11.16, 11.19, 11.20, 11.21(16), 11.30, 11.38, and 11.513, Stats.; See also OAG 05-10 (August 9, 2010).

IV. Proposed Motions:

MOTION: Board directs staff to continue communications with members of the Legislature and the Governor’s office to clarify the provisions of s. GAB §1.91, Wis. Adm. Code, in an effort to successfully complete its promulgation.

MOTION: Board adopts the “Guideline Relating to “Person(s) making independent disbursements,” to be issued in the instance that the Legislature and Governor prohibits promulgation of s. GAB §1.91, Wis. Adm. Code.



REPORT
OF
GOVERNMENT ACCOUNTABILITY BOARD

Clearinghouse Rule 10-087
s. GAB 1.91
Wisconsin Administrative Code

The Wisconsin Government Accountability Board proposes an order to create s. GAB 1.91, Wis. Adm. Code, relating to organizations making independent disbursements.

ANALYSIS PREPARED BY GOVERNMENT ACCOUNTABILITY BOARD:

1. Proposed Rule: See Proposed Order attached immediately following this report.
2. Statutes Interpreted: ss. 11.01(4) and (18m), 11.05, 11.055, 11.06, 11.09, 11.10, 11.12, 11.14, 11.16, 11.19, 11.20, 11.21(16), 11.30, 11.38, and 11.513, Stats.
3. Statutory Authority: ss. 5.05(1)(f) and 227.11(2)(a), Stats.
4. Explanation of agency authority: Express rule-making authority to interpret the provisions of statutes the Board enforces or administers is conferred on it pursuant to s. 227.11(2)(a), Stats. In addition, s. 5.05(1)(f), Stats., provides that the Board may promulgate rules under ch. 227, Stats., for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns or ensuring their proper administration.

In *Citizens United v. FEC*, 558 U.S. ___, (No. 08-205)(January 21, 2010), the United States Supreme Court greatly expanded the rights of organizations to engage in independent expenditures and strengthened the ability of the government to require disclosure and disclaimer of the independent expenditures. Pursuant to s. 5.05(1), the Board has the responsibility for the administration of campaign finance statutes in ch. 11, Stats. Rules promulgated by the Board will ensure the proper administration of the campaign finance statutes and properly address the application of *Citizens United v. FEC*.
5. Plain language analysis: Within the context of ch. 11, Stats, the proposed order will provide direction to organizations receiving contributions for independent disbursements or making independent disbursements following the U.S. Supreme Court decision in *Citizens United v. FEC*, 558 U.S. ___, (No. 08-205)(January 21, 2010). The proposed rule enumerates registration, reporting, and disclaimer requirements of provisions of ch. 11, Stats., which apply to organizations receiving contributions or making independent disbursements. Comporting with *Citizens United*, the proposed rule does not treat persons making independent

disbursements as full political action committees or individuals under s. 11.05, Stats., for the purposes of registration and reporting. With respect to contributions or in-kind contributions received, this proposed rule requires organizations to disclose only donations “made for” political purposes, but not donations received for other purposes.

6. Summary of, and comparison with, existing or proposed federal regulations: At the federal level, the Federal Election Commission provides rules at 11 CFR 109.10, which regulate persons who are not a committee and who make independent expenditures. An independent expenditure statement and reports quarterly are required for any person making independent expenditures in excess of an aggregate \$250.00 in a calendar year. If a person makes an independent expenditure in the aggregate of \$10,000.00 or more, an independent expenditure statement and report must be filed within 48 hours of the expenditure. Any person making an independent expenditure in the aggregate of \$1,000.00 or more within 20 days of an election must file an independent statement and report within 24 hours of the expenditure. The independent expenditure statement must include the identity of the person making the expenditure, any contributions received in excess of \$200.00, and the candidate benefitted by the expenditure. In addition, a disclaimer is required for any communication resulting from an independent expenditure.

7. Comparison with rules in adjacent states:

Section 5/9-1.15, Ill. Stats., defines “expenditure” generally and to include an electioneering communication or a communication expressly advocating for or against the nomination for election, election, retention or defeat of a clearly identifiable public official or candidate that is not made in connection, consultation or concert with or at the request or suggestion of the public official or candidate, the public official’s or candidate’s designated political committee or campaign, or any of their agents. Persons, including individuals, making independent expenditures exceeding an aggregate of \$3,000 in any 12 month period in Illinois are by definition political committees and subject to substantially similar registration, reporting, and disclaimer requirements as committees in Wisconsin. See ss. 5/9-8.6, 9-9.5, and 9-10. The Illinois administrative rules do not address independent expenditures likely due to the specificity and inclusiveness of the Illinois statutes.

Chapter 351—4.27 of the Iowa Administrative Code underwent redrafting in 2010 and prescribes requirements for registration and reporting of independent expenditures and it applies to any person, other than a candidate or a committee that has or should register, that makes one or more independent expenditures in excess of \$750.00 in the aggregate. 351—4.27, Iowa Adm. Code. A person subject to filing an independent expenditure statement must identify the person making the expense and for whom it benefits electronically on forms proscribed

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by the Iowa Ethics and Campaign Disclosure Board . 351—4.27 and 4.27(2) and (3), Iowa Adm. Code. A disclaimer on communications is required. 351—4.27(6), Iowa Adm. Code. A person making independent expenditures may need to instead file an organization statement as a political committee as defined by 68A.102(18), Iowa Stats., and comply with all committee reporting requirements.

Michigan Statutes ss. 169.203 and 169.208 provide a definition for an “independent committee,” which upon exceeding \$500.00 in contributions or expenditures is subject to substantially similar registration, reporting, and disclaimer requirements as committees in Wisconsin. See Michigan Statutes ss. 169.224, et al. See also generally R 169, Parts 2 and 3, Michigan Admin. Code. Pursuant to Michigan Statutes s. 169.251 a person other than a committee who makes independent expenditures in the amount of \$100.01 or more in a calendar year is also required to make a report of the independent expenditure.

Minnesota statutes regulate independent expenditures, requiring registration upon a committee, fund, or party unit making or receiving a contribution, or making an expenditure exceeding \$100.00. ss. 10A.12(subd. 1a), 10A.14 and 10A.121, Minn. Stats. Campaign reports from a committee, fund, or party unit are prescribed by s. 10A.20, Minn. Stats. See also s. 211A.02, Minn. Stats. Individuals are also required to report independent expenditures exceeding \$100.00 within 24 hours of the expense. s. 10A.20(subd. 6b), Minn. Stats. Disclaimers are addressed in ss. 10A.17 and 211B.04, Minn. Stats. Minnesota has begun promulgation of an administrative rule specifically addressing disclaimers for independent expenditures (proposed Part 4503.1500.)

8. Summary of factual data and analytical methodologies: Adoption of the rule was predicated on state statutes and federal case law.
9. List of persons who appeared or registered for or against the proposed rule at any public hearing held by the agency:

August 30, 2010 Public Hearing:

Mike McCabe, Wisconsin Democracy Campaign—Favor, stating that the rule is a much-needed and important response to *Citizens United*. Further, the rule provides less disclosure than the public deserves, but as much disclosure as current state law permits.

May 10, 2010 Informational Hearing:

Mike McCabe, Wisconsin Democracy Campaign—Favor, stating that given the state of the law and the definition of “contribution,” the rule does as much as it can, but does not require disclosure of original source of contributions which is needed.

Mike Wittenwyler, Attorney—Favor, stating that the proposed rule is a good reasonable solution, but noted four language suggestions.

10. Summary of public comments to the proposed rule and the agency's response to the comments:

The agency did not receive any public comments opposing the rule. Generally, those persons or organizations speaking in favor of the proposed rule emphasized the need to provide direction to organizations making independent disbursements that were not permitted to do so prior to the *Citizens United* decision. Those speaking in favor of the proposed rule acknowledged that the rule accomplished this goal in a fair and reasonable manner in the context of the current state of the law.

Language suggestions offered by Attorney Wittenwyler in the following four areas were adopted by the Board at its meeting on May 10, 2010:

1. Include in analysis a clear statement that the rule does not require these organizations to register as full political action committees and that disclosure is limited to earmarked contributions for a political purpose.
2. Clarify the definition of "independent" found in s. GAB 1.91(1)(f) to clearly state "and is not made in concert with."
3. Clarify that the filing fee referenced in s. GAB 1.91(5) is specific to the "depository account" established under the rule.
4. Clarify that the entities affected include "tribes" and "labor organizations" (rather than "unions.")

The Emergency Rule Order for s. GAB 1.91 (EmR 1016) was in effect for the Fall 2010 elections. Approximately 13 organizations registered under the Emergency Rule Order and reported activity totaling nearly \$2 million. The registration and disclosure process worked smoothly, showing the effectiveness of the proposed rule.

11. Explanations of modifications to the proposed rule as a result of the public comments or testimony received at public hearings: The Government Accountability Board made no substantive modifications to this rule following the August 30, 2010 public hearing.
12. Legislative Council staff clearinghouse report: See Clearinghouse Report to Agency attached immediately following this report.
13. Response to Legislative Council staff recommendations in the clearinghouse report:

The Government Accountability Board considered and adopted the Legislative Council recommendations found in Sections 2-5 of the Clearinghouse Report to Agency.

In Section 1 of the Clearinghouse Report to Agency, Legislative Council requested an explanation of the following matters:

- (a) How the regulation of the new entity, “organizations,” under the rule differs from the regulation of a committee under ch. 11, Stats.
- (b) The statutory authority for treating an “organization” differently than a committee under ch. 11, Stats.; the decision of the U.S. Supreme Court in *Citizens United v. FEC*, 558 U.S. ___ (dated January 21, 2010) may have invalidated portions of s. 11.38, Stats., but it did not alter the statutory structure under which the board administers and implements ch. 11, Stats. In other words, if *Citizens United* requires alterations in ch. 11, Stats., what power does the board, rather than the Legislature, have to effect those changes?

The Government Accountability Board provides the following additional explanation in response to Legislative Council’s requests.

Pursuant to §5.05(1)(f), Stats., the legislature authorized the Government Accountability Board specific power to promulgate rules under ch. 227, Stats., for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns or ensuring their proper administration. Furthermore, the legislature has generally authorized agencies, such as the Government Accountability Board, to promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute and ensure the proper administration of the statute. §227.11(2)(a), Stats.

The specific authority granted to the Government Accountability Board to promulgate rules interpreting or implementing the laws regulating election campaigns and ensuring their proper administration is broad. See §5.05(1)(f), Stats. In *SEB v. WMC*, the Wisconsin Supreme Court recognized this broad authority of the Government Accountability Board’s predecessor agency, the State Elections Board, to craft a new standard of express advocacy for the State of Wisconsin pursuant to §5.05(1)(f), Stats. 597 N.W.2d 721, ¶ 33 (Wis. 1999). The Court specifically stated: “The creation of such a standard is properly the role of the legislature and the Board...” *Id.* The Court also noted that the level of regulation desirable in this area depends upon public policy considerations more

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appropriately explored in a forum other than this Court and that the Court's role in areas "peppered with political perceptions and emotionally laden views," was one restricted to interpreting the scope of constitutional requirements. *Id.*

Wisconsin has adopted the "elemental" approach to determining the validity of an administrative rule, comparing the elements of the rule to the elements of the enabling statute, such that the statute need not supply every detail of the rule. *WCCCD v. DNR*, 204 WI 40, ¶14 (Wis. 2004). If the rule matches the elements contained in the statute, then the statute expressly authorizes the rule. *Id.* (citing: *Grafft v. DNR*, 2000 WI App 187, ¶7, 238 Wis. 2d 750, 618 N.W.2d 897.) A cardinal rule of statutory interpretation is that statutes must be construed so as to avoid absurd results. *Id.*

Given a choice of possible interpretations of statute, Courts must select the construction that results in constitutionality rather than invalidity. It is the cardinal principle of statutory construction to save and not destroy. *State v. Vonesh*, 401 N.W.2d 170, 175 (Wis. Ct. App. 1986). Likewise, an administrative rule should ordinarily be given that construction which will, if possible, sustain its validity. *Law Enforcement Standards Board v. Village of Lyndon Station*, 305 N.W.2d 89, 97-98 (Wis. 1981). Rules made in exercise of a power delegated by statute should be construed together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason. *Id.* Furthermore, an administrative construction of an agency's own regulations is controlling in determining their meaning unless plainly erroneous or inconsistent with the regulations. *Id.* Conflicts between different statutes, by implication or otherwise, are not favored and will not be held to exist, if they may otherwise be reasonably construed. *Id.* Construction of statutes should be done in a way which harmonizes the whole system of law of which they are a part, and any conflict should be reconciled if possible. *Id.*

In *Citizens United v. FEC*, 558 U.S. ___, (No. 08-205)(January 21, 2010), the United States Supreme Court greatly expanded the rights of organizations to make independent disbursements and strengthened the ability of the government to require disclosure and disclaimer of the independent disbursements. However, the United States Supreme Court clearly indicated that persons wishing to make independent disbursements should not have to create a completely separate political action committee in order to engage in political speech in the form of independent disbursements, nor be subject to all of the same restrictions on political action committees. *Id.* (slip opinion pages 21-22). This portion of the *Citizens United* decision has been used in at least two lawsuits to argue that certain statutes are unconstitutional because they treat the organization making independent disbursements the same as a political committee.

The proposed rule GAB §1.91 interprets a number of statutory provisions in ch. 11, Stats., and provides direction to persons making independent disbursements

with respect to registration, reporting, and disclaimer requirements. The proposed rule interprets the definition of “committee” found in §11.01(4), Stats., and multiple sections of ch. 11, Stats, in the context of the *Citizens United* decision to harmonize the Wisconsin campaign finance statutes and to ensure their proper administration. Specifically, the proposed rule interprets and provides a definition for “person” as used in §11.01(4), Stats., to provide a mechanism for disclosure emphasized in the Legislature’s declaration of policy as set forth in §11.001, Wis. Stats., and as reinforced by the United States Supreme Court in *Citizens United*.

The Government Accountability Board’s interpretation of ch. 11, Stats., as set forth in ch. GAB §1.91, avoids absurd results or unconstitutional applications of ch. 11, Stats. For instance, under ch. 11, Stats., corporations are prohibited from making contributions to a “committee.” See 11.38(1)(a)1. and 3., Stats. Without the interpretation of ch. 11, Wis. Stats., as provided in ch. GAB §1.91, a corporation wishing to make independent disbursements would first have to establish a “committee,” but then would be precluded from making a “contribution” to that committee and prohibited from receiving contributions from other corporations, which is contrary to *Citizens United*. Likewise, §11.12(1)(a), Stats., prohibits a corporation from engaging in independent disbursements unless those disbursements are by or through a registered committee. This is directly contrary to the *Citizens United* decision, which specifically permitted a corporation’s use of general treasury funds for independent disbursements. Without the interpretation of ch. 11, Stats., as provided in ch. GAB §1.91, §11.12(1)(a), Stats., would, in effect, reinstitute the corporate prohibition on independent disbursements and run afoul of *Citizens United*. Furthermore, without the interpretation of ch. 11, Stats., as provided in ch. GAB §1.91, a person’s or individual’s donations or contributions to the organization would apply to the \$10,000 aggregate contribution limits found in §11.26(4), Stats., which is also contrary to the *Citizens United* decision.

Finally, in a recently issued formal opinion, the Wisconsin Attorney General also has recognized that corporations are a “person” and, therefore, §§11.05(1) and 11.12(1)(a), Stats., apply to corporations, but also emphasized that “Wisconsin law must also permit corporations to register and file under §§11.05 and 11.06(7), Stats., so that they may exercise their constitutional right to engage in political speech.” See OAG 05-10, ¶¶ 30-31 (August 9, 2010)(attached). The Attorney General specifically recognized that in addition to this plain reading of the statutes, the Government Accountability Board has issued an emergency rule to “ensure the proper administration of the campaign finance statutes and properly address the application of *Citizens United v. FEC*.” *Id.* at ¶32. The Attorney General noted that the rule interprets §§11.05 and 11.06, Stats., and other relevant sections of ch. 11, Stats., to facilitate a corporation’s registration and filing requirements and concludes that both the statutes and the administrative code provide a mechanism for corporate reporting and avoid a ban on a corporation’s constitutionally protected political advocacy. *Id.* at ¶¶ 32-33.

The Government Accountability Board has properly exercised the broad rule-making authority specifically granted by the Legislature in §5.05(1)(f), Stats., and which was recognized by the Wisconsin Supreme Court in *SEB v. WMC*. However, the Government Accountability Board has also heeded the Wisconsin Supreme Court's admonishments in *SEB v. WMC* by providing notice and clarity of the specific requirements of ch. 11, Stats., as they apply to organizations receiving contributions for, incurring obligations for, or making independent disbursements. Furthermore, the Government Accountability Board has interpreted the provisions of ch. 11, Stats., so as to facilitate registration and disclosure of organizations making independent disbursements, while at the same time avoiding a ban on a corporation's constitutionally protected political advocacy, thus harmonizing the whole system of campaign finance law in ch. 11, Stats., and ensuring the proper administration of ch. 11, Stats.

14. Final regulatory flexibility analysis: The creation of this rule does not affect the normal operations of business.
15. Economic impact report: Not applicable.
16. Changes to the proposed rule's plain language analysis or fiscal estimate: Not applicable.

CONCLUSION AND RECOMMENDED ACTION:

The Government Accountability Board unanimously concludes that s. GAB 1.91, Wis. Adm. Code, should be created. The proposed rule GAB §1.91 interprets a number of statutory provisions in Chapter 11, Stats., and provides direction with respect to registration, reporting, and disclaimer requirements for persons making independent disbursements. The proposed rule interprets the definition of "committee" found in §11.01(4), Wis. Stats., and multiple sections of ch. 11, Wis. Stats, in the context of the U.S. Supreme Court decision *Citizens United v. FEC*, 558 U.S. ___, (No. 08-205)(January 21, 2010) and to harmonize the Wisconsin campaign finance statutes to ensure their proper administration. Specifically, the proposed rule interprets and provides a definition for "person" as used in §11.01(4), Stats., to provide a mechanism for disclosure emphasized in the Legislature's declaration of policy as set forth in §11.001, Wis. Stats., and reinforced by the United States Supreme Court in *Citizens United*.

Within the context of ch. 11, Stats, the proposed order will provide direction to organizations receiving contributions for independent disbursements or making independent disbursements following the *Citizens United* decision. The proposed rule enumerates registration, reporting, and disclaimer requirements of provisions of ch. 11, Stats., which apply to organizations receiving contributions or making independent disbursements. Comporting with *Citizens United*, the proposed rule does not treat persons making independent disbursements as full political action committees or individuals under s. 11.05, Stats., for the purposes of registration and reporting. With

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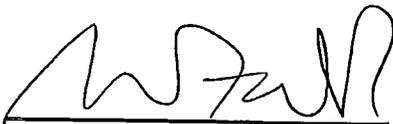
respect to contributions or in-kind contributions received, this proposed rule requires organizations to disclose only donations "made for" political purposes, but not donations received for other purposes.

The Government Accountability Board recommends promulgation of this rule.

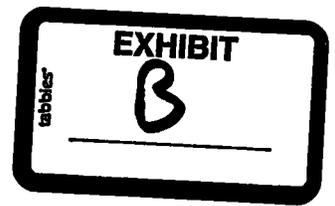
Respectfully submitted,

January 13, 2011

GOVERNMENT ACCOUNTABILITY BOARD



Shane W. Falk
Staff Counsel



ORDER OF THE GOVERNMENT ACCOUNTABILITY BOARD
CR 10-087

The Wisconsin Government Accountability Board proposes an order to create s. GAB 1.91, Wis. Adm. Code, relating to organizations making independent disbursements.

ANALYSIS PREPARED BY GOVERNMENT ACCOUNTABILITY BOARD:

1. Statutes Interpreted: ss. 11.01(4) and (18m), 11.05, 11.055, 11.06, 11.09, 11.10, 11.12, 11.14, 11.16, 11.19, 11.20, 11.21(16), 11.30, 11.38, and 11.513, Stats.
2. Statutory Authority: ss. 5.05(1)(f) and 227.11(2)(a), Stats.
3. Explanation of agency authority: Express rule-making authority to interpret the provisions of statutes the Board enforces or administers is conferred on it pursuant to s. 227.11(2)(a), Stats. In addition, s. 5.05(1)(f), Stats., provides that the Board may promulgate rules under ch. 227, Stats., for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns or ensuring their proper administration.

In *Citizens United v. FEC*, 558 U.S. ___, (No. 08-205)(January 21, 2010), the United States Supreme Court greatly expanded the rights of organizations to engage in independent expenditures and strengthened the ability of the government to require disclosure and disclaimer of the independent expenditures. Pursuant to s. 5.05(1), the Board has the responsibility for the administration of campaign finance statutes in ch. 11, Stats. Rules promulgated by the Board will ensure the proper administration of the campaign finance statutes and properly address the application of *Citizens United v. FEC*.

4. Related statute(s) or rule(s): ch. 11, Stats., and ch. GAB 1, Wis. Adm. Code.
5. Plain language analysis: Within the context of ch. 11, Stats, the proposed order will provide direction to organizations receiving contributions for independent disbursements or making independent disbursements following the U.S. Supreme Court decision in *Citizens United v. FEC*, 558 U.S. ___, (No. 08-205)(January 21, 2010). The proposed rule enumerates registration, reporting, and disclaimer requirements of provisions of ch. 11, Stats., which apply to organizations receiving contributions or making independent disbursements. Comporting with *Citizens United*, the proposed rule does not treat persons making independent disbursements as full political action committees or individuals under s. 11.05, Stats., for the purposes of registration and reporting. With respect to contributions or in-kind contributions received, this proposed rule requires organizations to disclose only donations "made for" political purposes, but not donations received for other purposes.

6. Summary of, and comparison with, existing or proposed federal regulations: At the federal level, the Federal Election Commission provides rules at 11 CFR 109.10, which regulate persons who are not a committee and who make independent expenditures. An independent expenditure statement and reports quarterly are required for any person making independent expenditures in excess of an aggregate \$250.00 in a calendar year. If a person makes an independent expenditure in the aggregate of \$10,000.00 or more, an independent expenditure statement and report must be filed within 48 hours of the expenditure. Any person making an independent expenditure in the aggregate of \$1,000.00 or more within 20 days of an election must file an independent statement and report within 24 hours of the expenditure. The independent expenditure statement must include the identity of the person making the expenditure, any contributions received in excess of \$200.00, and the candidate benefitted by the expenditure. In addition, a disclaimer is required for any communication resulting from an independent expenditure.
7. Comparison with rules in adjacent states:

Section 5/9-1.15, Ill. Stats., defines "expenditure" generally and to include an electioneering communication or a communication expressly advocating for or against the nomination for election, election, retention or defeat of a clearly identifiable public official or candidate that is not made in connection, consultation or concert with or at the request or suggestion of the public official or candidate, the public official's or candidate's designated political committee or campaign, or any of their agents. Persons, including individuals, making independent expenditures exceeding an aggregate of \$3,000 in any 12 month period in Illinois are by definition political committees and subject to substantially similar registration, reporting, and disclaimer requirements as committees in Wisconsin. See ss. 5/9-8.6, 9-9.5, and 9-10. The Illinois administrative rules do not address independent expenditures likely due to the specificity and inclusiveness of the Illinois statutes.

Chapter 351—4.27 of the Iowa Administrative Code underwent redrafting in 2010 and prescribes requirements for registration and reporting of independent expenditures and it applies to any person, other than a candidate or a committee that has or should register, that makes one or more independent expenditures in excess of \$750.00 in the aggregate. 351—4.27, Iowa Adm. Code. A person subject to filing an independent expenditure statement must identify the person making the expense and for whom it benefits electronically on forms proscribed by the Iowa Ethics and Campaign Disclosure Board. 351—4.27 and 4.27(2) and (3), Iowa Adm. Code. A disclaimer on communications is required. 351—4.27(6), Iowa Adm. Code. A person making independent expenditures may need to instead file an organization statement as a political committee as defined by 68A.102(18), Iowa Stats., and comply with all committee reporting requirements.

Michigan Statutes ss. 169.203 and 169.208 provide a definition for an "independent committee," which upon exceeding \$500.00 in contributions or expenditures is subject to substantially similar registration, reporting, and disclaimer requirements as committees in Wisconsin. See Michigan Statutes ss. 169.224, et al. See also generally R 169, Parts 2 and 3, Michigan Admin. Code. Pursuant to Michigan Statutes s. 169.251 a person other than a committee who makes independent expenditures in the amount of \$100.01 or more in a calendar year is also required to make a report of the independent expenditure.

Minnesota statutes regulate independent expenditures, requiring registration upon a committee, fund, or party unit making or receiving a contribution, or making an expenditure exceeding \$100.00. ss. 10A.12(subd. 1a), 10A.14 and 10A.121, Minn. Stats. Campaign reports from a committee, fund, or party unit are prescribed by s. 10A.20, Minn. Stats. See also s. 211A.02, Minn. Stats. Individuals are also required to report independent expenditures exceeding \$100.00 within 24 hours of the expense. s. 10A.20(subd. 6b), Minn. Stats. Disclaimers are addressed in ss. 10A.17 and 211B.04, Minn. Stats. Minnesota has begun promulgation of an administrative rule specifically addressing disclaimers for independent expenditures (proposed Part 4503.1500.)

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 may have a minimal effect on small businesses that will participate in receiving contributions or making independent disbursements. The economic impact of this effect is minor. Businesses may have a filing fee of \$100.00, if the amount of aggregate independent disbursements made in any year exceeds \$2,500.00.
10. Effect on small business: The creation of this rule may have a minimal effect on small businesses as explained above.
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, Attn: Shane W. Falk, 212 E. Washington Avenue, 3rd Floor, P.O. Box 7984, Madison, Wisconsin 53707-7984, no later than August 30, 2010.

FISCAL ESTIMATE: The creation of this rule has minimal fiscal effect. There may be additional registrants filing reports with the Board and potentially additional enforcement actions that may require staff action. The extent of this potential fiscal impact is undetermined.

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

TEXT OF PROPOSED RULE:

SECTION 1. GAB 1.91 is created to read:

1.91 Organizations Making Independent Disbursements

- (1) In this section:
 - (a) "Contribution" has the meaning given in s. 11.01(6), Stats.
 - (b) "Designated depository account" means a depository account specifically established by an organization to receive contributions and from which to make independent disbursements.
 - (c) "Disbursement" has the meaning given in s. 11.01(7), Stats.
 - (d) "Filing officer" has the meaning given in s. 11.01(8), Stats.
 - (e) "Incurred obligation" has the meaning given in s. 11.01(11), Stats.
 - (f) "Independent" means the absence of acting in cooperation or consultation with any candidate or authorized committee of a candidate who is supported or opposed, and is not made in concert with, or at the request or suggestion of, any candidate or any agent or authorized committee of a candidate who is supported or opposed.
 - (g) "Organization" means any person other than an individual, committee, or political group subject to registration under s. 11.23, Stats.
 - (h) "Person" includes the meaning given in s. 990.01(26), Stats.
- (2) A corporation, or association organized under ch. 185 or 193, Stats., is a person and qualifies as an organization that is not prohibited by s. 11.38(1)(a)1., Stats., from making independent disbursements until such time as a court having jurisdiction in the State of Wisconsin rules that a corporation, or association organized under ch. 185 or 193, Stats., may constitutionally be restricted from making an independent disbursement.
- (3) Upon accepting contributions made for, incurring obligations for, or making an independent disbursement exceeding \$25 in aggregate during a calendar year, an organization shall establish a designated depository account in the name of the organization. Any contributions to and all disbursements of the organization shall

be deposited in and disbursed from this designated depository account. The organization shall select a treasurer for the designated depository account and no disbursement may be made or obligation incurred by or on behalf of an organization without the authorization of the treasurer or designated agents. The organization shall register with the board and comply with s. 11.09, Stats., when applicable.

- (4) The organization shall file a registration statement with the appropriate filing officer and it shall include, where applicable:
 - (a) The name, street address, and mailing address of the organization.
 - (b) The name and mailing address of the treasurer for the designated depository account of the organization and any other custodian of books and accounts for the designated depository account.
 - (c) The name, mailing address, and position of other principal officers of the organization, including officers and members of the finance committee, if any.
 - (d) The name, street address, mailing address, and account number of the designated depository account.
 - (e) A signature of the treasurer for the designated depository account of the organization and a certification that all information contained in the registration statement is true, correct and complete.
- (5) The designated depository account for an organization required to register with the Board shall annually pay a filing fee of \$100.00 to the Board as provided in s. 11.055, Stats.
- (6) The organization shall comply with s. 11.05(5), Stats., and notify the appropriate filing officer within 10 days of any change in information previously submitted in a statement of registration.
- (7) An organization making independent disbursements shall file the oath for independent disbursements required by s. 11.06(7), Stats.
- (8) An organization receiving contributions for independent disbursements or making independent disbursements shall file periodic reports as provided ss. 11.06, 11.12, 11.19, 11.20 and 11.21(16), Stats., and include all contributions received for independent disbursements, incurred obligations for independent disbursements, and independent disbursements made. When applicable, an organization shall also file periodic reports as provided in s. 11.513, Stats.
- (9) An organization making independent disbursements shall comply with the requirements of s. 11.30(1) and (2)(a) and (d), Stats., and include an attribution

identifying the organization paying for any communication, arising out of independent disbursements 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."

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.

Dated August 30, 2010

KEVIN J. KENNEDY
Government Accountability Board
Director and General Counsel



Joint Committee for the Review of Administrative Rules

Clearinghouse Rule 10-087 (GAB 1.91)

Testimony of Shane W. Falk
Staff Counsel
Government Accountability Board
April 27, 2011

Co-Chairperson Vukmir, Co-Chairperson Ott and Committee Members:

Thank you for the opportunity to appear before this joint committee and testify regarding Clearinghouse Rule 10-087, otherwise known as GAB s. 1.91. The Government Accountability Board unanimously supports this rulemaking.

In *Citizens United v. FEC*, 558 U.S. ___, (No. 08-205)(January 21, 2010), the United States Supreme Court greatly expanded the rights of organizations to engage in independent expenditures and strengthened the ability of the government to require disclosure and disclaimer of independent expenditures. For the first time in more than 100 years, corporations were allowed to spend general treasury funds on political communications that directly advocated for the election or defeat of candidates.

Currently Wisconsin law, s. 11.38, Stats., still contains a prohibition of not only corporate contributions for a political purpose, but also a prohibition of corporate independent disbursements. The later is in conflict with the *Citizens United* decision. The Government Accountability Board proposed this rule to provide a mechanism to enable this corporate political speech within the context of Wisconsin's campaign finance laws, subject to minimal disclosure requirements that are similar to those affirmed by the United States Supreme Court on an 8-to-1 vote.

In recognizing that a corporation was entitled to make independent disbursements--spend general treasury funds for political ads so long as it was not coordinated with a candidate--the United States Supreme Court relied heavily on the application of an "information interest" of the public. This "information interest" likewise was recognized as a sufficient government interest to require corporations to provide disclosure when making the independent disbursements. In essence, if a corporation is granted the right to engage in political speech just like individuals, similarly those corporations must then provide disclosure of those corporate political disbursements.

Within the context of ch. 11, Stats, the proposed order will provide direction to organizations receiving contributions for independent disbursements or making independent disbursements following the U.S. Supreme Court decision in *Citizens United v. FEC*, 558 U.S. ___, (No. 08-205)(January 21, 2010). The proposed rule enumerates minimal registration, reporting, and disclaimer requirements of provisions of ch. 11, Stats., which apply to organizations receiving contributions or making independent disbursements. Comporting with *Citizens United*, the proposed rule does not treat

persons making independent disbursements as full political action committees or individuals under s. 11.05, Stats., for the purposes of registration and reporting. With respect to contributions or in-kind contributions received, this proposed rule requires organizations to disclose only donations “made for” political purposes, but not donations received for other purposes.

In other words, these minimal campaign finance reporting obligations only require disclosure of donations “earmarked” for independent expenditures. In addition, this proposed rule does not affect campaign finance law exemptions found in s. 11.29, Stats., for communications of an organization to members, shareholders, or subscribers. Absolutely no registration or reporting requirements exist for any such qualifying communication.

The proposed rule interprets the definition of “committee” found in §11.01(4), Stats., and multiple sections of ch. 11, Stats, in the context of the *Citizens United* decision to harmonize the Wisconsin campaign finance statutes and to ensure their proper administration. Specifically, the proposed rule interprets and provides a definition for “person” as used in §11.01(4), Stats., to provide a mechanism for disclosure emphasized in the Legislature’s declaration of policy as set forth in §11.001, Wis. Stats., and reinforced by the United States Supreme Court in *Citizens United*.

The Government Accountability Board’s interpretation of ch. 11, Stats., as set forth in ch. GAB §1.91, avoids absurd results or unconstitutional applications of ch. 11, Stats. For instance, under ch. 11, Stats., corporations are prohibited from making contributions to a “committee.” See 11.38(1)(a)1. and 3., Stats. Without the interpretation of ch. 11, Wis. Stats., as provided in ch. GAB §1.91, a corporation wishing to make independent disbursements would first have to establish a “committee,” but then would be precluded from making a “contribution” to that committee and prohibited from receiving contributions from other corporations, which is contrary to *Citizens United*. Likewise, §11.12(1)(a), Stats., prohibits a corporation from engaging in independent disbursements unless those disbursements are by or through a registered committee. This is directly contrary to the *Citizens United* decision, which specifically permitted a corporation’s use of general treasury funds for independent disbursements. Without the interpretation of ch. 11, Stats., as provided in ch. GAB §1.91, §11.12(1)(a), Stats., would, in effect, reinstitute the corporate prohibition on independent disbursements and run afoul of *Citizens United*. Furthermore, without the interpretation of ch. 11, Stats., as provided in ch. GAB §1.91, a person’s or individual’s donations or contributions to the organization would apply to the \$10,000 aggregate contribution limits found in §11.26(4), Stats., which is also contrary to the *Citizens United* decision.

Finally, in a recently issued formal opinion, the Wisconsin Attorney General also has recognized that corporations are a “person” and, therefore, §§11.05(1) and 11.12(1)(a), Stats., apply to corporations, but also emphasized that “Wisconsin law must also permit corporations to register and file under §§11.05 and 11.06(7), Stats., so that they may exercise their constitutional right to engage in political speech.” See OAG 05-10, ¶¶ 30-31 (August 9, 2010). The Attorney General specifically recognized that in addition to

this plain reading of the statutes, the Government Accountability Board has issued an emergency rule to “ensure the proper administration of the campaign finance statutes and properly address the application of *Citizens United v. FEC.*” *Id.* at ¶32. The Attorney General noted that the rule interprets §§11.05 and 11.06, Stats., and other relevant sections of ch. 11, Stats., to facilitate a corporation’s registration and filing requirements and concludes that both the statutes and the administrative code provide a mechanism for corporate reporting and avoid a ban on a corporation’s constitutionally protected political advocacy. *Id.* at ¶¶ 32-33.

The Emergency Rule Order for s. GAB 1.91 (EmR 1016) was in effect for the Fall 2010 elections. Approximately 13 organizations registered under the Emergency Rule Order and reported campaign activity totaling nearly \$2 million. The registration and disclosure process worked smoothly, showing the effectiveness of the proposed rule.

On behalf of the Government Accountability Board, I appreciate your consideration of these issues with regard to this rule and will answer any questions you may have at this time.

Thank you.

Shane W.Falk
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Government Accountability Board
(608) 266-8005
Shane.Falk@wi.gov



James Madison
JAMES MADISON CENTER FOR FREE SPEECH

GENERAL COUNSEL
James Bopp, Jr., Esq.

Testimony of
Wisconsin Right to Life, Inc.
before the
Election and Campaign Reform Committee
of the
Wisconsin State Assembly

Randy Elf

March 24, 2011

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or of the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

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Chairman Tauchen and members of the Election and Campaign Reform Committee.

Wisconsin Right to Life, Inc. ("WRTL"), appreciates the opportunity to testify today regarding a new Wisconsin Government Accountability Board ("GAB") rule.

As you may know, WRTL, a non-profit corporation exempt from federal income taxation under I.R.C. § 501.c.4 (2006), is a non-sectarian and non-partisan entity.¹ It is not connected with any political candidate or political party. Nor is it connected with any political committee other than its own. Cf. 2 U.S.C. § 431.7 (2002) (defining "connected organization" under federal law).

WRTL engages in political speech that it reasonably fears a GAB rule, GAB § 1.91 (2010), regulates. In short, Section 1.91 is unconstitutionally vague and unconstitutionally overbroad. Either would suffice to reject Section 1.91 as written,² yet Section 1.91 is both. It is unconstitutionally vague for the reasons explained below.³ It is unconstitutionally overbroad, because it defines entities as "organizations" and thereby imposes on them full-fledged political-committee-like burdens when the entities neither are under the control of, nor have the major purpose of nominating or electing, a candidate or candidates for state or local office

¹ One should avoid saying "organization" generically here, because "organization" is a term of art in the Wisconsin law at issue. See GAB § 1.91.1.f (2010).

² *Infra* Part C.

³ *Infra* Part D.

in Wisconsin.⁴ Section 1.91 is also overbroad for other reasons.⁵ Nevertheless, there are ways to amend Section 1.91 to make it constitutional.⁶

Understanding this requires, first, understanding Wisconsin election law, and, second, understanding constitutional law. The first task is no small one, because – to put it politely – Chapter 11 of the Wisconsin statutes and the GAB rules are extraordinarily difficult to read, much less understand.

A. Section 1.91 Organization Definition

Section 1.91 defines organizations as persons *other than* individuals, committees, or groups, GAB § 1.91.1.f, that “accept[] contributions made for, incur[] obligations for, or mak[e] an independent disbursement exceeding \$25 in aggregate during a calendar year,” *id.* § 1.91.3, with “contribution,” “incurred obligation,” and “independent disbursement” having the same meaning as in the statute. *See id.* § 1.91.1.a, b, d (citations omitted).

The incurred-obligation definition depends on the contribution and disbursement definitions. *See* WIS. STAT. § 11.01.11 (2007). With limited exceptions, “contribution” includes:

A gift, subscription, loan, advance, or deposit of money or anything of value, except a loan of money by a commercial lending institution made by the institution in accordance with applicable laws and regulations in the ordinary course of business, made *for political*

⁴ *Infra* Part F.

⁵ *Infra* Part G.

⁶ *Infra* Part H.

purposes. In this subdivision "anything of value" means a thing of merchantable value.

Id. § 11.01.6.a.1 (emphasis added). With limited exceptions, disbursement similarly includes:

A purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, except a loan of money by a commercial lending institution made by the institution in accordance with applicable laws and regulations in the ordinary course of business, made *for political purposes.* In this subdivision, "anything of value" means a thing of merchantable value.

Id. § 11.01.7.a.1 (emphasis added).

An act is for "political purposes" when it is done *for the purpose of influencing the election or nomination for election* of any individual to state or local office, for the purpose of influencing the recall from or retention in office of an individual holding a state or local office, for the purpose of payment of expenses incurred as a result of a recount at an election, or for the purpose of influencing a particular vote at a referendum. In the case of a candidate, or a committee or group which is organized *primarily for the purpose of influencing the election or nomination for election* of any individual to state or local office, for the purpose of influencing the recall from or retention in office of an individual holding a state or local office, or for the purpose of influencing a particular vote at a referendum, all administrative and overhead expenses for the maintenance of an office or staff which are used principally for any such purpose are deemed to be for a political purpose.

(a) Acts which are for "political purposes" include but are not limited to:

1. The making of a communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate or a particular vote at a referendum.
2. The conduct of or attempting to influence an endorsement or nomination to be made at a convention of political party members or supporters concerning, in

whole or in part, any campaign for state or local office.

Id. § 11.01.16 (emphasis added).

The GAB has limited Section 11.01.16. Under the newly amended Section 1.28, “the applicable requirements of ch. 11., Stats.,” GAB § 1.28.2, apply when speakers:

- “Make ... *disbursements for political purposes*,” *id.* § 1.28.2.a (emphasis added); *see id.* § 1.28.4, or
- “Make a communication for a political purpose.” *Id.* § 1.28.2.c; *see id.* § 1.28.4. Regardless of the medium, *see id.* § 1.28.1.b (listing specific media and adding “any other form of communication that may be utilized for a political purpose”), “a communication is for a ‘political purpose’”⁷ when

(a) The communication contains terms such as the following or *their functional equivalents* with reference to a clearly identified candidate 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~~

⁷ Section 1.28.2.a refers to “disbursements for political purposes” while Section 1.28.2.c refers to “a communication for a political purpose.” Section 1.28.3 limits the latter yet not the former.

~~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.~~

GAB § 1.28.3 (emphasis added) (stricken text deleted by a GAB emergency rule).⁸

Which speakers Section 1.28 applies to is another matter. Section 1.28 applies to “[i]ndividuals other than candidates[.]” *Id.* § 1.28.2.a. It also applies to “persons *other than* political committees[.]” *id.* (emphasis added); *i.e.*, “persons other than” committees⁹ that are (1) “under the control of a candidate” or (2) “formed *primarily to influence elections*[.]” *Id.* § 1.28.1.a (emphasis added). However, Wisconsin law does not define “formed primarily to influence elections.”¹⁰ See generally *Wisconsin Right to Life, Inc. v. Paradise*, 138 F.3d 1183, 1185 (7th Cir.

⁸ See Notice of Order Adopting Emergency Rule (Dec. 22, 2010), available at http://gab.wi.gov/sites/default/files/event/123/notice_of_hearing_emr_order_1_28_pdf_17450.pdf (all Internet sites visited March 14, 2011).

⁹ Under Wisconsin campaign-finance law generally, “committee” and “political committee” are synonyms, see WIS. STAT. § 11.01.4, but under this regulation “political committee” is a proper subset of “committee.” See GAB § 1.28.1.a (“‘Political committee’ means every committee which ...”).

¹⁰ See generally Order of the GAB, CR 09-013 at 1 (March 23, 2010) (recalling the application of former Section 1.28 to “individuals and organizations”), available at <http://elections.state.wi.us/docview.asp?docid=19255&locid=47>.

1998) (appearing to bring “groups,”¹¹ including WRTL, under former Section 1.28); *Elections Bd. v. Wisconsin Mfrs. & Commerce*, 597 N.W.2d 721, 727 & n.10, 731, 736 (Wis.), *cert. denied*, 528 U.S. 969 (1999).¹²

B. The Burdens on Section 1.91 Organizations

Wisconsin imposes a panoply of burdens on entities that Wisconsin *via* Section 1.91 defines as organizations:

- Registration (including treasurer-designation and bank-account) and termination requirements. GAB §§ 1.91.3 (bank account, treasurer, and registration), 1.91.4, 6 (registration), 1.91.5 (filing fee), 1.91.8 (citing WIS. STAT. § 11.19 (termination)).
- Recordkeeping requirements. *Id.* § 1.91.8 (citing WIS. STAT. § 11.12 (which includes recordkeeping requirements in Section 11.12.3)), and
- Extensive reporting requirements. *Id.* (citing full-fledged political-committee reporting requirements).

¹¹ This is different from how Wisconsin law defines “group.” See WIS. STAT. § 11.01.10.

¹² Until the GAB amended Section 1.28 in 2010, this law or Wisconsin law in general, see *Wisconsin Mfrs.*, 597 N.W.2d at 727 & n.10, reached only express advocacy as defined in *Buckley*, 424 U.S. at 44 & n.52, 80. *Wisconsin Mfrs.*, 597 N.W.2d at 731; see also WIS. STAT. § 11.06.2 (“if a disbursement is made or obligation incurred by an individual other than a candidate or by a committee or group which is not primarily organized for political purposes, and the disbursement does not constitute a contribution to any candidate or other individual, committee or group, the disbursement or obligation is required to be reported only if the purpose is to expressly advocate the election or defeat of a clearly identified candidate or the adoption or rejection of a referendum”). The Wisconsin Supreme Court left it to the Wisconsin Legislature or the GAB to decide whether to amend Wisconsin law. See *Wisconsin Mfrs.*, 597 N.W.2d at 736 (referring to the Elections Board, the GAB’s predecessor).

The weight of these political-committee-like burdens¹³ is such that the speech would simply not be “worth it” for many entities that do not want to bear these burdens. *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986) (“*MCFL*”).

C. First Principles

Freedom of speech is the norm, not the exception. *See, e.g., Citizens United v. FEC*, 558 U.S. ___, ___, 130 S.Ct. 876, 911 (2010) (“more speech, not less, is the governing rule”); *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976).

The framers established government with the consent of the governed, *see, e.g.,* U.S. CONST. preamble (1787) (“We the People of the United States”); WIS. CONST. preamble (“We, the people of Wisconsin, grateful to Almighty God for our freedom”), and government has only those powers that the governed surrendered to it in the first place.

This power – including the “constitutional power of Congress to regulate federal elections[,]” *Buckley*, 424 U.S. at 13 & n.16, and each state’s parallel power over its own, though not other states’, elections, *see, e.g., North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 281 (4th Cir. 2008) (“*NCRL III*”) (citing *Buckley*, 424 U.S. at 13); WIS. CONST. art. III – is further constrained by other law.

¹³ As opposed to, for example, limited independent-expenditure reports, *see, e.g., Buckley*, 424 U.S. at 80-81; 2 U.S.C. § 434.c (2002), or limited reports for electioneering-communications as defined in the Federal Election Campaign Act (“FECA”), *see, e.g., Citizens United v. FEC*, 558 U.S. ___, ___, 130 S.Ct. 876, 914-16 (2010); 2 U.S.C. § 434.f (2002), which Wisconsin does not have.

Under the Fourteenth Amendment, U.S. CONST. amend. XIV (1868), state law regulating political speech must not be vague. *See Buckley*, 424 U.S. at 41-43, 76-77. To avoid the problems vagueness causes, law regulating political speech must also be simple and concise. *See Citizens United*, 130 S.Ct. at 889.

Even non-vague law regulating political speech must comply with the First Amendment, U.S. CONST. amend. I (1791), which guards against overbreadth, *Buckley*, 424 U.S. at 80 (“impermissibly broad”), and applies to the states. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

The government’s power to regulate *elections* is an exception to the norm of freedom of speech. *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296-97 (1981). The power to regulate *elections* is also self-limiting. To ensure law is not “impermissibly broad,” *Buckley* establishes that government may, subject to further inquiry,¹⁴ have the power to regulate donations received and spending for political speech only when they are “unambiguously related to the campaign of a particular ... candidate” in the jurisdiction in question, 424 U.S. at 80, *quoted in Wisconsin Mfrs.*, 597 N.W.2d at 729, or “unambiguously campaign related” for short. *Id.* at 81. This principle, which continues after *Citizens United*, *see New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 676 & n.4 (10th Cir. 2010) (“*NMYO*”), helps ensure government regulates only speech that government has the “power to regulate,” *NCRL III*, 525 F.3d at 282, *i.e.*, speech that government has a

¹⁴ *E.g., infra* Parts F, G.

constitutional interest in regulating. *See id.* at 281 (citing *Buckley*, 424 U.S. at 80). It is part of the larger principle that law regulating political speech must not be overbroad. *See Buckley*, 424 U.S. at 80 (“impermissibly broad”).

D. Vagueness

Given the language of Section 1.28, it is not clear whether the definitions of “contribution” and “disbursement” as Section 1.91 uses the terms depend only on the Wisconsin statute, or on the Wisconsin statute plus Section 1.28.

On the one hand, if Section 1.91 depends only on the Wisconsin statute, then there is no vagueness problem *if the statute per Wisconsin Manufacturers*, 597 N.W.2d at 731, reaches only express advocacy as defined in *Buckley*, 424 U.S. at 44 n.52, 80; otherwise, “purpose of influencing the election[,]” WIS. STAT. § 11.01.16, is unconstitutionally vague under *Buckley*, 424 U.S. at 77.

On the other hand, if Section 1.91 also depends on Section 1.28 and the Wisconsin Supreme Court lifts its temporary injunction on Section 1.28, then the “contribution” and “disbursement” definitions are unconstitutionally vague, because Section 1.28 refers to what *Citizens United*, 130 S.Ct. at 895 (citing *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 470 (2007) (“*WRTL-II*”)), calls the appeal-to-vote test. See GAB § 1.28.3.a (“functional equivalents”), 1.28.3.b (“susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate”).¹⁵

¹⁵ Section 1.28.3.a *without* the phrase “or their functional equivalents” means express advocacy as defined in *Buckley*, 424 U.S. at 44 & n.52, 80, *vis-à-vis* state or

WRTL II rejects a contention that the appeal-to-vote test is vague by noting it applied *only* to electioneering communications as defined in the Federal Election Campaign Act (“FECA”). 551 U.S. at 474 n.7.¹⁶ The implication is that elsewhere the test *is* vague. *See id.* Section 1.28 reaches beyond FECA electioneering communications. *See, e.g.*, GAB § 1.28.3. Therefore, Section 1.28, and by extension Section 1.91, are vague even under *WRTL II*, to say nothing about *Citizens United*.

Moreover, *Citizens United* removes the appeal-to-vote test as a constitutional limit on government power.¹⁷ What remains from *WRTL II* regarding the appeal-

local office in Wisconsin. *See* WIS. STAT. § 11.01.1 (defining “candidate”). Whatever the phrase “or their functional equivalents” may have meant in the previous version of this regulation, GAB § 1.28.2.c (2001), the phrase has since become a term of art, *see McConnell v. FEC*, 540 U.S. 93, 206 (2003), that means the appeal-to-vote test. *See WRTL II*, 551 U.S. at 457, 469-70, 474 n.7.

¹⁶ In short, electioneering communications as defined in FECA are communications that (1) are broadcast, cablecast, or satellite (“Broadcast”), 2 U.S.C. § 434.f.3.A.i (2002), (2) run in the 30 days before a primary or 60 days before a general election (“30-60 Day Windows”), *id.* § 434.f.3.A.i.II, (3) have a clearly identified candidate in the jurisdiction in question, *see id.* § 434.f.3.A.i.I, (4) are targeted to the relevant electorate, *id.* § 434.f.3.A.i.III, and (5) do not expressly advocate. *See id.* § 434.f.3.B.ii; *see also id.* § 434.f.3.B.

¹⁷ Although *Citizens United* holds that an electioneering communication as defined in FECA passes the appeal-to-vote test, 130 S.Ct. at 889-90, the question of whether electioneering communications as defined in FECA pass the appeal-to-vote test no longer affects whether government may regulate them. *Compare WRTL II*, 551 U.S. at 457, 469-70, 474 n.7, *with Citizens United*, 130 S.Ct. at 889-90, 912-13, 915. *WRTL II* holds that government may ban them – and implies that government may otherwise regulate them, *see* 551 U.S. at 457, 465, 471, 476-77, 477, 478, 478-79, 479, 480, 481 – only when they pass the test. *Id.* at 457, 469-70, 474 n.7. They pass the test when their only reasonable interpretation is as an appeal to vote for or against a clearly identified candidate in the jurisdiction. *See id.* at 457, 469-70, 474 n.7. But *Citizens United* holds that regardless of whether they pass the test, government may *not* ban electioneering communications as defined in FECA, *e.g.*,

to-vote test is the conclusion that the test is unconstitutionally vague, and therefore overbroad, as to all speech, not just electioneering communications as defined in FECA. *See* 551 U.S. at 492-94 (Scalia, J., concurring in part and concurring in the judgment). Here is why. The appeal-to-vote test lacks “the degree of clarity necessary to avoid the chilling of fundamental political discourse[.]” *Id.* at 493. It “provides ample room for debate and uncertainty” about its meaning. *Id.* The appeal-to-vote test

ultimately depend[s] ... upon a judicial judgment (or is it – worse still – a jury judgment?) concerning “reasonable” or “plausible” import that is far from certain, that rests upon consideration of innumerable surrounding circumstances which the speaker may not even be aware of, and that lends itself to distortion by reason of the decisionmaker’s subjective evaluation of the importance or unimportance of the challenged speech. In this critical area of political discourse, the speaker[s] cannot be compelled to risk felony [or other] prosecution with no more assurance of impunity than [their] prediction that what [t]he[y] say[] will be found susceptible of some “reasonable interpretation other than as an appeal to vote for or against a specific candidate.” Under these circumstances, “many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to

130 S.Ct. at 889-90, 912-13, by persons other than foreign nationals. *See id.* at 911 (citing 2 U.S.C. § 441e). And regardless of whether electioneering communications as defined in FECA pass the test, government *may*, subject to further inquiry, *see, e.g., id.* at 915-16 (giving an example of when disclosure is unconstitutional), have the power to regulate them by requiring *non-political-committee* reporting. *Id.* at 915 (upholding non-political-committee reporting). *Infra* Part F. Since the appeal-to-vote test applied *only* to electioneering communications as defined in FECA, *WRTL II*, 551 U.S. at 474 n.7; *see also North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 282 (4th Cir. 2008) (“*NCRL III*”) (citing *WRTL II*, 127 S.Ct. 2652, 2667 (2007)); *National Right to Work Legal Def. & Educ. Found., Inc. v. Herbert*, 581 F. Supp.2d 1132, 1144, 1150 (D. Utah 2008) (citing *NCRL III*, 525 F.3d at 282), it no longer serves any constitutional purpose. *Citizens United* removes the appeal-to-vote test as a constitutional limit on government power.

abstain from protected speech – harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.” *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (citation omitted).

WRTL II, 551 U.S. at 493-94 (Scalia, J., concurring in part and concurring in the judgment) (brackets in original omitted).

So *Citizens United* does not just remove the appeal-to-vote test as a constitutional limit on government power. It renders the test unconstitutionally vague. How is anyone – including a speaker or a law enforcer – to know whether speech is the “functional equivalent[]” of terms that GAB § 1.28.3.a lists or is “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate” under GAB § 1.28.3.b? Such a standard is “impermissibly vague[.]” *Id.* at 492.

Calling the appeal-to-vote test “objective[.]” *Citizens United*, 130 S.Ct. at 889, 895, does not mean the test is *not* vague. See *WRTL II*, 551 U.S. at 474 n.7. “Objective” is not the opposite of “vague.” A standard can be both.¹⁸ The fact that *WRTL II* thought the appeal-to-vote test was “objective[.]” see *Citizens United*, 130 S.Ct. at 895 (citing *WRTL II*, 551 U.S. at 470), does not mean that the test is not vague. After *Citizens United* removed the *WRTL II* appeal-to-vote test as a constitutional limit on government power, all that remains of the test is the

¹⁸ For example, a standard asking whether a reasonable person would conclude that speech “advocat[es] the election or defeat’ of a candidate” or is “for the purpose of influencing” an election would be both objective, see *WRTL II*, 551 U.S. at 470 (“reasonable”), and vague. *Buckley*, 424 U.S. at 42-43, 77 (ellipsis omitted).

conclusion that it is unconstitutionally vague. See 551 U.S. at 492-94 (Scalia, J., concurring in part and concurring in the judgment).

Therefore, Section 1.28, and by extension Section 1.91, are unconstitutionally vague.¹⁹

E. Overbreadth: In General

Where “the First Amendment is implicated, the tie [(if there is one)] goes to the speaker, not the censor.” *WRTL II*, 551 U.S. at 474.

F. Overbreadth: The Section 1.91 Organization Definition

Most case law addresses political-committee burdens by addressing political-committee definitions. However, Wisconsin imposes political-committee burdens *via* its committee/political-committee, “persons other than political committees,” and organization definitions. WIS. STAT. § 11.01.4; GAB §§ 1.28.1.a, 1.28.2 (“Individuals other than candidates and persons other than political committees”), 1.91.1.f.

In a constitutional analysis, it is important to remember that it is not the label but the substance that matters. As explained below,²⁰ the burdens that apply when Wisconsin defines an entity as an organization under Section 1.91.1.f²¹ are the very burdens that *Citizens United* recognizes are “onerous” when they apply to

¹⁹ The constitutional law that applies to Section 1.91 has implications for Wisconsin law beyond Section 1.91, yet Section 1.91 is what at issue here.

²⁰ *Infra* Part F.

²¹ *Supra* Part A.

political committees. See 130 S.Ct. at 897. But government may not abrogate First Amendment rights through clever drafting or revision. It “cannot foreclose the exercise of constitutional rights by mere labels.” *NAACP v. Button*, 371 U.S. 415, 429 (1963), followed in *FEC v. Colorado Republican Fed. Campaign Comm.*, 518 U.S. 604, 622 (1996) (“*Colorado Republican I*”).

As a matter of law, not fact, political-committee – or, here, organization – status is not only “burdensome[.]” *Citizens United*, 130 S.Ct. at 897, but also “onerous[.]” *id.* at 898; *WRTL II*, 551 U.S. at 477 n.9 (citing *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 253-55 (1986) (“*MCFL*”)), because political committees “are expensive and subject to extensive regulations.” *Citizens United*, 130 S.Ct. at 897. Any contrary contention conflicts with Supreme Court precedent. Government may impose far greater burdens on entities it may define as political committees under *Buckley*, 424 U.S. at 74-79, than it may impose on other persons. See *MCFL*, 479 U.S. at 251-56. These are “well-documented and onerous burdens,” *WRTL II*, 551 U.S. at 477 n.9 (citing *MCFL*, 479 U.S. at 253-55), regardless of whether government bans an entity itself from speaking and says only an entity’s political committee may speak, see, e.g., *Citizens United*, 130 S.Ct. at 897, or whether government requires the entity itself to be a political committee. See, e.g., *id.* (noting that allowing the entity to speak would “not alleviate the First Amendment problems”).²² While it is one thing to assert that non-political-

²² Federal courts of appeal have struck down state laws that – like Wisconsin’s – do not ban speech but instead require that entities themselves bear political-

committee disclosure requirements “do not prevent anyone from speaking,” *id.* at 914 (quoting *McConnell v. FEC*, 540 U.S. 93, 201 (2003)),²³ full-fledged political-committee burdens are another matter. These requirements are so burdensome and onerous that allowing speech only if an entity becomes a political committee – or, here, an organization – is like banning the entity’s speech, *see id.* at 897, when the entity reasonably concludes that the speech is “simply not worth it.” *MCFL*, 479 U.S. at 255.

Political-committee – or, here, organization – requirements are burdensome and onerous even if they include “only” – so to speak – (1) registration, including treasurer-designation, (2) recordkeeping, or (3) extensive reporting requirements yet not (4) limits or (5) source bans on contributions received. *See Citizens United*, 130 S.Ct. at 897-98 (mentioning (1), (2), and (3), but not (4) or (5)). Similar state

committee-like burdens. *See NMYO*, 611 F.3d at 673 (quoting N.M. STAT. § 1-29.26.L (New Mexico’s political-committee definition)); *NCRL III*, 525 F.3d at 279 (“plaintiffs challenged the constitutionality of North Carolina’s definition of ‘political committee,’ because it threatened to impose numerous and burdensome obligations on organizations”); *Colorado Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1140-41 (10th Cir. 2007) (“CRLC”) (“whether or not a corporation meets the *MCFL* exemption, it must still register as a political committee”).

National Organization for Marriage v. McKee misses this point. *See* 723 F. Supp.2d 245, 261-62, 263-64 & n.140 (D. Me. 2010), *notice of appeal filed* (1st Cir. Aug. 20, 2010).

²³ On the same page, the Court discusses such disclosure requirements that *do* prevent speaking. *See Citizens United*, 130 S.Ct. at 914 (non-political-committee disclosure (quoting *McConnell*, 540 U.S. at 198 (non-political-committee disclosure (quoting, in turn, *Buckley*, 424 U.S. at 74 (political-committee disclosure)))))).

requirements, such as Wisconsin's,²⁴ are also a "significant regulatory burden[.]" *NCRL III*, 525 F.3d at 286 (citing *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712 (4th Cir. 1999) ("*NCRL I*"), *cert. denied*, 528 U.S. 1153 (2000)), even if they do not include (4)²⁵ or (5).²⁶ Under *Citizens United*, 130 S.Ct. at 897, (1), (2), and (3) are full-fledged political-committee burdens, regardless of whether (4) and (5) are present. Onerous requirements such as (1), (2), or (3) may not be prior restraints on speech, yet by giving government the power to license speech, they in effect are prior restraints. *Cf. id.* at 895-96. Wisconsin *via* its organization definition, GAB 1.91.1.f, imposes (1), (2), and (3) on entities.

With such burdens in mind, *Buckley* establishes that government may define an entity as a political committee or otherwise impose political-committee-like burdens only if (a) it is "under the control of a candidate" or candidates, or (b) "the

²⁴ *Supra* Part A. *McKee* misses this point as well. *See* 723 F. Supp.2d at 261-62.

²⁵ *See CRLC*, 498 F.3d at 1141 (referring to political-committee "disclosure requirements" and "administrative, organizational, and reporting requirements"); *Richey v. Tyson*, 120 F. Supp.2d 1298, 1316 & nn.19-21 (S.D. Ala. 2000) (citing political-committee registration, recordkeeping, and reporting requirements); *Volle v. Webster*, 69 F. Supp.2d 171, 172 (D. Me. 1999) (same); *New York Civil Liberties Union v. Acito*, 459 F. Supp. 75, 78-79 (S.D.N.Y. 1978) (same).

Some contribution-source bans apply whenever government defines an entity as a "political committee." *See* 2 U.S.C. §§ 441b.a, 441b.b.2 (2002) (national banks and national corporations), 441e (2002) (foreign nationals).

²⁶ *See National Right to Work Legal Def. & Educ. Found., Inc. v. Herbert*, 581 F. Supp.2d 1132, 1136, 1138, 1139 (D. Utah 2008) (citing political-committee burdens for political-issues committees, burdens which do not include limits or source bans on contributions received).

major purpose” of the entity is “the nomination or election of a candidate” or candidates, in the jurisdiction. See 424 U.S. at 79, followed in *McConnell*, 540 U.S. at 170 n.64, and *MCFL*, 479 U.S. at 252 n.6, 262; *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 505 n.5 (7th Cir. 1998); *Colorado Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1153-54 (10th Cir. 2007) (“CRLC”) (noting that *McConnell* did not change the test (citations omitted)); *NCRL III*, 525 F.3d at 287-90.²⁷

These two tests address whether a *definition* through which government imposes political-committee burdens is constitutional. *Brownsburg*, 137 F.3d at 505 n.5 (holding that *Buckley* limits a political-committee *definition* to entities passing the major-purpose test); *Unity08 v. FEC*, 596 F.3d 861, 867 (D.C. Cir. 2010) (noting that the tests limit a political-committee *definition* (quoting *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 392, 395-96 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981))); *NCRL III*, 525 F.3d at 288-89 (considering whether a political-committee *definition* has the major-purpose test); *CRLC*, 498 F.3d at 1139 (holding a political-committee *definition* unconstitutional because it lacks the major-purpose test); *id.* at 1154-55 (applying the major-purpose test to a political-committee

²⁷ While *McKee* cited the plaintiff as saying the Supreme Court had not applied the major-purpose test to state law, 723 F. Supp.2d at 264, the court did not acknowledge the rest of the sentence: “yet other courts, including this Court, have.” *Id.*, D.Ct. Doc. 140 at 14 (citing D.Ct. Doc. 115 at 18 (citing, in turn, *Volle v. Webster*, 69 F. Supp.2d 171, 174-77 (D. Me. 1999) (“general registration and disclosure requirements can now apply only to organizations that are under the control of a candidate or whose ‘major purpose’ is the nomination or election of a candidate” (citing, in turn, *Buckley*, 424 U.S. at 78))).

definition);²⁸ see also *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 997-98, 1008-09, 1011-12 (9th Cir. 2010) (“*HLW*”) (considering a political-committee definition, stating incorrectly that the plaintiff also challenged the political-committee disclosure requirements,²⁹ and applying a major-purpose test), cert. denied, 562 U.S. ____, 131 S.Ct. ____ (U.S. Feb. 22, 2011).³⁰

Furthermore, government may not cleverly draft or revise its law to impose burdens such as (1) registration and termination requirements, (2) recordkeeping requirements, or (3) extensive reporting requirements³¹ on entities *in a capacity other than as a political committee* when the entities do not pass the proper “under the control of a candidate” or major-purpose test. See *National Right to Work Legal Def. & Educ. Found., Inc. v. Herbert*, 581 F. Supp.2d 1132, 1152-54 (D. Utah 2008)

²⁸ See also *NMYO*, 611 F.3d at 676 (“the issue ... is solely whether NMYO and SWAP may be classified as political committees”).

²⁹ See *HLW*, No. 1:08-cv-00590-JCC, VERIFIED COMPL. FOR DECLARATORY & INJUNCTIVE RELIEF at 10-12 (Count 1) (W.D. Wash. April 16, 2008), available at <http://jamesmadisoncenter.org/Main/WA/Complaint.pdf>.

³⁰ With varying degrees of precision, other circuits have quoted *Buckley* or *MCFL* and recognized the major-purpose test. See, e.g., *FEC v. EMILY's List*, 581 F.3d 1, 16 n.15 (D.C. Cir. 2009); *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 348, 350-51 (4th Cir. 2009) (“*RTAO*”), cert. granted and judgment vacated, 559 U.S. ____, 130 S.Ct. 2371 (2010); *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1101 n.16 (9th Cir. 2003) (“*CPLC I*”); *Akins v. FEC*, 146 F.3d 1049, 1050 (D.C. Cir. 1998) (Silberman, J., concurring); *FEC v. Survival Educ. Fund*, 65 F.3d 285, 295 (2d Cir. 1995); *FEC v. Florida for Kennedy Comm.*, 681 F.2d 1281, 1287 (11th Cir. 1982); see also *United States v. National Comm. for Impeachment*, 469 F.2d 1135, 1141-42 (2d Cir. 1972) (pre-dating *Buckley* and *MCFL*).

³¹ *Supra* Part F.

(political-issues committee). Such entities have a First Amendment right to be free of these burdens. See *MCFL*, 479 U.S. at 254-56; *Buckley*, 424 U.S. at 79; *NCRL III*, 525 F.3d at 286; *CRLC*, 498 F.3d at 1153-54; see generally *Citizens United*, 130 S.Ct. at 897-98.³² Government may not abrogate this right through clever drafting or revision. It “cannot foreclose the exercise of constitutional rights by mere labels.” *Button*, 371 U.S. at 429, followed in *Colorado Republican I*, 518 U.S. at 622.

Determining whether an entity is “under the control of a candidate” or candidates for state or local office in Wisconsin is straightforward. See *NMYO*, 611 F.3d at 677 (citing *Buckley*, 424 U.S. at 79); *Unity08*, 596 F.3d at 867; *Machinists Non-Partisan Political League*, 655 F.2d at 394-96; *FEC v. Florida for Kennedy Comm.*, 681 F.2d 1281, 1287 (11th Cir. 1982).

Determining whether an entity passes the major-purpose test is also straightforward. See *CRLC*, 498 F.3d at 1152. The test asks what *the* major purpose of an entity is, not whether something is *a* major purpose. *MCFL*, 479 U.S. at 252 n.6, 262; *Buckley*, 424 U.S. at 79; *NCRL III*, 525 F.3d at 287-89, 302-04. And “major” is the root of “majority,” which means more than half. Thus, an entity can have only one major purpose. See *MCFL*, 479 U.S. at 252 n.6 (referring to “the major purpose” of an entity and “its organizational purpose,” not purposes).

³² A Ninth Circuit panel missed this point and lumped full-fledged political-committee disclosure requirements and other disclosure requirements into one overbreadth analysis. This panel contradicted a previous Ninth Circuit panel. A subsequent Ninth Circuit panel compounded the confusion. *Infra* Part G.

The law provides two methods to determine whether an entity passes the major-purpose test. Either suffices. The first method to determine an entity's major purpose considers how the entity has *articulated* its mission in its organizational documents, *see MCFL*, 479 U.S. at 241-42, 252 n.6, or in public statements, *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996), and the second method considers whether, in *carrying out* its mission, the entity spends the majority of its money on contributions to candidates or on independent expenditures³³ for candidates, *CRLC*, 498 F.3d at 1152, *followed in NMYO*, 611 F.3d at 678; *NCRL III*, 525 F.3d at 289, in the jurisdiction in question.

³³ Meaning express advocacy as defined in *Buckley* and not coordinated with a candidate, the candidate's agents, the candidate's committee, or a party, which is the standard under the Constitution. *See* 424 U.S. at 39-51, 74-81; *McConnell*, 540 U.S. at 219-23; *Brownsburg*, 137 F.3d at 505. The phrase "independent spending" in *CRLC*, 498 F.3d at 1152 (citing/quoting *MCFL*, 479 U.S. at 252 n.6, 262), refers to express advocacy as defined in *Buckley*. *See MCFL*, 479 U.S. at 249.

A word of caution: In assessing independent expenditures, one looks to express advocacy as defined in *Buckley*, 424 U.S. at 44 & n.52, 80, not the "functional equivalent" of express advocacy. Speech that is the "functional equivalent" of express advocacy is speech that passes the appeal-to-vote test, *WRTL II*, 551 U.S. at 469-70, which applied *only* to electioneering communications as defined in FECA, *id.* at 474 n.7, which by definition are not express advocacy.

By definition, express advocacy and electioneering communications as defined in FECA are mutually exclusive. They do not overlap. Indeed, they *cannot* overlap. *Buckley* limits the FECA expenditure and independent-expenditure definitions to express advocacy – with express advocacy being a subset of "expenditure" and "independent expenditure." 424 U.S. at 44 & n.52, 80. And under FECA, neither expenditures nor independent expenditures are electioneering communications. 2 U.S.C. § 434.f.3.B.ii; *see NCRL III*, 525 F.3d at 282 (stating that electioneering communications are "beyond" express advocacy); *see also McConnell*, 540 U.S. at 189 (stating that the electioneering-communication definition is not limited to express advocacy).

Section 1.91 defines entities as organizations, and thereby imposes full-fledged political-committee-like burdens on them, regardless of whether they are under the control of, or have the major purpose of nominating or electing, a candidate or candidates for state or local office in Wisconsin.³⁴

In fact, an entity can be a Wisconsin organization by spending less – far less – than half its money on contributions to or independent expenditures for candidates for state or local office in Wisconsin. An entity, no matter how large its budget, becomes an organization by receiving contributions for, incurring obligations for, or making, disbursements exceeding \$25 in a calendar year. GAB § 1.91.1.h. This is an insubstantial amount. *See Buckley*, 424 U.S. at 79 & n.105

³⁴ For less-restrictive means than defining entities as political committees, see *infra* Part F. Contrary to a district court’s denial of a temporary restraining order, there is nothing “pernicious” here. *National Org. for Marriage v. McKee*, 666 F. Supp.2d 193, 210 n.96 (D. Me. 2009). Although the major-purpose test may allow an entity that is active in many jurisdictions not to be a political committee in any jurisdiction, *see id.*, this follows from the twin principles that (1) each jurisdiction may regulate its own elections and (2) an entity may have only one major purpose. *See supra* Parts C, F. Besides, the fact that it is unconstitutional to define an entity as a political committee does not mean it is unconstitutional to regulate any political speech the entity does. *See infra* Part F. Moreover, the Constitution does not limit such regulation to “one-time reporting.” 666 F. Supp.2d at 208. Reporting may occur during reporting periods when regulable political speech occurs, however many times that is. One difference between such reporting and full-fledged political-committee reporting is that the former occurs when regulable speech occurs, while the latter occurs during all reporting periods. *Compare* 2 U.S.C. § 434.c.1-2, 434.g (2002) (independent-expenditure reports) *and id.* § 434.f.1 (electioneering-communications reports) *with id.* § 434.a.2-4 (political-committee reports); 11 C.F.R. § 109.10.b (2003). Another difference is what government may require reports include. *Compare* 2 U.S.C. § 434.c.1-2, 434.g *and id.* § 434.f.2 *with id.* § 434.a, b, e. And that is just reporting requirements. *See, e.g., id.* §§ 432 (2004), 433 (1980).

(applying the “under the control of a candidate” and major-purpose tests to a political-committee definition with a \$1000 threshold); *NMYO*, 611 F.3d at 678-79 (striking down a \$500 threshold); *CRLC*, 498 F.3d at 1154 (striking down Colorado’s major-purpose test as applied to CRLC’s speech, because \$200 was insubstantial compared to CRLC’s overall budget (quoting and affirming *Colorado Right to Life Committee, Inc. v. Davidson*, 395 F. Supp.2d 1001, 1021 (D. Colo. 2005))); *Volle v. Webster*, 69 F. Supp.2d 171, 174-77 (D. Me. 1999) (striking down a \$50 threshold as applied to the speech of an individual and his business).

Therefore, Wisconsin’s organization definition is unconstitutionally overbroad.³⁵

³⁵ Whether the organization *disclosure requirements* are unconstitutional is another matter.

It is true that *SpeechNow.org v. FEC* – which is confusing, *see infra* Part G – considers political-committee disclosure requirements. 599 F.3d 686, 696-98 (D.C. Cir.) (*en banc*), *cert. denied*, 562 U.S. ____, 131 S.Ct. 553 (2010). However, under current Supreme Court case law, *see MCFL*, 479 U.S. at 262, *quoted in CRLC*, 498 F.3d at 1152, the political-committee definition *is* constitutional as applied to SpeechNow’s speech, because SpeechNow *passes* the major-purpose test: It *has* the major purpose of nominating or electing candidates in the jurisdiction in question. *See SpeechNow*, No. 1:08-cv-00248, COMPL. ¶¶ 7, 47 (D.D.C. Feb. 14, 2008), *available at* http://www.fec.gov/law/litigation/spechnow_complaint.pdf. Thus, *SpeechNow* properly reaches the political-committee disclosure requirements.

McKee misses this point. *See* 723 F. Supp.2d at 263.

A subsequent Tenth Circuit panel correctly considers political-committee disclosure requirements when the plaintiffs challenge *only* political-committee disclosure requirements, not a political-committee definition. *See Sampson v. Buescher*, 625 F.3d 1247, 1253, 1255 (10th Cir. 2010).

If Wisconsin wanted to regulate, for example, spending for political speech by persons it may *not* define as political committees under *Buckley*, 424 U.S. at 74-79, then it could, subject to further inquiry, *see, e.g., Citizens United*, 130 S.Ct. at 915-16 (giving an example of when disclosure is unconstitutional), use the less-restrictive means, *id.* at 915 (citing *MCFL*, 479 U.S. at 262), of requiring burdensome yet non-“onerous” disclosure, *id.* at 898; *WRTL II*, 551 U.S. at 477 n.9 (citing *MCFL*, 479 U.S. at 253-55), of (1) express advocacy as defined in *Buckley*, 424 U.S. at 44 & n.52, 80, *i.e.*, independent expenditures as defined in *Buckley*, *id.* at 39-51, 74-81, *vis-à-vis* state or local office in Wisconsin or (2) electioneering communications as defined in FECA having a clearly identified candidate for state or local office in Wisconsin. *See Citizens United*, 130 S.Ct. at 914-16 (electioneering communications as defined in FECA); *MCFL*, 479 U.S. at 262 (express advocacy (citing 2 U.S.C. § 434.c)); *Buckley*, 424 U.S. at 80-81 (express advocacy).³⁶ Wisconsin does not *have to* do this though. No jurisdiction *has to* regulate absolutely, positively everything that it may regulate. But whatever course Wisconsin chooses, it may impose political-committee burdens *only* on entities it may define as full-fledged political committees – or, here, organizations.

G. Overbreadth: The Organization Disclosure Requirements

Full-fledged political-committee *disclosure requirements* apply only if the *definition* through which the jurisdiction imposes political-committee burdens is

³⁶ Government must base disclosure on the nature of the speech, not the nature of the speaker. *See NCRL III*, 525 F.3d at 290.

constitutional in the first place. So when the definition is unconstitutional – as Wisconsin’s organization definition is – the requirements are unnecessary to consider in concluding that Section 1.91 as whole is unconstitutionally overbroad.³⁷

³⁷ Moreover, government may impose greater disclosure burdens on entities it may define as political committees under *Buckley*, 424 U.S. at 74-79, than it may impose on other entities. *Supra* Part F.

Therefore, it would be incorrect to lump full-fledged political-committee disclosure requirements and other disclosure requirements into one overbreadth analysis. It is possible, for example, for it to be unconstitutional to (1) define an entity as a full-fledged political committee even when it is constitutional to (2) regulate the entity’s speech by less-restrictive means. *See, e.g., Citizens United*, 130 S.Ct. at 897-98, 914-16 (noting the burdens of being a full-fledged political committee, and later upholding disclosure requirements for electioneering communications as defined in FECA by an entity that is *not* a political committee); *MCFL*, 479 U.S. at 254-55, 262 (noting the burdens of being a full-fledged political committee, and later upholding reporting requirements for express advocacy as defined in *Buckley* by an entity that is *not* a political committee); *Buckley*, 424 U.S. at 74-81 (establishing the tests for when government may define entities as full-fledged political committees and later upholding reporting requirements for express advocacy as defined in *Buckley* by persons government may *not* define as political committees).

Not distinguishing (1) from (2) is among a *pre-Citizens United* Ninth Circuit panel’s mistakes in *Alaska Right to Life Committee v. Miles*, 441 F.3d 773, 786-94 (9th Cir.) (“*ARLC*”), *cert. denied*, 549 U.S. 886 (2006). By not following the major-purpose test, *see id.*, *ARLC* contradicts Ninth Circuit precedent that does follow the test, *see CPLC I*, 328 F.3d at 1101 n.16 (quoting *MCFL*, 479 U.S. at 252-53), albeit without “precision[.]” *Supra* Part F.

ARLC even holds full-fledged political-committee disclosure is not “onerous[.]” because Alaska law has no limits on contributions received, has no political-committee spending limits, does not have reporting requirements limiting political committees’ fundraising ability, and does not require “structural changes” in entities. 441 F.3d at 791. However, this contradicts *MCFL*, 479 U.S. at 254-55. *Supra* Part F. And Supreme Court decisions since *ARLC* hold political-committee status is not only “burdensome[.]” *Citizens United*, 130 S.Ct. at 897, but also “onerous[.]” *id.* at 898; *WRTL II*, 551 U.S. at 477 n.9 (citing *MCFL*, 479 U.S. at 253-55), even when it requires “only” – so to speak – (1) registration, including treasurer

designation, (2) recordkeeping, or (3) extensive reporting. See *Citizens United*, 130 S.Ct. at 897-98.

Furthering the *ARLC* confusion *pre-Citizens United*, another Ninth Circuit panel – while rejecting full-fledged political-committee burdens, *California Pro-Life Council v. Randolph*, 507 F.3d 1172, 1187-89 (9th Cir. 2007) (“*CPLC II*”) – says government may impose disclosure requirements “irrespective of the major purpose of an organization[.]” *Id.* at 1180 n.11 (citing *ARLC*, 441 F.3d at 786). This is incomplete and misleading. Government may impose “onerous” political-committee disclosure requirements under particular circumstances; government may impose other disclosure requirements under other particular circumstances. The two analyses differ.

Even if *ARLC* and *CPLC II* were good law before *Citizens United*, they do not survive *Citizens United*, especially in combination with *WRTL II* and *MCFL*.

Although a *post-Citizens United* Ninth Circuit panel does not lump political-committee disclosure requirements and other disclosure requirements into one overbreadth analysis, see *HLW*, 624 F.3d at 1011-12, 1016-18, it incorrectly addresses a political-committee definition and political-committee disclosure requirements together. It also stretches the major-purpose test beyond what the Supreme Court and other circuits have established. See *id.* at 1011-12. It similarly goes beyond what the Supreme Court and other circuits have established in allowing government to regulate speech by entities that government may *not* define as political committees under *Buckley*. Compare *id.* at 1016-18 with *infra* Part F.

The District of Columbia Circuit’s *SpeechNow.org* opinion, 599 F.3d at 697-98, also contradicts *MCFL*, *WRTL II*, and *Citizens United*.

Although *SpeechNow* does not lump full-fledged political-committee disclosure requirements and other disclosure requirements into one overbreadth analysis, *SpeechNow* can still be confusing, because it addresses both kinds of disclosure simultaneously. See *id.* at 696-97. It can also be confusing, because it addresses the political-committee definition *after, not before*, addressing political-committee disclosure requirements. See *id.* at 697-98. These may mislead the reader into either lumping the two types of disclosure into one overbreadth analysis or considering a political-committee definition and political-committee disclosure requirements in the wrong order.

Apart from that, *SpeechNow* in effect upholds the political-committee definition as applied to *SpeechNow*’s speech by saying that defining an entity as a political committee is not that much more burdensome than just requiring reporting of

In fact, Wisconsin law is like state law that the Tenth Circuit has struck down: It unconstitutionally imposes full-fledged political-committee burdens. It has no less-restrictive means. Further consideration is unnecessary to determine that Section 1.91 as whole is unconstitutionally overbroad. See *NMYO*, 611 F.3d at 676-79 (considering only political-committee status and not going further, as the district court had).

Nevertheless, some aspects of the Section 1.91 disclosure requirements are unconstitutionally overbroad even for entities that Wisconsin may define as political committees – or, here, organizations.

First, the requirement to file an oath for independent disbursements, GAB § 1.91.7, is unconstitutional, because the government's interest does not reflect the burden on the speech under *Davis v. FEC*, 554 U.S. 724, 744 (2008) (citing *Buckley*, 424 U.S. at 68). Although the GAB calls this a “voluntary” oath, GAB 1.42.1-4 (1994), the law requires filing an oath that independent disbursements are independent when the organization desires to make independent disbursements exceeding \$25 in a calendar year. The organization must (1) file the oath with its

independent expenditures properly understood. *Id.* This is incorrect as a matter of statutory law. Compare 2 U.S.C. §§ 432, 433, 434 with *id.* § 434.c, g; see also *SpeechNow*, 599 F.3d at 691-92 (listing political-committee burdens). It is also incorrect as a matter of constitutional law. In this respect, *SpeechNow* – like *ARLC* and *CPLC II* – contradicts *MCFL*, 479 U.S. at 254-55. *Supra* Part F. It also contradicts Supreme Court decisions holding political-committee status is not only “burdensome[.]” *Citizens United*, 130 S.Ct. at 897, but also “onerous[.]” *id.* at 898; *WRTL II*, 551 U.S. at 477 n.9 (citing *MCFL*, 479 U.S. at 253-55), even when it requires “only” (1) registration, including treasurer designation, (2) recordkeeping, or (3) extensive reporting. See *Citizens United*, 130 S.Ct. at 897-98.

registration statement before making any disbursement, (2) refile the oath for each calendar year by January 31, WIS. STAT. § 11.06.7.a, b, which may well be long before an organization does its speech – and is often long before an organization even plans its speech – and then (3) amend “the oath whenever there is a change in the candidate or candidates to whom it applies.” *Id.* § 11.06.7.b. In other words, organizations must guess at the beginning of the year which candidates they will mention in what Wisconsin calls “independent disbursements,” and then continually update their guess whenever their plans change. This oath requirement is especially burdensome, given how quickly and frequently political-speech plans arise and change. *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring). The burden is especially great on small organizations. *Cf. WRTL II*, 551 U.S. at 477 n.9 (referring to political-committee burdens on small nonprofit corporations (citing *MCFL*, 479 U.S. at 253-55)).

Second, Section 1.91.8 requires organizations to comply with, *inter alia*, political-committee reporting thresholds in WIS. STAT. § 11.06.1.a, b, d, g, h. The reporting thresholds are either \$20, *id.* § 11.06.1.a, d, g, h, or \$100. *Id.* § 11.06.1.b.

Having to:

- Report contributors’ names and addresses for all contributions exceeding \$20. *Id.* § a.
- Report contributors’ occupations and employers for all contributions exceeding \$100 in a calendar year. *Id.* § b.
- Itemize other income exceeding \$20. *Id.* § d.

- Itemize disbursements exceeding \$20 with the names and addresses of persons receiving disbursements, plus the date and purpose of the disbursements. *Id.* § g, and
- Itemize obligations exceeding \$20 and give the names and addresses of persons or business where WRTL-SPAC incurred the obligations, plus the date and purpose of the obligations, *id.* § h,

is a severe burden, especially on small organizations. See *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1033 (9th Cir. 2009) (referring *pre-Citizens United* to tailoring); *id.* at 1036 (Noonan, J., concurring) (“How do the names of small contributors affect anyone else’s vote? Does any voter exclaim, ‘Hank Jones gave \$76 to this cause. I must be against it!’”). The “value of this financial information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level.” *Id.* at 1033 (controlling opinion) (emphasis omitted).

This is especially so since Wisconsin does not index its \$20 or \$100 reporting thresholds for inflation, which means their real value declines every year. See *Randall v. Sorrell*, 548 U.S. 230, 261 (2006).

H. Amending Section 1.91

Wisconsin can amend Section 1.91 to make it constitutional.

On the one hand, if Wisconsin wants to continue to impose full-fledged political-committee-like burdens on organizations, then Wisconsin should use non-vague language and limit its organization definition to entities that are under the

control of, or have the major purpose of nominating or electing, candidates for state or local office in Wisconsin, with "the major purpose" defined as noted above.³⁸

On the other hand, if Wisconsin wants to regulate speech by organizations it may *not* define as political committees – or, here, organizations – then it should use non-vague language, drop the full-fledged political-committee burdens,³⁹ and regulate only the spending for political speech that Supreme Court case law has established Wisconsin may, subject to further inquiry, regulate *via* less restrictive, non-onerous means: (1) Express advocacy as defined in *Buckley*, *i.e.*, independent expenditures as defined in *Buckley*, *vis-à-vis* state or local office in Wisconsin, or (2) electioneering communications as defined in FECA having a clearly identified candidate for state or local office in Wisconsin, *see, e.g.*, 2 U.S.C. § 434.c, g; *id.* § 434.f,⁴⁰ without requiring reports within 24 hours of speech or contracts to engage in speech. *See Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174, 1197 (10th Cir. 2000) (striking down a 24 hour reporting requirement).⁴¹

³⁸ *Supra* Part F.

³⁹ *Supra* Part A.

⁴⁰ *Supra* Part F.

⁴¹ *North Carolina Right to Life Comm. Fund for Indep. Political Expenditures v. Leake* rejects a challenge to a 24 hour reporting requirement by saying *McConnell* upholds one. 524 F.3d 427, 439 (4th Cir.) ("*NCRL-FIPE*") (citing *McConnell*, 540 U.S. at 195-96), *cert. denied*, ___ U.S. ___, 129 S.Ct. 490 (2008). However, the *McConnell* plaintiffs did not challenge 24 hour reporting. While they challenged a law with 24 hour reporting, they challenged it for other reasons. *See* 540 U.S. at 195. Thus, *McConnell* does not apply, and *NCRL-FIPE* is incorrect.

In either event, Wisconsin should drop the Section 1.91.7 requirement to file oaths for independent disbursements, set Section 1.91.8⁴² reporting thresholds at constitutional levels, and automatically adjust them for inflation. Reporting thresholds should not be so low that even the smallest donors run the risk of "threats, harassments, or reprisals if their names were disclosed." *Citizens United*, 130 S.Ct. at 916 (citing *McConnell*, 540 U.S. at 198). Nor should reporting thresholds be so low that even the least expensive political speech cannot be anonymous for those speakers that – unlike WRTL – wish to engage in anonymous speech. *Cf. McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 355 (1995).

Reporting thresholds from law addressed or challenged in previous Supreme Court opinions might provide guidance for what might be constitutional now, when the previous thresholds are adjusted for inflation. *See Randall*, 548 U.S. at 261. For example:

- As for the threshold for defining an entity as a political committee, *Buckley* addresses a law with a \$1000 threshold without addressing the constitutionality of the threshold itself. *See* 424 U.S. at 62, 82-83. Adjusted for inflation since 1976, this threshold is \$3889.44 in 2011.⁴³

- As for entities that it is constitutional for government to define as political committees under *Buckley*, 424 U.S. at 74-79, *Buckley* approves a \$100 reporting

⁴² The constitutional law that applies to Section 1.91.7 and 1.91.8 has implications for Wisconsin law beyond Section 1.91, yet Section 1.91 is what at issue here.

⁴³ *See* http://www.bls.gov/data/inflation_calculator.htm.

threshold for contributions that political committees receive. *Id.* at 82-83. *Buckley* also addresses a law with a \$100 reporting threshold for political-committee spending without addressing the constitutionality of the threshold itself. *See id.* at 82-83, 158. Adjusted for inflation since 1976, these thresholds are \$388.94 in 2011.

- As for independent expenditures properly understood, *see id.* at 39-51, 74-81; *McConnell*, 540 U.S. at 219-23; *Brownsburg*, 137 F.3d at 505,⁴⁴ *Buckley* approves a \$100 reporting threshold. 424 U.S. at 74-76. Again, adjusted for inflation since 1976, this is \$388.94 in 2011.

- As for electioneering communications as defined in FECA, *McConnell* approves an aggregate \$10,000 reporting threshold for spending for such electioneering communications, and a \$1000 reporting threshold for contributions to persons making such electioneering communications. 540 U.S. at 194-202. Adjusted for inflation since 2003, these are \$11,968.64 and \$1,196.86, respectively, in 2011.

WRTL appreciates the opportunity to testify today and remains available to consider providing whatever further assistance the Election and Campaign Reform Committee may feel it needs.

Thank you for your consideration.

⁴⁴ *Supra* Part F.



State of Wisconsin
2011 - 2012 LEGISLATURE



LRB-2254/1
JTK:nwn:rs

2011 ASSEMBLY BILL 196

June 28, 2011 - Introduced by JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES. Referred to Committee on Election and Campaign Reform.

- 1 AN ACT *to amend* 5.05 (1) (f); and *to create* 11.211 of the statutes; relating to:
2 prohibiting the promulgation of certain rules concerning campaign financing
3 by the Government Accountability Board.

Analysis by the Legislative Reference Bureau

Currently, under the campaign finance law, with limited exceptions, an individual who or committee that makes disbursements (expenditures for political purposes) must register with the appropriate filing officer or agency. With limited exceptions, a registrant is required to file regular and special reports containing specified information pertaining to financial activity. The law also regulates the extent to which corporations and cooperatives, including unincorporated cooperative associations, may make disbursements.

Currently, the Government Accountability Board (GAB) may promulgate rules interpreting or implementing specific statutes regulating the conduct of elections or election campaigns or ensuring the proper administration of these statutes. This bill prohibits GAB from promulgating any rule: 1) affecting the authority of a corporation or cooperative, whether or not incorporated, to make any disbursement independently of a candidate who is supported or opposed or any agent or authorized committee of such a candidate; or 2) imposing any registration, reporting, filing, accounting, treasury, or fee payment requirement or any attribution requirement in making communications upon any person, including any organization, apart from the requirements imposed under the campaign finance law.



State of Wisconsin
2011 - 2012 LEGISLATURE



LRB-2253/1
JTK:nwn:rs

2011 SENATE BILL 139

June 30, 2011 - Introduced by JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES. Referred to Committee on Transportation and Elections.

- 1 AN ACT *to amend* 5.05 (1) (f); and *to create* 11.211 of the statutes; relating to:
2 prohibiting the promulgation of certain rules concerning campaign financing
3 by the Government Accountability Board.

Analysis by the Legislative Reference Bureau

Currently, under the campaign finance law, with limited exceptions, an individual who or committee that makes disbursements (expenditures for political purposes) must register with the appropriate filing officer or agency. With limited exceptions, a registrant is required to file regular and special reports containing specified information pertaining to financial activity. The law also regulates the extent to which corporations and cooperatives, including unincorporated cooperative associations, may make disbursements.

Currently, the Government Accountability Board (GAB) may promulgate rules interpreting or implementing specific statutes regulating the conduct of elections or election campaigns or ensuring the proper administration of these statutes. This bill prohibits GAB from promulgating any rule: 1) affecting the authority of a corporation or cooperative, whether or not incorporated, to make any disbursement independently of a candidate who is supported or opposed or any agent or authorized committee of such a candidate; or 2) imposing any registration, reporting, filing, accounting, treasury, or fee payment requirement or any attribution requirement in making communications upon any person, including any organization, apart from the requirements imposed under the campaign finance law.

SENATE BILL 139

This bill is introduced as required by s. 227.19 (5) (e), stats. in support of the objection of the Joint Committee for the Review of Administrative Rules to the promulgation of rules under proposed Clearinghouse Rule CR 10-087 by GAB.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 5.05 (1) (f) of the statutes is amended to read:

2 5.05 (1) (f) ~~Promulgate~~ Subject to s. 11.211, promulgate rules under ch. 227
3 applicable to all jurisdictions for the purpose of interpreting or implementing the
4 laws regulating the conduct of elections or election campaigns or ensuring their
5 proper administration.

6 **SECTION 2.** 11.211 of the statutes is created to read:

7 **11.211 Certain rule making prohibited.** The board shall not promulgate
8 any rule:

9 **(1)** Affecting the authority of a foreign or domestic corporation or association
10 organized under ch. 185 or 193 to make any disbursement independently of a
11 candidate who is supported or opposed or any agent or authorized committee of such
12 a candidate.

13 **(2)** Imposing upon any person, including any organization, any registration,
14 reporting, filing, accounting, treasury, or fee payment requirements or any
15 attribution requirements in making communications, apart from the requirements
16 imposed under this chapter.

17

(END)



JOINT COMMITTEE FOR THE REVIEW OF ADMINISTRATIVE RULES

COMMITTEE CO-CHAIRS: SENATOR LEAH VUKMIR AND REPRESENTATIVE JIM OTT

Clearinghouse Rule 10-087

**Report to the Legislature
Clearinghouse Rule 10-087
The Joint Committee for Review of Administrative Rules**
Produced pursuant to 227.26(2)(g), Stats.

Clearinghouse Rule 10-087, promulgated by the Government Accountability Board (GAB), creates rules for organizations making independent disbursements.

Description of Problem

At the request of Representative Jim Ott, the Joint Committee for Review of Administrative Rules (JCRAR) held a public hearing on Clearinghouse 10-087 relating to independent disbursements on April 27, 2011. On January 21, 2010, the US Supreme Court ruled in *Citizens United v. FEC* that organizations including corporations were allowed to engage in independent expenditures, but allowed states to have disclosure and disclaimer requirements. The GAB prepared Clearinghouse Rule 10-087 to address the implications of the Citizens United court case.

Arguments in Favor of Suspension

- *There are two issues that are being dealt with by this rule. The first is placing proper registration requirements on corporations which were not questioned during the public hearing or executive session. The other is the expansion of the term organization to include any individual. Under this rule, any person spending more than \$25 for a political purpose would have to register with the GAB at a cost of \$100. This requirement would have grave first amendment ramifications.*
- *A person that makes a handful of buttons or a couple signs should not be treated the same as a political action committee spending millions of dollars to sway an election.*
- *The Citizens United case did not authorize the government to place registration burdens on all individuals as the GAB rule attempts.*
- *Questions were raised as to the authority of the GAB to issue this rule without an action of the legislature.*

Arguments Against Suspension

- *Under the Citizens United case, the state is authorized to regulate independent expenditures for corporations and that is what this rule is trying to accomplish. Suspending the rule would restrict the GAB's ability to register corporate election activities.*
- *Without the promulgation of this rule, Wisconsin statutes would require that any corporation wishing to make an independent disbursement would have to first establish a committee which is in direct conflict with the Citizens United case.*
- *The general public has a right to know of anyone that is making an independent disbursement of \$25 or more.*

Action by Joint Committee for Review of Administrative Rules

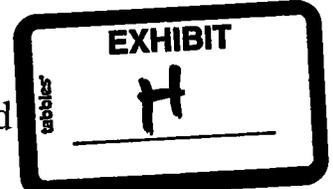
On June 2, 2011, the Joint Committee for Review of Administrative Rules held an executive session on Clearinghouse Rule 10-087. The committee passed the following motion on a 6-4 vote (YES: Vukmir, Ott, Leibham, Grothman, LeMahieu, Meyer; NO: Taylor, Risser, Hebl, Kessler):

"That the Joint Committee for Review of Administrative Rules objects to Clearinghouse Rule 10-087, pursuant to s. 227.19 (5) (d), Stats., on the grounds that the proposed rule imposes an undue hardship as stated in s. 227.19 (4) (d) 6., Stats."

On June 23, 2011, the Joint Committee for Review of Administrative Rules voted 6-4 (YES: Vukmir, Ott, Leibham, Grothman, LeMahieu, Meyer; NO: Hebl, Taylor, Risser, Kessler) to introduce LRB 2253 and LRB 2254, which limits the GAB's ability to regulate registration, reporting, filing or accounting activities of a corporation or individual that is independent of a candidate. The bills were introduced as Senate Bill 139 and Assembly Bill 196.

Passage of one of the bills in support of the JCRAR suspension would remove the GAB's ability to regulate independent expenditures of corporations and individuals.

State of Wisconsin\Government Accountability Board



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JUDGE THOMAS H. BARLAND
Chair

KEVIN J. KENNEDY
Director and General Counsel

June 1, 2011

Members, Joint Committee for the Review
of Administrative Rules
State Capitol
Madison, WI
By Hand

Dear Senators and Representatives:

I am writing to address what I perceive as some misconceptions about proposed GAB 1.91 which the Board is seeking to promulgate as a permanent rule (Clearinghouse Rule 10-087). By long-standing statute, corporations have been prohibited from making political contributions or independent expenditures in campaigns. In the *Citizens United* case, the United States Supreme Court ruled that corporations could not be prohibited from making independent expenditures but could be subject to disclosure requirements.

Under current Wisconsin statutes, a corporation making an independent expenditure is subject, by operation of law, to all the registration and reporting requirements that the statutes impose on all political committees. This is because a corporation making an independent expenditure meets the definition of such a committee. As Attorney General Van Hollen has said:

"Committees" or "political committees" are defined to include "any person other than an individual and any combination of 2 or more persons, permanent or temporary, which makes or accepts contributions or makes disbursements, whether or not engaged in activities which are exclusively political, except that a 'committee' does not include a political 'group ...'" Wis. Stat. § 11.01(4). Absent an indication of contrary legislative intent, the word "person," as used in Wisconsin law, "includes all partnerships, associations and bodies political or corporate." Wis. Stat. § 990.01(26). A corporation is, therefore, a "person" within the meaning of Wis. Stat. § 11.12(1)(a). Because a corporation is a person by virtue of Wis. Stat. § 990.01(26), it also, therefore, meets the statutory definition of a committee. Thus, it is my opinion that Wis. Stat. § 11.12(1)(a) applies to corporations.

* * *

The registration requirements in Wis. Stat. § 11.05(1) expressly apply, among other things, to "every committee other than a personal campaign committee which ... makes disbursements in a calendar year in an aggregate amount in excess of \$25 ...". Other provisions in Wis. Stat. ch. 11 provide how registration is to occur and what must be reported. Likewise, the filing requirements in Wis. Stat. § 11.06(7) expressly apply, among other things, to "[e]very committee, other than a personal campaign committee, which ... desires to make disbursements during any calendar year, which are to be used to advocate the election or defeat of any clearly

#2

identified candidate or candidates in any election" Because, as already discussed, a corporation is within the statutory definition of a committee, it follows that, like other committees, corporations may register and file under Wis. Stat. §§ 11.05 and 11.06(7)

OAG-05-10.

The purpose of GAB 1.91 is basically to exempt corporations from reporting requirements that appear overbroad in the case of corporations. The rule does not impose any requirement that the statutes do not already impose. The rule requires a corporation only to disclose transfers from its corporate treasury and contributions to the corporation made for a political purpose that it uses for independent expenditures. Without the rule, a corporation would have to disclose all the sources of its income including its customers (if it is a for-profit corporation) and its paid membership list (if it is a not-for-profit). It requires establishment of a separate checking account to make clear which corporate funds are being used for a political purpose so that, if an audit is required, the GAB will not have to audit the entire books of a corporation. For these reasons, we respectfully ask that the Committee endorse GAB 1.91.

Sincerely,

Kevin J. Kennedy
Director and General Counsel

State of Wisconsin Government Accountability Board

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JUDGE THOMAS H. BARLAND
Chair

KEVIN J. KENNEDY
Director and General Counsel



July 12, 2011

Members, Assembly Committee on Elections and Campaign Finance Reform
State Capitol
Madison, WI
By Hand

Dear Representatives:

I am writing to address 2011 Assembly Bill 196 that has been referred to your committee. This bill was introduced by the Joint Committee on the Review of Administrative Rules in response to proposed GAB 1.91 (Clearinghouse Rule 10-087). I believe there are a number of misconceptions about the intent and effect of that rule.

Assembly Bill 196 would restrict the Government Accountability Board (G.A.B.) from promulgating any rule: 1) affecting the authority of a corporation or cooperative, whether or not incorporated, to make any disbursement independently of a candidate who is supported or opposed or any agent or authorized committee of such a candidate; or 2) imposing any registration, reporting, filing, accounting, treasury, or fee payment requirement or any attribution requirement in making communications upon any person, including any organization, apart from the requirements imposed under the campaign finance law. The proposed rule did neither.

By long-standing statute, corporations have been prohibited from making political contributions or independent expenditures in campaigns. In the *Citizens United* case, the United States Supreme Court ruled that corporations could not be prohibited from making independent expenditures but could be subject to disclosure requirements. The rule does not affect this new ability in the least. The Court upheld imposing reporting requirements on corporations making independent expenditures in the same case.

But, under current Wisconsin statutes, a corporation making an independent expenditure is subject, by operation of law, to all the registration and reporting requirements that the statutes impose on all political committees. This is because a corporation making an independent expenditure meets the definition of such a committee. As Attorney General Van Hollen advised in a formal opinion to the G.A.B.:

"Committees" or "political committees" are defined to include "any person other than an individual and any combination of 2 or more persons, permanent or temporary, which makes or accepts contributions or makes disbursements, whether or not engaged in activities which are exclusively political, except that a 'committee' does not include a political group" Wis. Stat. § 11.01(4). Absent an indication of contrary legislative intent, the word "person," as used in Wisconsin law, "includes all partnerships, associations and bodies politic or corporate." Wis. Stat. §

990.01(26). A corporation is, therefore, a "person" within the meaning of Wis. Stat. § 11.12(1)(a). Because a corporation is a person by virtue of Wis. Stat. § 990.01(26), it also, therefore, meets the statutory definition of a committee. Thus, it is my opinion that Wis. Stat. § 11.12(1)(a) applies to corporations.

* * *

The registration requirements in Wis. Stat. § 11.05(1) expressly apply, among other things, to "every committee other than a personal campaign committee which ... makes disbursements in a calendar year in an aggregate amount in excess of \$25" Other provisions in Wis. Stat. ch. 11 provide how registration is to occur and what must be reported. Likewise, the filing requirements in Wis. Stat. § 11.06(7) expressly apply, among other things, to "[e]very committee, other than a personal campaign committee, which ... desires to make disbursements during any calendar year, which are to be used to advocate the election or defeat of any clearly identified candidate or candidates in any election" Because, as already discussed, a corporation is within the statutory definition of a committee, it follows that, like other committees, corporations may register and file under Wis. Stat. §§ 11.05 and 11.06(7).

OAG-05-10.

The proposed rule does not impose any reporting requirements not imposed by statute. To the contrary, the purpose of GAB 1.91 is basically to *exempt* corporations from reporting requirements that appear overbroad in the case of corporations. The rule does not impose any requirement that the statutes do not already impose. The rule requires a corporation only to disclose transfers from its corporate treasury and contributions to the corporation made for a political purpose that it uses for independent expenditures, along with reporting the actual independent expenditures themselves. Absent the proposed rule, and based on the Attorney General's opinion, the statutes would require a corporation to disclose all the sources of its income including its customers (if it is a for-profit corporation) and its paid membership list (if it is a not-for-profit). The rule only requires establishment of a separate checking account to make clear which corporate funds are being used for a political purpose so that, if an audit is required, the GAB will not have to audit the entire books of a corporation.

For these reasons, we respectfully ask that the Committee examine more closely the need to recommend passage of Assembly Bill 196 and its real effect on the proposed rule. We encourage the Committee to consider modifying the legislation to track proposed GAB 1.91. This would exempt corporations from onerous reporting requirements under current law, while promoting the disclosure championed in *Citizens United* and current Wisconsin statutes.

Sincerely,

Kevin J. Kennedy
Director and General Counsel



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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GOVERNMENT
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J.B. VAN HOLLEN
ATTORNEY GENERAL

Raymond P. Taffora
Deputy Attorney General

August 9, 2010

OAG—05—10

Mr. Kevin J. Kennedy
Director and General Counsel
Government Accountability Board
212 East Washington Avenue, 3rd Fl.
Madison, WI 53703

Dear Mr. Kennedy:

Questions Presented

¶1. In light of the recent United States Supreme Court decision in *Citizens United v. FEC*, ___ U.S. ___, 130 S. Ct. 876 (2010), and on behalf of the Government Accountability Board, you have requested my opinion concerning the enforceability of Wis. Stat. ch. 11 generally, and the constitutionality of Wis. Stat. § 11.38(1)(a)1., specifically. In *Citizens United*, the United States Supreme Court invalidated a federal ban on corporate independent expenditures under the First Amendment to the United States Constitution.

Short Answer

¶2. Having carefully reviewed the *Citizens United* decision and having compared the federal statute at issue in that case with Wis. Stat. § 11.38(1)(a)1., it is my opinion that the reasoning and conclusion of *Citizens United* are clearly applicable and that any ban on corporate independent expenditures under Wisconsin law violates the guarantees of freedom of speech and association under the First Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment. The *Citizens United* decision, however, does not appear to have any direct and immediate impact on the validity of those portions of Wis. Stat. § 11.38 which do not involve corporate independent expenditures. In addition, I conclude that no other statutory provision bars corporate independent expenditures because corporations are not prevented by statute from registering and reporting information required by Wis. Stat. ch. 11. Finally, I conclude *Citizens United* does not directly invalidate Wisconsin's registration, reporting, and disclaimer requirements.

The Role Of Attorney General Opinions In Addressing Constitutional Issues

¶3. In 65 Op. Att'y Gen. 145 (1976), this office was asked to determine the extent to which provisions of Wis. Stat. ch. 11 had been invalidated by *Buckley v. Valeo*, 424 U.S. 1 (1976), in which the U.S. Supreme Court had held that certain provisions of the Federal Election

Campaign Act were unconstitutional. My predecessor concluded that, although most of Wis. Stat. ch. 11 was unaffected, some portions of that chapter—in particular, the limits on candidate expenditures—were unconstitutional under the *Buckley* decision, while other provisions required a narrow interpretation in order to avoid unconstitutionality. 65 Op. Att’y Gen. at 146.

¶4. In issuing that 1976 opinion, this office considered the alternative of awaiting (or even commencing) court litigation to specifically test the constitutionality of the various provisions in Wis. Stat. ch. 11 that had been thrown into doubt by *Buckley*. My predecessor rejected that option as unduly time-consuming, costly, and burdensome—both for persons subject to the state laws in question and for those charged with enforcing those laws. *Id.* at 146-47. I agree with my predecessor that where, as here, a decision of the U.S. Supreme Court directly impacts the validity of a state law, an opinion from this office on the scope of that impact is appropriate. *See also* 67 Op. Att’y Gen. 211 (1978) (concluding Wis. Stat. § 11.38 ban on corporate spending on referendum questions is unconstitutional in light of *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)); OAG 4-07 (concluding Wis. Stat. § 118.51(7)(a) prohibition on school transfers that would increase racial imbalance is unconstitutional in light of *Parents Inv. in Comm. Sch. v. Seattle School*, 551 U.S. 701 (2007)).

¶5. In addressing the constitutional validity of the state campaign financing law in light of *Citizens United*, I apply the standard used in my predecessor’s prior opinion, which focused on whether “the reasoning and the conclusions reached” in the Supreme Court decision “are clearly applicable” to state law. 67 Op. Att’y Gen. at 214. This standard is demanding and narrow. In addition to its holding, *Citizens United* provides direction on, but ultimately leaves unanswered, significant questions regarding the appropriate scope of acceptable governmental regulation, through campaign financing regulations, of the exercise of fundamental First Amendment freedoms. It is beyond the scope of this opinion to answer each of these unanswered questions as applied to Wisconsin law. That *Citizens United* may not directly apply to portions of Wisconsin’s campaign financing law is not to say that they are free of constitutional doubt. Regulations in this area, by their nature, affect First Amendment interests. *See Buckley*, 424 U.S. at 23 (“[C]ontribution and expenditure limitations both implicate fundamental First Amendment interests”). In a free society, these interests should not be disregarded in the lawmaking and regulatory process.

The Impact of *Citizens United* on Wis. Stat. § 11.38

¶6. The *Citizens United* case involved a non-profit corporation that had produced and sought to distribute a 90-minute film about then-Senator Hillary Clinton at a time when she was a candidate in the Democratic Party’s 2008 Presidential primary elections. *Citizens United*, 130 S. Ct. at 887. A question arose as to whether the corporation’s plan to distribute the film through a video-on-demand system was prohibited by 2 U.S.C. § 441b which, among other things, made it unlawful for any corporation to make expenditures: (1) for communications expressly advocating the election or defeat of a candidate for federal office; or (2) for “electioneering communications,” 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.” *Citizens United*, 130 S. Ct. at 887 (quoting 2 U.S.C. § 434(f)(3)(A)). The corporation sought declaratory and injunctive relief against the Federal Election Commission on that question. *Id.* at 888.

¶7. If the film was not “express advocacy or its functional equivalent,” decisions prior to *Citizens United* held that 2 U.S.C. § 441b’s prohibitions on corporate speech could not be constitutionally applied. *Federal Elections Com’n v. Wisconsin Right to Life*, 551 U.S. 449, 481 (2007) (Opinion of Roberts, C.J.).¹ The *Citizens United* Court determined that the film was the functional equivalent of express advocacy and that the case, therefore, could not be resolved without examining the constitutionality of the prohibitions on corporate expenditures contained in 2 U.S.C. § 441b. *Citizens United*, 130 S. Ct. at 890-92.

¶8. The United States Supreme Court determined that the federal prohibition on corporate independent expenditures was a ban on core political speech protected by the First Amendment and, as such, subject to strict constitutional scrutiny. *Id.* at 898. The Court then considered and rejected each of the various governmental interests that had been offered in support of the ban, concluding that no sufficient interest justified the prohibition of political speech on the basis of the speaker’s corporate identity. *Id.* at 913. Accordingly the Court held that the restrictions on corporate independent expenditures in 2 U.S.C. § 441b were invalid and could not be applied to the film in question. *Citizens United*, 130 S. Ct. at 913.

¶9. You have asked what impact the *Citizens United* holding has on the validity of Wis. Stat. § 11.38(1)(a)1, which 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.

¶10. That provision, on its face, sets forth a general prohibition against any independent “disbursement” by a foreign corporation, a domestic corporation (normally organized as a business corporation under Wis. Stat. ch. 180 or as a nonstock corporation under Wis. Stat. ch. 181), or an association organized as a cooperative under Wis. Stat. ch. 185 or 193. The term “disbursement” in turn, has been given a broad statutory definition that includes:

A purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, except a loan of money by a commercial lending institution made by the institution in accordance with applicable laws and regulations in the

¹In *Wisconsin Right to Life*, it was undisputed that a corporation’s advertisements, which clearly identified a candidate and were targeted to the relevant electorate during the pertinent time period, were within the scope of a federal statutory ban on certain electioneering communications. *Wisconsin Right to Life*, 551 U.S. at 464. The controlling opinion of the Court held that the First Amendment did not allow the ads to be banned because the ads were not “express advocacy” or its functional equivalent and the government had not identified any interest sufficiently compelling to justify burdening that speech. *Wisconsin Right to Life*, 551 U.S. at 481.

ordinary course of business, made for political purposes. In this subdivision, "anything of value" means a thing of merchantable value.

Wis. Stat. § 11.01(7)(a)1. In addition, the phrase "for political purposes," is statutorily defined, in part, as follows:

An act is for "political purposes" when it is done for the purpose of influencing the election or nomination for election of any individual to state or local office, for the purpose of influencing the recall from or retention in office of an individual holding a state or local office, for the purpose of payment of expenses incurred as a result of a recount at an election, or for the purpose of influencing a particular vote at a referendum.

Wis. Stat. § 11.01(16).

¶11. Under the above definitions, it is clear that Wis. Stat. § 11.38(1)(a)1., prohibits, among other things, any monetary expenditure by a corporation that is made for the purpose of influencing the election or nomination of a candidate for state or local office.

¶12. Wisconsin's prohibition on corporate expenditures for political purposes thus appears to be closely analogous, in legally material respects, to the federal prohibition on corporate independent expenditures that was invalidated in *Citizens United*. First, the two provisions are substantively similar in the types of speech to which they apply. The Wisconsin law prohibits corporate expenditures for the purpose of influencing the election or nomination of a political candidate, while the federal law prohibited corporate expenditures for communications expressly advocating the election or defeat of a political candidate or for certain communications that refer to a clearly identified candidate and are made within specified time periods.² Any differences in the substantive scope of the two prohibitions are not of a sort that would shield the Wisconsin law from the impact of *Citizens United*.

¶13. Second, the Wisconsin and federal provisions both share the particular feature that was found to be constitutionally objectionable in *Citizens United*. The *Citizens United* Court expressly and strongly reaffirmed its holding in many earlier cases that corporate speech is protected by the First Amendment. *Citizens United*, 130 S. Ct. at 899-900. The Court derived that holding from the general principle that the First Amendment prohibits "restrictions distinguishing among different speakers, allowing speech by some but not others." *Id.* at 898. The Court was clear that government may not take the right to speak away from some speakers and give it to others, thereby depriving the public of the opportunity to determine for itself which speakers and which speech are worthy of consideration. *Id.* at 899. This principle, the Court reasoned, applies not only to individual speakers, but also to associations of individuals, including corporations. *Id.* at 899-900.

²This office has also in the past found the prohibition on corporate disbursements under Wis. Stat. § 11.38 to be similar to the prohibition on corporate expenditures under 18 U.S.C. § 610 (which was the predecessor version of 2 U.S.C. § 441b). See 65 Op. Att'y Gen. 10, 12 n.5 and 13 (1976); 65 Op. Att'y Gen. at 158.

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¶14. From these principles, the Court reached the broad conclusion that “the Government may not suppress political speech on the basis of the speaker’s corporate identity.” *Id.* at 913. What the Supreme Court found to be constitutionally objectionable in 2 U.S.C. § 441b was the fact that it purported to prohibit political speech by certain speakers based on their corporate identity. Applying the Court’s reasoning here, it is clear that Wis. Stat. § 11.38(1)(a)1., similarly prohibits political speech based on the corporate identity of the speaker. The Wisconsin prohibition is thus squarely within the scope of the holding in *Citizens United*.

¶15. This conclusion is consistent with the previous opinion of this office in 67 Op. Att’y Gen. 211. At that time, Wis. Stat. § 11.38(1)(a)1., included a prohibition on corporate spending in referendum elections. My predecessor found that prohibition to be unconstitutional under *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), in which the U.S. Supreme Court had held that a Massachusetts law limiting corporate expenditures aimed at influencing referendum votes violated the First and Fourteenth Amendments to the United States Constitution. In reaching that conclusion, my predecessor found that Wis. Stat. § 11.38 was similar to the Massachusetts law at issue in *Bellotti* which, among other things, broadly prohibited corporations from making expenditures for the purpose of promoting or preventing the election of a candidate or influencing the vote on a question submitted to the electorate. 67 Op. Att’y Gen. at 212-13. Accordingly, my predecessor concluded that the reasoning and conclusions in *Bellotti* with regard to the Massachusetts prohibition were “clearly applicable” to the comparable prohibition in Wis. Stat. § 11.38(1)(a)1.

¶16. In *Citizens United*, the United States Supreme Court extended the reasoning and conclusions of *Bellotti* to broadly invalidate prohibitions on any independent political expenditures by corporations. *See, e.g., Citizens United*, 130 S. Ct. at 898-900, 902-03, 913. It follows, under the same logic that this office applied in 67 Op. Att’y Gen. 211, that the reasoning and conclusions in *Citizens United* are likewise clearly applicable to the general prohibition on corporate independent expenditures in Wis. Stat. § 11.38(1)(a)1.

¶17. It does not follow, however, that *Citizens United* has invalidated Wis. Stat. § 11.38(1)(a)1., in its entirety. On the contrary, the federal law at issue in *Citizens United*, like the state law at issue here, included a ban on corporate political *contributions*, in addition to the ban on corporate political *expenditures*. *See* 2 U.S.C. § 441b(a). The Supreme Court, however, did not strike down, or even question, the ban to the extent it applied to direct contributions. Rather, the Court emphasized that the *Citizens United* case was about expenditures, not about contributions, and made it clear that it was not disturbing the principle, recognized in *Buckley*, that political expenditures receive greater protection under the First Amendment than do political contributions. *See Citizens United*, 130 S. Ct. at 908-10. Ultimately, the Court invalidated the prohibition on corporate independent expenditures without affecting other aspects of 2 U.S.C. § 441b. *Citizens United* thus provides no direct or immediate basis for questioning the validity of any part of Wis. Stat. § 11.38(1)(a)1., other than the corporate expenditure prohibition.

¶18. Principles of severability support the same conclusion. Under Wisconsin law, statutory provisions are presumed to be severable and, if a particular provision is found to be

invalid, "such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application." Wis. Stat. § 990.001(11). In applying that mandate, the Wisconsin Supreme Court has held that an invalid provision must be severed unless doing so "would produce a result inconsistent with the manifest intent of the legislature." *Burlington Northern v. Superior*, 131 Wis. 2d 564, 580, 388 N.W.2d 916 (1986) (quoting Wis. Stat. § 990.001). This office has, in the past, taken the position that the legislative purpose of the contribution restrictions in Wis. Stat. ch. 11 "is largely capable of being achieved by the contribution limits alone, without concurrent expenditure limits." 65 Op. Att'y Gen. 237, 241, (1976). I find no reason to depart from that view. Accordingly, it is my opinion that it would be consistent with legislative intent to invalidate Wis. Stat. § 11.38(1)(a)1. only to the extent it prohibits corporate political expenditures, without affecting the contribution restrictions also contained in that provision. Any prohibition on corporate independent expenditures is thus severable from the remainder of Wis. Stat. § 11.38(1)(a)1.

¶19. Your letter of inquiry suggests that the corporate expenditure prohibition in Wis. Stat. § 11.38(1)(a)1., can be severed from the remainder of that provision by the simple expedient of interpreting and applying the provision as if the terms "or disbursement" and "independently" had been stricken from it. I respectfully disagree with that suggestion. The practical impact of Wis. Stat. § 11.38(1)(a)1., is determined not only by the specific words of that provision, but also by the way in which those words interact with other, related statutory provisions.

¶20. For example, the definition of "contribution" in Wis. Stat. § 11.01(6) includes a gift, subscription, loan, advance, or deposit of money or anything of value made for the purpose of influencing the election or nomination of a political candidate, without reference to the identity of the recipient of the gift, subscription, loan, advance, or deposit of money or thing of value. Under the federal provisions at issue in *Citizens United*, however, an "expenditure" includes a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value made for the purpose of influencing an election. See 2 U.S.C. §§ 431(9)(A)(i) and 441b(2). Under these overlapping state and federal definitions, it is possible that a corporation could make a gift, loan, advance or deposit of money or some other thing of value that might be considered both a "contribution," within the meaning of Wis. Stat. § 11.01(6), and an "expenditure," within the meaning of 2 U.S.C. §§ 431(9)(A)(i) and 441b(2).

¶21. The significance of this overlap between Wisconsin's definition of "contribution" and federal law's definition of "expenditure" is more than statutory. It is of constitutional significance. As most recently reiterated in the *Citizens United* decision, *Buckley* and its progeny make clear that expenditures are entitled to the highest degree of constitutional protection. *Citizens United*, 130 S. Ct. at 908-10. This is because "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley*, 424 U.S. at 19. In contrast, *Buckley* held that contributions deserve a somewhat lower degree of constitutional protection because "a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20 (emphasis added). In other words, the

constitutional difference between a transfer of value that is an expenditure and a transfer of value that is a contribution is determined by the identity of the recipient of that transfer.

¶22. Because Wis. Stat. § 11.01(6) defines “contribution” without reference to the identity of the recipient, that definition does not reflect the constitutional distinction between a contribution and an expenditure. Put differently, some “contributions” as defined in Wisconsin law could also be “expenditures” within the meaning of *Buckley* and *Citizens United* and, as such, are entitled to a higher degree of constitutional protection than *Buckley* and progeny afford to “contributions” made to a candidate or a political committee.³

¶23. Therefore, even if the terms “or disbursement” and “independently” were stricken from Wis. Stat. § 11.38(1)(a)1., as you suggest, the remaining prohibition on corporate “contributions”—as that term is defined in Wis. Stat. § 11.01(6)—still could apply to some corporate actions that would be constitutionally protected “expenditures” under *Citizens United*. The impact of *Citizens United* on Wis. Stat. § 11.38(1)(a)1., thus cannot be fully captured simply by striking certain words or phrases from that provision.⁴

¶24. The constitutionality of a restriction on an “expenditure” or a “contribution” thus depends on the nature of the conduct restricted, not on the particular statutory language used to describe that conduct. Accordingly, the United States Supreme Court, in *Citizens United*, invalidated the restrictions on corporate independent expenditures contained in 2 U.S.C. § 441b without specifying any particular words or phrases to be excised from that statute. See *Citizens United*, 130 S. Ct. at 913. Here, similarly, I conclude that, under the reasoning of *Citizens United*, the prohibition on corporate independent expenditures contained in Wis. Stat.

³Precision in the use of terminology is important with respect to the term “political committee” as well. In *Buckley*, political committees were discussed with reference to the permissibility of limits on their direct contributions to candidates. 424 U.S. at 35. As underscored in *Citizens United*, such direct contributions to a candidate by a political committee are subject to a lesser degree of constitutional scrutiny than would be applied to other political expenditures by the committee. 130 S. Ct. at 909 (distinguishing contribution cases from expenditure cases, stating that *Federal Election Com’n v. Nat. Right to Work Comm.*, 459 U. S. 197 (1982) “decided no more than that a restriction on a corporation’s ability to solicit funds for its segregated PAC, which made direct contributions to candidates, did not violate the First Amendment. *NRWC* thus involved contribution limits, which, unlike limits on independent expenditures, have been an accepted means to prevent *quid pro quo* corruption.”)(internal citations omitted).

⁴Unlike the statutory definition of “contribution” in Wis. Stat. § 11.01(6), Wis. Admin. Code § GAB 1.28(1)(c) (2010) defines “contributions for political purposes” in terms of the identity of the recipient. This regulatory definition, however, does not avoid the potential constitutional difficulty discussed above because “contributions for political purposes” are not limited to direct contributions to candidates and their committees. For example, a contribution to an individual who does not contribute to candidates but who engages in independent political speech would qualify under the rule’s definition of “contributions for political purposes.” See Wis. Admin. Code § GAB 1.28(1)(c). Such a contribution could be an “expenditure” within the meaning of *Buckley* and *Citizens United*, while also falling within the definition of “contributions for political purposes” in Wis. Admin. Code § GAB 1.28(1)(c).

§ 11.38(1)(a)1., is invalid, without need to interpret that provision as if any particular words or phrases had been stricken from it.

¶25. Finally, I note that Wis. Stat. § 11.38(1)(b) provides that “[n]o political party, committee, group, candidate or individual may accept any contribution or disbursement made to or on behalf of such individual or entity which is prohibited by this section.” For the reasons discussed above, the prohibition contained in Wis. Stat. § 11.38(1)(a) on corporate political expenditures—as that concept is discussed in *Citizens United* and in the present opinion—is constitutionally invalid. The prohibition contained in Wis. Stat. § 11.38(1)(b) on the acceptance of such corporate independent expenditures is thus similarly invalid. As previously noted, however, *Citizens United* did not address the constitutionality of statutory prohibitions on corporate contributions, as distinguished from corporate expenditures. Accordingly, nothing in *Citizens United* precludes Wis. Stat. § 11.38(1)(a) and (b) from continuing to be enforced with respect to both making and accepting of corporate political “contributions”—not as the term is defined in Wis. Stat. § 11.01(6), but as it is understood in the sense that the Supreme Court used when it approved contribution limits in *Buckley*. See 424 U.S. at 20-22; see also *Citizens United*, 130 S.Ct. at 908-10 (distinguishing precedent upholding limits on contributions from precedents finding limits on expenditures unconstitutional).⁵

The Impact of *Citizens United* on Wis. Stat. § 11.12(1)(a)

¶26. While your inquiry is principally directed at the constitutionality of Wis. Stat. § 11.38, your letter also seeks guidance on the implications of *Citizens United* on the constitutional enforcement of Wis. Stat. ch. 11.

¶27. The fatal feature of the federal campaign finance law challenged in *Citizens United* is that it prohibited corporations and unions from making independent expenditures from their general treasuries. Notably, however, it is not the only statutory subsection that potentially prohibits expenditures protected by the First Amendment.

¶28. Wisconsin Stat. § 11.12(1)(a) provides:

No contribution may be made or received and no disbursement may be made or obligation incurred by a person or committee, except within the amount authorized under s. 11.05 (1) and (2), in support of or in opposition to any specific candidate or candidates in an election, other than through the campaign treasurer of the candidate or the candidate's opponent, or by or through an individual or committee registered under s. 11.05 and filing a statement under s. 11.06 (7).

⁵In 65 Op. Atty. Gen. 10 (1976) and 65 Op. Atty Gen. 145, my predecessor issued opinions construing the scope of permissible prohibitions on corporate contributions and disbursements under Wis. Stat. § 11.38. These opinions were modified by 67 Op. Atty Gen. at 214. *Citizens United* supersedes any contrary statements in earlier opinions of this office, and those opinions are further modified to the extent they are inconsistent with this opinion.

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¶29. Among other things, this subsection bans a corporation from engaging in independent expenditures unless those expenditures are by or through a registered committee who has filed the appropriate statement. *Citizens United* makes clear these expenditures may come from a corporation's general treasury. 130 S. Ct. at 913. Thus, Wisconsin statutes must provide a mechanism by which a corporation may register under Wis. Stat. § 11.05 and file a statement under Wis. Stat. § 11.06(7) or the registration and filing requirements would be, for all practical purposes, a ban. In that case, Wis. Stat. § 11.12(1)(a) could not be constitutionally applied because application would ban First Amendment activities. However, such a mechanism for corporate registration and filing exists.

¶30. "Committees" or "political committees" are defined to include "any person other than an individual and any combination of 2 or more persons, permanent or temporary, which makes or accepts contributions or makes disbursements, whether or not engaged in activities which are exclusively political, except that a 'committee' does not include a political 'group . . .'" Wis. Stat. § 11.01(4). Absent an indication of contrary legislative intent, the word "person," as used in Wisconsin law, "includes all partnerships, associations and bodies politic or corporate." Wis. Stat. § 990.01(26). A corporation is, therefore, a "person" within the meaning of Wis. Stat. § 11.12(1)(a). Because a corporation is a person by virtue of Wis. Stat. § 990.01(26), it also, therefore, meets the statutory definition of a committee. Thus, it is my opinion that Wis. Stat. § 11.12(1)(a) applies to corporations.

¶31. Because Wis. Stat. § 11.12(1)(a) applies to corporations, Wisconsin law must also permit corporations to register and file under Wis. Stat. §§ 11.05 and 11.06(7), so that they may exercise their constitutional right to engage in political speech. The registration requirements in Wis. Stat. § 11.05(1) expressly apply, among other things, to "every committee other than a personal campaign committee which . . . makes disbursements in a calendar year in an aggregate amount in excess of \$25 . . ." Other provisions in Wis. Stat. ch. 11 provide how registration is to occur and what must be reported. Likewise, the filing requirements in Wis. Stat. § 11.06(7) expressly apply, among other things, to "[e]very committee, other than a personal campaign committee, which . . . desires to make disbursements during any calendar year, which are to be used to advocate the election or defeat of any clearly identified candidate or candidates in any election . . ." Because, as already discussed, a corporation is within the statutory definition of a committee, it follows that, like other committees, corporations may register and file under Wis. Stat. §§ 11.05 and 11.06(7).⁶ Thus, there is a statutory mechanism for corporate registration and reporting. Put another way, Wisconsin statutes are not constructed in a fashion that prevents a corporation from registering.

¶32. In addition to this plain reading of the statutes, the Government Accountability Board has issued an emergency rule to "ensure the proper administration of the campaign finance statutes and properly address the application of *Citizens United v. FEC*." Notice of Order of the Government Accountability Board, EmR 1016, ¶ 3 of Analysis (May 20, 2010) (available at http://www.legis.state.wi.us/erules/gab001_EmR1016.pdf) (last visited, July 30, 2010). The Rule

⁶Any corporation may also be a "group" as defined by Wis. Stat. § 11.01(10), and required to register by Wis. Stat. § 11.23. See also Wis. Stat. § 11.05(1)(a).

interprets Wis. Stat. §§ 11.05, 11.06 and other relevant sections to facilitate a corporation's registration and filing requirements under Wis. Stat. §§ 11.05 and 11.06. See Wis. Admin. Code §§ GAB 1.91(3) - (8).

¶33. Thus, both the statutes and the administrative code provide a mechanism for corporate reporting. Therefore, Wis. Stat. § 11.12(1)(a) is not a ban on a corporation's constitutionally protected political advocacy unless the underlying reporting and disclosure rules are themselves unconstitutional. Cf. *Citizens United*, 130 S. Ct. at 897-98 (prohibition on corporate "electioneering communications" not alleviated by ability of corporation to create federal political action committee, given that the political action committee is a separate entity and is subject to onerous registration and reporting requirements that have the effect of chilling speech).

Direct Impact of *Citizens United* on Reporting, Disclaimer, And Disclosure Provisions

¶34. In *Citizens United*, the Court specifically upheld the application of federal disclosure and disclaimer requirements to the "Hillary" movie and three advertisements for the movie. 130 S. Ct. at 913-16. Those disclosure provisions mandate that a person file a statement with the Federal Elections Commission within 24 hours of making a disbursement "for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of \$10,000 during any calendar year . . ." 2 U.S.C. § 434(f)(1). Disbursements in excess of \$200 are required to be itemized, and individual contributors to the communication must be listed with a name and address only if the individual contributed over \$1,000 during the year. 2 U.S.C. § 434(f)(2). Moreover, the communication must be "publicly distributed," 11 C.F.R. § 100.29(a)(2), defined as "broadcast, cable, or satellite communication" that can be received by 50,000 people in the relevant district or state. See 2 U.S.C. § 434(f)(3)(A)(i); 11 C.F.R. § 100.29(3). Compare with *Citizens United*, 130 S. Ct. at 897-98 (discussing federal PAC requirements); *Federal Election Com'n v. Mass. Citizens for Life*, 479 U.S. 238, 253-56 (1986) (discussing same, holding requirements may not be applied to certain incorporated groups); Wis. Stat. §§ 11.05, 11.06, 11.12, 11.14, 11.19, 11.20, 11.513 (setting forth Wisconsin's disclosure requirements).

¶35. In upholding those disclosure requirements as constitutional, the Court rejected the argument that disclosure and disclaimer "must be confined to speech that is the functional equivalent of express advocacy." *Citizens United*, 130 S. Ct. at 915. This holding in *Citizens United* supersedes any contrary statements in earlier opinions of this office, including the discussion in 65 Op. Att'y Gen. 145 of the scope of activities that may be constitutionally regulated under Wis. Stat. ch. 11.

¶36. After *Citizens United*, therefore, the distinction between express advocacy and issue advocacy, standing alone, is not constitutionally determinative. Accordingly, to the extent that Wis. Admin. Code § GAB 1.28 or Wis. Admin. Code § GAB 1.91 impose registration, reporting, or disclaimer requirements on independent expenditures that are not express advocacy

or its functional equivalent, *Citizens United* does not clearly indicate the rules are unconstitutional. To the contrary, *Citizens United* recognizes that the Constitution does not categorically limit disclosure and disclaimer regulations to only express advocacy or its functional equivalent. Any *potential* conflict created by the rules are with the statutes,⁷ not the Constitution. While this is no less of a serious concern for those who may be subject to the new rules, examining the statutory validity of these rules is beyond the scope of this opinion.

¶37. It does not follow, however, that every disclosure or disclaimer regulation (whether applied to express advocacy or issue advocacy) is constitutional. The *Citizens United* Court acknowledged that “as-applied challenges [to disclosure regulations] would be available if a group could show a reasonable probability that disclos[ure] [of] its contributors’ names [will] subject them to threats, harassment, or reprisals from either Government officials or private parties.” 130 S. Ct. at 914 (internal quotations omitted).

¶38. More generally, the *Citizens United* Court acknowledged that disclaimer and disclosure requirements “may burden the ability to speak,” and thus such requirements are subjected “to ‘exacting scrutiny,’ which requires a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest.” 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 64, 66). Finally, because intentionally violating the campaign financing law is subject to criminal penalties, *see* Wis. Stat. §§ 11.61(1)(a)-(c), consideration must be given to whether a statutory provision is unconstitutionally vague. *Buckley*, 424 U.S. at 40-41; *cf.* *Citizens United*, 130 S. Ct. at 895-96 (noting that complex speech regulations backed by criminal penalties force speakers to seek governmental permission before speaking, and analogizing the process to prior restraints).

¶39. Nonetheless, because *Citizens United* did not address the constitutionality of disclosure and disclaimer provisions similar to Wisconsin’s provisions, the “reasoning and conclusions” of the decision are not “clearly applicable” to those provisions. 67 Op. Att’y Gen. at 214. Any further discussion of the constitutionality of the Wisconsin disclosure and disclaimer requirements is thus beyond the scope of this opinion.

⁷The term “expressly advocate” is used in the definition of “political purposes,” Wis. Stat. § 11.01(16)(a)1. “Expressly advocate” is also used or incorporated independently of the definition of “political purposes” in statutes limiting who must register, what disbursements must be reported, and what communications are subject to disclaimer rules. *See, e.g.*, Wis. Stat. §§ 11.05(11), 11.06(2), 11.30(2).

¶40. Finally, it should be mentioned, particularly in light of mixed messages that accompanied post-*Citizens United* rulemaking,⁸ that *Citizens United* does not change Wisconsin law. While a United States Supreme Court opinion may provide guidance as to the constitutionally permissible scope of regulation, a United States Supreme Court opinion does not authorize regulatory activity. Only the Wisconsin Legislature, through its lawmaking powers, can change Wisconsin law or expand the scope of an agency's regulatory authority.

Conclusion

¶41. In 65 Op. Att'y Gen. 145, this office determined that the State Elections Board (the predecessor agency of the Government Accountability Board) had the authority to decline to enforce those portions of Wis. Stat. ch. 11 that were unconstitutional and to interpret and apply other parts of Wis. Stat. ch. 11 so as to avoid unconstitutionality. *Id.* at 156-58. In addition, this office urged that Wis. Stat. ch. 11 be amended to make it consistent with the *Buckley* decision. *Id.* at 147.

¶42. In the present situation, it is my understanding that the Government Accountability Board has already suspended its enforcement of the corporate expenditure prohibition in Wis. Stat. § 11.38(1)(a)1. I agree with that enforcement decision and would advise all district attorneys, in exercising their concurrent enforcement powers under Wis. Stat. ch. 11, to likewise interpret and apply Wis. Stat. § 11.38(1)(a)1. and (b) in a manner consistent with the views set forth in this opinion. I would also encourage the Wisconsin Legislature to amend Wis. Stat. § 11.38 to make it consistent with the *Citizens United* decision.

¶43. No other aspect of Wisconsin law is directly affected by the clear application of *Citizens United*.

Sincerely,



J.B. VAN HOLLEN
Attorney General

JBVH:RPT:KMS:TCB:rk

⁸Compare Notice of Order of the Government Accountability Board, EmR 1016, ¶ 3 of Analysis (May 20, 2010), ¶3 of Analysis ("*Citizens United* ... strengthened the ability of the government to require disclosure and disclaimer of independent expenditures.") with *id.* ¶ 5 of Analysis ("[T]his proposed rule requires organizations to disclose only those donations 'made for' political purposes."). Nothing in the text of Wis. Admin. Code § GAB 1.91 directly contradicts the conclusions stated above.

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JUDGE THOMAS H. BARLAND
Chair

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: August 2, 2011

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 Update

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

2011 July Continuing Reports

Materials for the 2011 July Continuing report were sent to all candidates, PACs, parties, conduits, sponsoring organizations, recall committees, and independent expenditure registrants. For most committees, this report covers campaign finance activity from January 1 through June 30, 2011 and was due on or before July 20, 2011. 1,451 committees were required to file a campaign finance report. As of July 22, we have received 1,134 campaign finance reports. Of those reports received, 787 were filed electronically by the committees in the Campaign Finance Information System, 118 excel files were submitted for conversion by staff, and 229 paper reports were received.

Staff will follow-up with committees that have not filed campaign finance reports yet for the July Continuing 2011 report period. The non-filers include 107 candidates, 36 political parties, 91 PACs, 2 recall committees, 45 corporations, 5 independent expenditure registrants, and 31 conduits. Staff sent the first email notice of late report on July 25. Phone calls and email attempts to follow-up with committees will continue. An update on the non-filers will be given to the Board at the next meeting.

Special Pre-Primary and Pre-Election Reports – Senate Dists. 2, 8, 10, 14, 18, 32 & Assm 48

Materials for the Special Pre-Primary filing were sent to those candidates and committees participating in the Special Primary and Assembly District 48 elections. This report covers campaign finance activity from January 1 through June 27, 2011 and was due on or before July 5, 2011. Committees were given the option to report all activity through June 30 on the July Continuing report and to file that report by July 5 instead of submitting a Pre-Primary and a separate July Continuing report covering only 3 days. 65 pre-primary reports were filed with the G.A.B.; 25 of those reports were filed by candidates. All candidates required to file a Special Pre-Primary report have filed.

Materials for the Special Pre-Election filing were sent out to those candidates and committees participating in the Special election.. This report covers campaign finance activity from July 1 through July 25, 2011 and is due on or before August 1, 2011.

Special Pre-Primary and Pre-Election Reports – Senate Dists. 12, 22, & 30

. Materials for the Special Pre-Primary filing were sent to those candidates and committees participating in the Special Primary and elections. This report covers campaign finance activity from July 1 through July 4, 2011 and was due on or before July 11, 2011. 20 pre-primary reports were filed with the G.A.B.; 8 of those reports were filed by candidates. All candidates required to file a Special Pre-Primary report have filed.

Materials for the Special Pre-Election filing were sent out to those candidates and committees participating in the Special election. This report covers campaign finance activity from July 5 through August 1, 2011 and is due on or before August 8, 2011.

Lobbying Update

Tracey Porter, Ethics and Accountability Specialist

Statement of Lobbying Activities and Expenditures Reports

Lobbying principal organizations and lobbyists registered and licensed as of January 1, 2011 in this legislative session are required to complete and file a six month Statement of Lobbying Activities and Expenditures report covering lobbying activity and expenditures from January through June, 2011. These reports are due on or before August 1, 2011. Filing notices were sent on July 8 to all lobbyists and lobbying organizations required to file, and email reminders will be sent throughout the month of July to those that have not filed. Staff continues to process matters that are the subject of lobbying communications reported by principal organizations as required by Chapter 13, *Wisconsin Statutes*.

Lobbying Registration and Reporting Information

Government Accountability Board staff continues to process 2011-2012 lobbying registrations, licenses and authorizations. Processing performance and revenue statistics related to this session’s registration is provided in the table below.

2011-2012 Legislative Session: Lobbying Registration by the Numbers (Data Current as of July 22, 2011)			
	Number	Cost	Revenue Generated
Organizations Registered	701	\$375	\$262,875
Lobbyists Licenses Issued (Single)	590	\$350	\$206,500
Lobbyists Licenses Issued (Multiple)	119	\$650	\$77,350
Lobbyists Authorizations Issued	1495	\$125	\$186,875

Lobbying principals are required to report lobbying activity for the period January 1 through June 30, 2011. Those reports are due by August 1. To date, we have discovered that a number of organizations either failed to register or to authorize lobbyists. We will be seeking forfeitures from these individuals and organizations.

New Lobbying Website Project Update

A significant amount of time has been allocated to develop the new lobbying application. Phase One, the public search feature, was completed in May and ready for public comment. Staff invited 26 members of the lobbying community, members of the Joint Committee on Finance, and members of the Joint Committee on Information Policy and Technology to participate in a Focus Group presentation and discussion on the functionality of the public search feature of the new lobbying database on May 19, 2011. There were 4 attendees.

Phase Two, the FOCUS subscription feature, is now complete and ready for public comment. Staff invited 26 members of the lobbying community and approximately 100 FOCUS subscribers to participate in a Focus Group presentation and discussion on the functionality of the FOCUS subscription service on July 22, 2011. Only one participant attended. Work will continue throughout the summer months on the project, with release of the application scheduled for early 2012.

Financial Disclosure Update

Cindy Kreckow, Ethics and Lobbying Support Specialist

Statements of Economic Interests – Annual Filing

The Government Accountability Board Ethics and Accountability staff mailed more than 2,000 pre-printed Statements of Economic Interests to state public officials required to file a statement with the Board under Chapter 19, *Wisconsin Statutes*. This includes incumbent state judges who were up for re-election in the spring of 2011 as well as reserve judges who are required to file a statement within 21 days of taking a case. Those officials not up for re-election in the spring had their statements mailed to them over the course of eight weeks, beginning January 24, 2011. Statements were due on or before May 2nd. With the 2011 changes in administration, there was some confusion on the part of officials who left their positions effective January 3rd, as well as those whose nominations were withdrawn by Governor Walker in late January. Many filers in both of those groups did not think they were required to file a 2011 statement. Cindy followed up with everyone affected from the date the statements were statutorily due until mid-July, when all issues were finally resolved. All 2011 statements are now accounted for and staff concurred in these cases that a late filing penalty was not warranted. Data entry and processing into the online index continues to occur only as time permits given budget restraints and staff shortage. Higher profile statements including Legislators, Supreme Court Justices, Court of Appeals Judges, and District Attorneys have all been entered with the exception of a few that have very large attachments. Municipal Judges are currently being entered into the online index and additional prioritizing will occur throughout the data entry process.

Quarterly Transaction Reports

Quarterly financial disclosure statements for the April – June reporting period were sent to 47 State Investment Board members and employees on July 1, 2011. These statements are to be completed and returned to the G.A.B. no later than August 1, 2011. Copies of all quarterly financial disclosure reports as well as statements of economic interests for employees and members of the Investment Board will be referred to the Legislative Audit Bureau.

Semi-Annual Legislative Liaison Reports

State agency legislative liaison reports for the January – June, 2011 reporting period were sent to 105 agencies who are required to file them on June 30th. The reports are due no later than August 1st.

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JUDGE THOMAS H. BARLAND
Chair

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For the August 2, 2011 Meeting

TO: Members, Wisconsin Government Accountability Board

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

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

SUBJECT: Elections Division Update

Election Administration Update

Introduction

Since the Government Accountability Board's May 17, 2011, meeting the Elections Division has focused on the following tasks:

1. Statewide Recount for the Office of Justice of the Supreme Court

On May 31, 2011, the Kloppenburg Campaign announced that they would not appeal the final statewide recount decision for the Supreme Court contest, thereby officially putting the recount to rest. Justice Prosser gained 371 votes at the recount and Ms. Kloppenburg received an additional 683 votes. Justice David T. Prosser was certified as the winner.

2. Special Elections

Assembly Districts 60, 83 and 94:

On February 22, 2011, Governor Walker called elections to fill the vacancies in Assembly Districts 60, 83 and 94, caused by the resignations of Mark Gottlieb, Scott L. Gunderson and Michael D. Huebsch respectively. Two districts, 60 and 94, required primaries which were conducted in four counties on Tuesday, April 5, 2011. No primary was required for the office of Representative to the Assembly District 83. The candidates certified to the May 3, 2011 special election ballot were:

➤ District 60

- Duey Stroebel (Republican)
- Rick Aaron (Democrat)

- District 83
 - Dave Craig (Republican)
 - James Brownlow (Democrat)
- District 94
 - John Lautz (Republican)
 - Steve Doyle (Democrat)

The special election for Assembly Districts 60, 83 and 94 was conducted on May 3, 2011. The deadline for G.A.B. to receive the Special Election canvasses from the counties was Friday, May 13, 2011. All canvasses were received well before the statutory deadline, allowing staff to certify the election on May 12, 2011. The special election canvass was signed by Judge Nichol. (No petitions for recount were filed.) Certificates of Election were mailed to the winning candidates immediately following the signing of the canvass statements. The winners were Duey Stroebel in District 60, Dave Craig in District 83 and Steve Doyle in District 94.

Assembly District 48:

On May 24, 2011, Governor Walker called an election to fill the vacancy in Assembly District 48, caused by the resignation of Joseph T. Parisi. Six candidates (all Democratic candidates) qualified for the ballot, triggering a Democratic primary conducted on Tuesday, July 12, 2011. Candidate certified to the Democratic primary ballot were:

- Vicky Selkove
- Bethany Ordaz
- Chris Taylor
- Fred Arnold
- Andy Heidt
- Dave De Felice

Since no other party candidates or independent candidates qualified for the ballot, the winner of the Democratic primary will appear on the ballot at the special election scheduled for August 9, along with a write-in line.

3. Recalls

Assembly Districts 2, 8, 10, 14, 18 and 32:

On June 3, 2011, the Government Accountability Board ordered recall elections in Assembly Districts 2, 8, 10, 14, 18 and 32. Fifteen Democratic candidates and one independent candidate registered for the recall elections in these districts. The six Republican incumbents are candidates automatically. Democratic Primaries were required in all six districts. The recall primaries were conducted on Tuesday, July 12, 2011, with the recall elections scheduled for August 9, 2011.

Senate District	Candidates Registered	Candidates on Primary Ballot	Candidates on Election Ballot
2	1 Rep (Inc.)		1 Rep (Inc.)
	3 Dem	2 Dem	Winner of Dem Primary
8	1 Rep (Inc.)		1 Rep (Inc.)
	3 Dem	2 Dem	Winner of Dem Primary
10	1 Rep (Inc.)		1 Rep (Inc.)

	2 Dem	2 Dem	Winner of Dem Primary
	1 Ind		
14	1 Rep (Inc.)		1 Rep (Inc.)
	3 Dem	2 Dem	Winner of Dem Primary
18	1 Rep (Inc.)		1 Rep (Inc.)
	3 Dem	2 Dem	Winner of Dem Primary
32	1 Rep (Inc.)		1 Rep (Inc.)
	2 Dem	2 Dem	Winner of Dem Primary

Assembly Districts 12, 22 and 30:

On June 10, 2011, the Government Accountability Board ordered recall elections in Assembly Districts 12, 22 and 30. Six Republican candidates (2 in each district) registered for the recall elections. One Democratic candidate registered in District 30. The three Democratic incumbents are candidates automatically. Republican Primaries were required in districts 12 and 22. One Republican candidate in District 30 was denied ballot access due to insufficient signatures, leaving one Republican candidate and one Democratic candidate. Therefore, no primary was required in District 30. The recall primaries in District 12 and 22, and the recall election in District 30 were conducted on Tuesday, July 19, 2011. The recall elections for Districts 12 and 22 are scheduled for August 16, 2011.

District	Candidates Registered	Candidates on Primary Ballot	Candidates on Election Ballot
12	2 Rep	2 Rep	Winner of Rep Primary
	1 Dem (Inc.)		1 Dem (Inc.)
22	2 Rep	2 Rep	Winner of Rep Primary
	1 Dem (Inc.)		1 Dem (Inc.)
30	2 Rep		1 Rep
	1 Dem		1 Dem (Inc.)
	1 Dem (Inc.)		

4. Extended Operating Hours to Support Clerk Partners and Voter Customers

As has been the practice for over 3 years, G.A.B. has offered extended operating hours to local election partners and voter customers in order to provide more effective election support. For the July 12th, 2011 and July 19th, 2011 elections, staff continued the practice of providing extended hours of services and technical support to our valued clerk customers and to the public before, during and immediately after any election. Staff's extended operating hours for both elections were as follows:

July 12, 2011 Special Primary and Recall Primaries

- Monday, July 11, 2011: 6:30 a.m. until 6:00 p.m.
- **Tuesday, July 12, 2011:** **6:30 a.m. until 9:00 p.m.**
- Wednesday, July 13, 2011: 6:30 a.m. until 6:00 p.m.

July 19, 2011 Recall Primaries and Recall Election

- Monday, July 18, 2011: 6:30 a.m. until 6:00 p.m.
- **Tuesday, July 19, 2011** **6:30 a.m. until 9:00 p.m.**
- Wednesday, July 20, 2011 6:30 a.m. until 6:00 p.m.

During the extended hours of operations, staff maintains an Election Activity Log of all calls relating to elections issues. A preliminary review of these data is being analyzed and the details will be posted on the G.A.B. website.

5. The New Voter Photo ID Law

The Governor signed the Voter Photo ID law on May 25, 2011; it was published on June 9, 2011; and, the provisions impacting the 2011 Summer Elections went into effect on June 10, 2011. Wisconsin Act 32, s.9118(1Q) and Act 23 under the 2011-2013 biennial budget Act (Act 32) required the G.A.B. to submit a proposal to the Joint Committee on Finance (JCF) under the Legislature's 14-day passive review process on the agency's plans to spend \$1.9 million dollars for public information and outreach voter ID implementation initiatives.

All 16 members of the JCF were visited for the purpose of discussing the proposed spending Plan, sharing G.A.B.'s philosophy behind the Plan, answering their questions and soliciting their input. The 14-day passive review process concluded on Thursday, July 14, 2011. On Friday, July 15, 2011, the JCF issued its approval letter stating that no objectives from JCF members had been raised. A copy of the G.A.B. approved Plan is attached.

6. MOVE Act: Status of Wisconsin's Compliance with the Military and Overseas Voter Empowerment MOVE Act

The Government Accountability Board staff has worked with legislative leaders regarding the need to adjust the election timeline for the September Partisan Primary, special elections, and Presidential Preference so that Wisconsin will be able to comply with the 45-day ballot preparation that is required by the MOVE Act. The Senate and Assembly Committees on Elections met and wrote two bills, SB 115 and SB 116, with feedback from G.A.B. staff. SB 115 moves the Presidential Preference election to coincide with the April Spring Election and requires the creation of a special Presidential Preference Only ballot 48- days before the election that must be sent to military and overseas electors to comply with the MOVE Act. SB 116 moves the September Partisan Primary to the second Tuesday in August and addresses the timeline of other election related events.

The Senate passed both bills before the end of the session in June; however the Assembly did not take up either bill before the Legislative Session ended. G.A.B. staff anticipates that the bills will be addressed quickly upon the start of the fall Legislative session. Staff will continue to provide feedback to the Legislature.

7. Federal Voting Assistance Program Grant Application

In mid-May 2011, the Federal Voting Assistance Program (FVAP) through the Department of Defense announced a nationwide \$16 million dollar grant opportunity for all 50 states. The grant program, "Electronic Absentee Systems for Elections (EASE)," will be awarded to states, territories, and/or localities for proposals that fulfill a public purpose of support by improving the voting experience of military and overseas voters, reduce impediments faced by them and stimulate the development of innovative approaches to absentee voting by military and overseas voters.

On July 13, 2011, Board staff submitted a proposal to the FVAP for an EASE grant. In the proposal, staff delineated the creation of a system that will allow military and overseas electors to receive their absentee ballot online. This system would integrate with current online tools such as ballot tracking, voter look-up, the online mail-in registration system and the Statewide Voter Registration System (SVRS). It would require the development of a ballot preparation tool to create an online ballot, an online ballot delivery tool to link an elector's address to the correct

ballot, and a data collection and evaluation tool, to integrate data from the new system with data collected in SVRS and the Wisconsin Election Data Collection System. Board staff asked for \$1.9 million over the next two years to complete the proposed project.

8. 2010-2011 Four-Year Voter Record Maintenance

On June 10, 2011, G.A.B. completed the 2010-2011 Four-Year Voter Record Maintenance. Voter's who did not respond to the Notice of Suspension of Registration sent on April 29, 2011 were given a status of "Inactive – 4 Year Maintenance" in SVRS. Voters whose records were recorded as returned undeliverable were also given the status "Inactive – 4 Year Maintenance."

G.A.B staff sent each municipality and county a list of inactivated voters from their jurisdictions. The list included all voters who were sent postcards as part of the Four-Year Voter Record Maintenance process and the voter's current status in SVRS.

Based upon the information in SVRS on June 10, 2011, of the 240,505 postcards mailed, 52,418 (22%) postcards were returned as undeliverable, 14,636 (6%) postcards were returned requesting continuation, and 173,451 (72%) postcards had not been recorded in the Statewide Voter Registration System (SVRS) as returned. Similar to the 2008 Four-Year Voter Record Maintenance, clerks continue to record the postcards that are continuing to be returned and to update the voter records accordingly.

The 2010 General Election was the last election where G.A.B. will conduct the Four-Year Voter Record Maintenance. For General Elections going forward, G.A.B. will continue to support clerks by identifying voters who qualify for the four-year record maintenance, and by providing uniform guidance for statewide consistency. Clerks, however, will be responsible for sending the Notices of Suspension of Registration and making updates to the voter records in their municipality. The changes in SVRS to accommodate this transition will be implemented prior to the 2012 General Election. G.A.B. appreciates the cooperation of its clerk partners in bring the 2010-2011 Four-Year Voter Record Maintenance process to completion.

9. Accessibility

Government Accountability Board staff are taking advantage of the 2011 Recall and Special Elections to conduct On-site Accessibility Compliance Reviews. In order to cover as many polling places as possible, the Government Accountability Board is supplementing our staff by hiring temporary workers who undergo extensive training to assist with the On-site Accessibility Compliance Reviews.

On July 12, 2011, G.A.B. staff and representatives conducted reviews in 20 counties for Recall Primaries in State Senate Districts 2, 8, 10, 14, 18, and 32. There were 79 polling places visited in 59 municipalities. On July 19, 2011, G.A.B. staff and representatives conducted On-site Accessibility Compliance Reviews in 9 counties for the Recall Primaries in State Senate Districts 12 and 22, and for the Recall General Election in State Senate District 30. There were 69 polling places visited in 42 municipalities.

Findings include:

- A. Insufficient signage for parking spaces and entrances.
- B. Doors that require more than 8 lbs. of force to open. Survey findings revealed doors as heavy as 12-17 lbs. in several locations.
- C. Required election notices are not always posted and those posted are not printed in 18 point font.

- D. Municipalities that received G.A.B. Accessibility improvement grant funds or supplies to assist respective polling places to achieve compliance could not show or demonstrate items that the funds were intended to purchase, or the supplies that were received. This finding is disturbing and will be closely followed-up for explanations.
- E. Less frequent problems identified include:
 - Lack of privacy for voters using accessible equipment.
 - Thresholds which are greater than 1/2-inch high.
 - Gaps and uneven pavement in the pathway from the parking area to the accessible entrance.
 - A buzzer located on the entrance door that does not work or simply needs a new battery.

Electronic Voting System Security: During the On-site Accessibility Compliance Reviews on July 12 and 19, 2011, staff and representatives also performed a visual inspection of the security tags on voting equipment to verify that serial numbers on the inspector's statement match the machines and tamper-evident seals. Staff and representatives continue to find inconsistency in the chief inspectors' attention to proper security procedures. Staff found that some chief inspectors are neglecting pre-election security checks and do not seem to fully understand the need for the tamper-resistant seal and security checks.

G.A.B. also plans to conduct another wave of On-site Accessibility Compliance Reviews on August 9, 2011 for the State Assembly District 48 General Election, and on August 16, 2011 for the Recall General Elections in State Senate Districts 12 and 22.

Training

Staff are creating web-based election training for the absentee functionality in the Statewide Voter Registration System. The training will aid clerks to learn how to track absentee applications and ballots using the Statewide Voter Registration System. The training will include written step by step instructions and web-base video demonstrations.

Plans are that staff will implement the web-based election training this summer in four phases. Phase 1 will train on entering and processing absentee applications in SVRS. Phase 2 will train how to process specific types of absentee applications in SVRS. Phase 3 will focus on the different types of absentee vote locations. Phase 4 will concentrate on absentee ballots. GAB Staff has set August 31, 2011 as the project date for completing all the absentee web-base election training.

Please refer to the Attachment titled, "Training Summary," for additional training information.

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. This process has been followed since the Interfaces became functional in SVRS on August 6, 2008.

Since the last Board Meeting, clerks processed approximately 9,160 HAVA Checks with DOT/SSA on voter applications in SVRS.

2. Retroactive HAVA Checks Status

As previously reported, Board staff is working with the Department of Transportation (DOT) to gather additional information to help resolve HAVA Check non-matches. Staff is taking a three-pronged approach to investigating and resolving the non-matches:

- DOT gave G.A.B. access to the Public Abstract Request System (PARS) look-up tool for G.A.B. to look up voters whose driver license does not match, so the driver license number can be corrected in SVRS. We are continuing to correct the non-driver license non-matches through PARS.
- DOT provided G.A.B. with a bulk file containing the names and dates of birth for all of the HAVA Check non-matches that resulted from names or dates of birth not matching. G.A.B. will do further analysis on the bulk file to group non-matches into categories to facilitate correction of the data. We will also be able to determine non-matches that result from name variations or typographical errors, versus truly different data which may require investigation.
- G.A.B. is working with DOT to enhance the existing HAVA Check such that DOT would not only provide the non-match reason (i.e. name, date of birth, or driver license number) but also provide the name and date of birth as it appears at DOT to assist clerks in resolving the non-matches. This proposed enhancement is in the process of being approved by the G.A.B. IT governance and management process for both agencies before we can proceed.

3. Voter Registration Statistics

As of Friday, July 15, 2011, there were a total of 3,286,006 active voters in SVRS. There were 1,043,663 inactive voters, and 272,700 were cancelled voters. 6,478 voters have been merged by clerks as duplicates since the last report. The number of active voters in SVRS has significantly decreased, and the number of inactive voters has increased since the last Board report due to the Four-Year Maintenance Process.

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 or someone who has not voted in four years. A cancelled voter is one who will not become active again, e.g. deceased person.

4. G.A.B. Help Desk

The G.A.B. Help Desk is supporting over 1,800 active SVRS users. The Help Desk staff assisted with processing the canvass, data requests and testing SVRS improvements. Help Desk staff is continuing to improve and maintain the two training environments that are being utilized in the field. Staff is monitoring state enterprise network status, assisting with processing data requests and processing voter verification postcards.

Overall, the majority of inquiries to the G.A.B. Help Desk during May, June and July from clerks were regarding assistance with setting-up the July 12, 2011 and July 19, 2011 Recall Primaries and Election and Special Election for Assembly Dist 48, recall inquiries, recount inquiries, and running reports. The majority of calls in June were from electors with questions concerning the 4 Year Maintenance postcards being mailed. On the July 12, 2011 Recall Primary Day, the majority of calls were from the voting public voicing concern about new Voter ID requirements, confusion at the polling place regarding Voter ID and asking where to vote. Many of these voters did not reside in a district with a primary.

Due to the redesigned poll list with upside down print, many clerks were having difficulty printing and requested assistance. Calls for this period also consisted of clerks requesting assistance entering data into the G.A.B. Canvass Reporting System and the Wisconsin Election Data Collection System (WEDCS), reconciling election data, entering Election Day Registrations (EDR) and running reports. Help Desk staff assisted with configuring and installing SVRS on many new clerk computers due to the end of the fiscal year with municipalities upgrading computer equipment.

Ethics Division CFIS reporting has generated a considerable amount of call traffic during July.

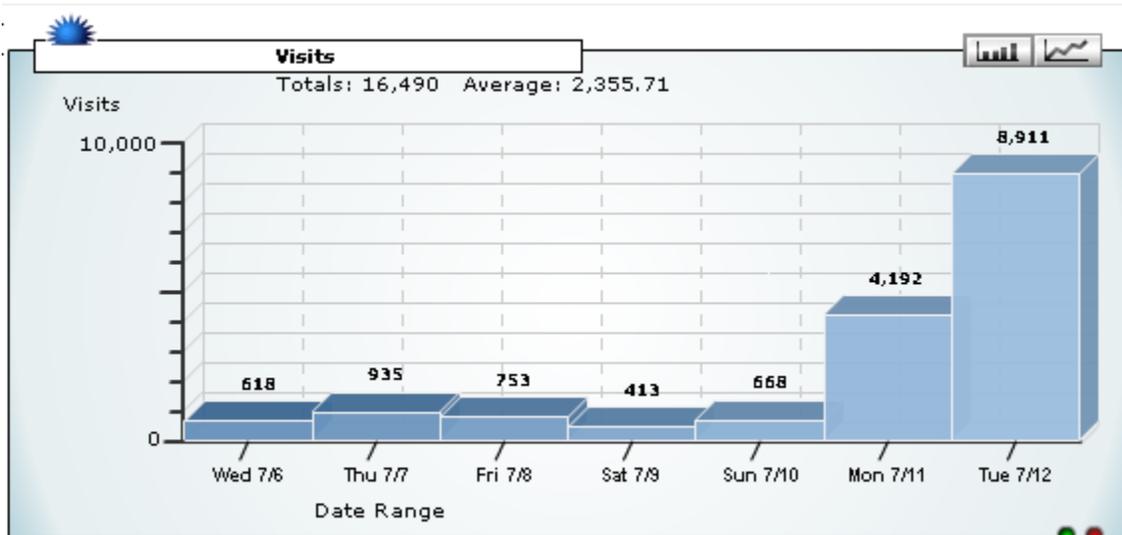
G.A.B. Help Desk Call Volume (261-2028)	
May 2011	1762
June 2011	1815
July 2011 (as of July 18, 2011)	1540
Total Calls for Period	5117

To alleviate distractions from the Reception Desk during recent activities and election related events, calls for the Front Desk's main number and the 800 number have remained transferred to the Help Desk. The Front Desk main number remains transferred due to the volume of activity at the front desk. The Help Desk operated on extended hours for both election events during this period.

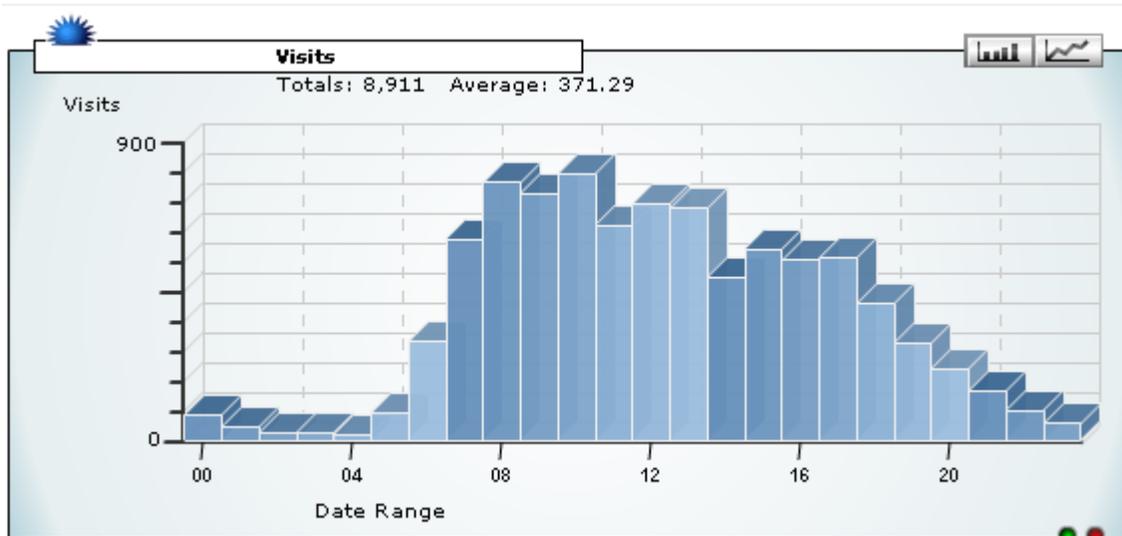
The G.A.B. main business telephone has remained forwarded to the Help Desk since April 4, 2011.

G.A.B. Reception Desk Call Volume (266-8005)	
May 2011	0
June 2011	0
July 2011	0
Total Calls for Period	0

The graph on the following page illustrates voter activity accessing the GAB Voter Public Access (VPA) website for the week of the July 12 Recall Primary. Statistics indicate unique visitors to the site. Primary day had 8,911 visitors, typically viewing 7 pages per visit.



Unique visits for July 12, 2011 only. Traffic peaked at 10:00 am with 803 visits per hour.



5. Click-and-Mail Voter Registration

Board staff continue to work on the new Click-and-Mail Voter Registration process that will allow voters to provide voter registration information on-line, and then print off and mail in a voter registration form. We are currently in the process of updating the web forms to accommodate the new changes included in the Voter Photo-ID bill. We hope to finalize the new system and make it available to the public in late Summer 2011.

6. SVRS Hardware Refresh

Beginning in early March 2011 G.A.B. and DET technical staff began the process of refreshing the SVRS server farm with new virtual servers and associated hardware. The Production servers (Prod), Development Servers (DEV), Systems Integration Testing Servers (SIT) and User Acceptance Testing Servers (UAT) environments have been rebuilt and migrated to the new SAN. The project has been completed meeting the June 30, 2011 deadline.

7. New Elections Division IT Team

As previously reported, the Elections Division has been working with a Department of Administration, Division of Enterprise Technology (DOA/DET) Team led by Herb Thompson to assemble a dedicated "team approach" to applications development and support for the Elections Division's IT Systems.

We have hired a dedicated IT Team to support Elections Division's labor-intensive applications. Lead to start on April 27, 2011, and a new applications developer to start in May 2011. Unfortunately, the new Team Lead was not retained, and the new applications developer opted not to join the team.

David Grassl, formerly of the Department of Administration, and lead architect for G.A.B. systems including WEDCS, Canvass, and Access Elections, is the Team Lead. He was also lead architect on the new Budget system at DOA, and several other groundbreaking projects. We are fortunate to have a person of David's caliber leading the G.A.B. dedicated IT Team!

As part of the IT Team's composition, we have also hired a new application developer, Rajesh Kirubanandham, also formerly from the Department of Administration. Rajesh is also well known to G.A.B. staff as the lead developer for the Canvass system, and the Redistricting proof of concept project. We retained Kamal Pasikanti as our database administrator, where he has been performing admirably for the last three-plus years. We are in the process of hiring another applications developer to fill the remaining slot on the team.

The new 4-member team will be co-managed by G.A.B. and DOA/DET (Herb), and will support all Elections Division software applications including SVRS, WEDCS, Canvass, Accessibility and any new IT tools the Division may need. The Team will also build capacity and functionalities within SVRS in order to process the 2010 Census redistricting results. Equally exciting, the Team will transfer the SVRS from a Citrix platform onto a web-based platform which will significantly boost performance and reduce operating costs.

8. Redistricting

The Wisconsin Legislature recently published the updated population data and census maps that resulted from the 2010 decennial Census, on March 21, 2011. This officially started the redistricting clock. Counties have up to 60 days to enact a tentative redistricting plan. Municipalities are allotted up to the following 60 days to enact an ordinance or resolution establishing municipal wards. After that, counties and municipalities are given up to 60 days to establish election districts. These three steps should be completed by October 1, 2011. All local elections beginning January 1, 2012 must be managed from the newly established districts. The Wisconsin Legislature must complete the new legislative districts by early May 2012 so they can be used for the 2012 fall elections. The Legislature provided a Geographic Information System (GIS) tool for municipalities and counties to draw their new districts. The new districts will be available as GIS data files as soon as they are complete.

G.A.B. IT staff are working on modifications to SVRS to allow for the new boundaries to be imported directly into SVRS, alleviating the need for clerks to manually enter them. There are many system upgrades and changes that will be made during 2011 to prepare SVRS for the new districts. A Proof of Concept and planning report were prepared in 2010 by DOA/DET which provides the roadmap for these changes.

Staff will remain in close communication with clerks during the redistricting process so clerks are aware of the timelines. Clerks should not be changing any of the existing districts in SVRS at this time. The current districts will remain in place until the new districts are ready to be

implemented (after October 1, 2011). Once the new districts have been imported, clerks will be given specific instructions on how to “tweak” and finalize their new district boundaries in SVRS.

Important Technical Information about the Redistricting Initiative: SVRS redistricting is done using address range technology today. This is a manually intensive process which takes a lot of time to get implemented. The G.A.B. Technical Team will be changing the SVRS district management software to a GIS-based solution. B G.A.B. did a proof of concept with this new technology when Dane County looked at the Regional Transit Authority (RTA) boundaries. G.A.B. was able to leverage GIS to cut-down the time needed to implement this new district by over 80%.

G.A.B. is currently collaborating with the Legislative Technology Service Bureau (LTSB) and the University of Wisconsin Applied Population Lab (UW APL) to leverage the WISE-LR districting software. LTSB and UW APL have been working jointly to create this new boundary management software to help local municipalities draw the new district lines. The WISE-LR software has no license fee associated to it so the cost to implement is much less.

Significant changes will be made to the SVRS Software in terms of:

- A. Address Validation (Use GIS instead of Address Ranges)
- B. Ability to references districts for previous elections
- C. Streamline the interface between local GIS groups and the SVRS GIS District Management Software
- D. Transparency to the public by using GIS Maps to display polling places and district maps

Timeline: G.A.B. is moving fast to implement this new feature to be ready for next year’s elections. A list of key milestones:

- Import District GIS Data and Complete Boundary Management Tool: 10/1/2011
- Convert SVRS Address Information (Voter, Polling Place, other locations): 11/1/2011
- Release new SVRS District Management Software (Include Voter Public Access Website): 4th Qty 2011
- NOTE: I’m working with the assumption that the G.A.B. team will manage the first iteration of setting up GIS districts in SVRS. Counties will do this 2nd quarter of 2012.

9. SVRS Core Activities

A. Software Upgrade(s)

SVRS 7.1 patch 8 was installed on June 18, 2011. This emergency patch changed the poll book to include a signature field as required by the 2011 Wisconsin Act 23, the Voter Photo ID Bill. The next version of SVRS (version 7.2) is planned to be installed after the 2011 August elections and will include the updates for the new Enhanced Mail-In Voter Registration process.

B. System Outages

There was an unscheduled, SASI network service outage on June 29, 2011 causing an interruption that impacted staff access to the state enterprise network for 1½ hours. This service outage did not impact clerk customer access to SVRS. DET investigation of the incident proved inconclusive as to the root cause. Technicians did discover that a redundancy fiber link serving G.A.B. was not operational at a switch in the DOA building. Service outage began at approximately 1:15 pm and concluded at 2:40 pm.

C. Data Requests

Staff regularly receives requests from customers interested in purchasing electronic voter lists. SVRS has the capability and capacity to generate electronic voter lists statewide, for any county or municipality in the state, or by any election district, from congressional districts to school districts. The voter lists also include all elections that a voter has participated in, going back to 2006 when the system was deployed.

The following statistics demonstrate the activity in this area from the last Board report through July 14, 2011:

- Fifty (50) inquiries were received requesting information on purchasing electronic voter lists from the SVRS system.
- Thirty-one (31) electronic voter lists were purchased.
- \$38,025 was received for the voter lists requested.

30-60 Day Forecast

1. Continue to assist Municipal Clerks, candidates and public to prepare for the August Recall elections.
2. Continue to Plan for full implementation of all components and aspects of the Voter Photo ID Law and the Legislatively-approved G.A.B. Voter Photo Plan for training local election officials and offering outreach informational services to the general public.
3. Continue development of G.A.B.'s Enhanced Mail-In Voter Registration Initiative.
4. Continue collaboration with the Department of Transportation (DOT) to resolve the HAVA Check non-matches that remain from the Retroactive HAVA Check Project, as well as the HAVA Checks that municipal clerks run on a regular basis.
5. Prepare for the Board's September 12 meeting.

Action Items

None.

ATTACHMENT #1

GAB Election Division's Training Initiatives
5/16/2011-8/2/2011

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.	2 types of classes: Application; Election Mgmt /HAVA Interfaces; 16 hours	New users of the SVRS application software.	13	100
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.	2 types of classes: Absentee Process; Reports, Labels & Mailings; 4 – 8 hours each	Experienced users of the SVRS application software.	7	98
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.	20
WisLine	Series of programs designed to keep local government officers up to date on the administration of elections in Wisconsin.	90 – 120 minute conference call, conducted by Elections Division staff.	Clerks and chief inspectors	Board staff conducted five WisLine teleconferences for clerks and chief inspectors covering the impact of the Voter Photo ID Law for elections held prior to the 2012 February Primary.	25 – 50 per program broadcast; audio files are available on the G.A.B. website for download.

ATTACHMENT #1

GAB Election Division's Training Initiatives
5/16/2011-8/2/2011

Training Type	Description	Class Duration	Target Audience	Number of Classes	Number of Students
WBETS	<p>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.</p>	Varies	County and municipal clerks and their staff.	Phase 1 of eLearning training plan completed; Absentee Process training modules under construction.	Site is available for clerks to train temp workers in data entry; relies are also able to access the site upon request.
Other	<ul style="list-style-type: none"> • Board staff gave election administration and SVRS presentations to county clerks at WCCA Convention in Ladysmith; WMCA Districts 1 & 2 in Birchwood. • Board staff developed training materials, including step-by-step guides, handouts and audio files for clerks to use for self-education and the training of election inspectors for the "soft" implementation of the Voter Photo ID Law for summer recall elections. 				

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KEVIN J. KENNEDY
Director and General Counsel

July 1, 2011

The Honorable Alberta Darling, Senate Co-Chair
Joint Committee on Finance
Room 317 East, State Capitol
Madison, WI 53707-7882

The Honorable Robin Vos, Assembly Co-Chair
Joint Committee on Finance
Room 309 East, State Capitol
Madison, WI 53708-8593

Dear Senator Darling, Representative Vos:

I am pleased to provide you and members of the Joint Committee on Finance a Plan on how we, the Government Accountability Board, propose to expend the \$1,965,200 approved by the Legislature and Governor Walker for implementing the new Voter Photo ID Law. We appreciate the Committee's support. This Plan is submitted in response to the language contained in the 2011-2013 Biennial Budget, which states, in part:

No later than July 1, 2011, and before making any expenditures under section 7.08 (12) of the statutes or 2011 Wisconsin Act 23, section 144 (1), for the purpose of outreach or public information, the government accountability board shall transmit to the co-chairpersons of the joint committee on finance in writing, a plan identifying the specific proposed purposes for the expenditures and proposed amounts to be expended for each specific purpose.

The Government Accountability Board's fiscal analysis estimated that \$2,180,900 was necessary to fully and successfully implement the Voter Photo ID Law. The Legislature appropriated \$1,965,200 for 2011-2013, which includes \$165,200 earmarked for training local election officials. The approval of a lesser amount of funds than requested necessitated some adjustments to the Board's Act 23 implementation budget as summarized in attached Plan. In addition to the specific requirement that expenditures be identified for outreach and public information, we are providing an overview of the Board's overall spending Plan for the biennium to implement the requirements of Act 23.

Thank you for your favorable consideration of our proposed Plan. I may be contacted at 608-261-8683 or Kevin.Kenedy@wi.gov to respond to questions you may have.

Sincerely,

Government Accountability Board

A handwritten signature in black ink that reads "Kevin J. Kennedy".

Kevin J. Kennedy
Director and General Counsel

Enclosure

cc: Legislative Fiscal Bureau (2)
Department of Administration
Members, Government Accountability Board
Nathaniel E. Robinson, Elections Division Administrator
Sharrie L. Hauge, Chief Administrative Officer

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KEVIN J. KENNEDY
Director and General Counsel

Government Accountability Board Budget Details for Implementing the Voter Photo Identification Law

Agency Request: \$2,180,900

Approved Budget: \$1,965,200

Budget Summary

1. <u>Public Information, Outreach, and Training/Education</u>		<u>\$751,300</u>
▪ Public Information Multi-Media Campaign	(\$436,100)	
▪ Public Outreach Campaign	(\$150,000)	
▪ Training/Education/Technical Assistance	(\$165,200)	
2. <u>Program Support</u>		<u>\$698,702</u>
▪ Personnel (Staffing Costs)	(\$599,292)	
▪ Staff Travel	(\$30,000)	
▪ Equipment	(\$10,000)	
▪ Administrative Expense	(\$59,410)	
3. <u>Statewide Voter Registration System (SVRS)</u>		<u>\$515,199</u>
▪ Modifications for Implementing Photo ID	(\$515,199)	
4. <u>Budget Total</u>		<u>\$1,965,200</u>
	(1,965,200)	

Budget Narrative

1. Public Information/Outreach and Training/Education **(\$751,300)**

A. Public Information Multi-Media Campaign **(\$436,100)**

Act 23 contains the following language:

SECTION 144. Nonstatutory provisions.

(1) PUBLIC INFORMATIONAL CAMPAIGN. In conjunction with the first regularly scheduled primary and election at which the voter identification requirements of this act

initially apply, the government accountability board shall conduct a public informational campaign for the purpose of informing prospective voters of the voter identification requirements of this act.

Action Plan:

The Board will conduct a comprehensive, statewide campaign to inform and educate the public about the voter identification requirements of Act 23. In its original fiscal estimate for SB-6, the Board projected a multi-media public education campaign would cost \$500,000, based on the budgets of previous state-sponsored campaigns for tourism, economic development and public health (H1N1 flu prevention). Due to the reduced budget, the Board intends to spend \$436,100 for the public information campaign.

There are several existing State contracts for advertising and public relations services. The Board proposes to use one of these contractors to purchase professional services for assisting to develop and deploy the statewide campaign. The Board will not use the firm for developing the text/information for the source materials/documents as that will be the responsibility of our knowledgeable staff. The advertising and public relations expertise would be use in deciding how to more effectively allocate limited advertising dollars. The Board will select an agency to assist staff in:

- Identifying target audiences and demographics
- Tailoring campaign themes to reach those audiences
- Producing advertisements but not drafting/developing the text
- Developing strategies and budgets for the deployment of paid media
(Includes the optimal mix of electronic, print, outdoor and online advertising)
- Managing media buys and placing advertisements.

In preparing the details of this budget Plan, staff consulted with a state advertising / public relations firm this is currently providing services to a State agency. To fulfill the specific directive regarding the first regular primary and election to which the law applies, we anticipate conducting focused waves of advertising prior to the February 21 primary and the April 5 general election / presidential preference primary. The recommended statewide campaign would consist of radio, billboards (posters), transit, online and print ads, and would generate more than 70 million impressions. The public informational campaign would be continued in conjunction with the Partisan Primary and General Elections in the fall of 2012, which involve much higher voter turnout than the spring elections.

In order to conduct a campaign that also includes television advertisements, staff was informed that a budget of \$892,000 would be required, and would generate approximately 117 million impressions. Board staff is not recommending inclusion of paid television advertising for budgetary reasons.

In addition to the paid multi-media campaign, the Board anticipates making extensive use of free/earned media through public service announcements, news releases, news conferences, and interviews with news media outlets. These activities will be carried out by existing Board staff as well as by project staff to be hired exclusively for assisting with the implementation of the Photo ID Law.

B. Public Outreach Campaign
(\$150,000)

Act 23 contains the following language:

SECTION 95. 7.08 (12) of the statutes is created to read:

7.08 (12) ASSISTANCE IN OBTAINING PROOF OF IDENTIFICATION. Engage in outreach to identify and contact groups of electors who may need assistance in obtaining or renewing a document that constitutes proof of identification for voting under s. 6.79 (2) (a), 6.86 (1) (ar), or 6.87 (4) (b) 1., and provide assistance to the electors in obtaining or renewing that document.

Action Plan:

In its fiscal estimate for SB-6, the Board projected a public outreach campaign would cost \$150,000. This dollar amount was based on the budget for a state-sponsored anti-smoking campaign, as well as advice from public relations professionals with expertise in conducting outreach campaigns. The Board plans to spend \$150,000 for outside assistance with the public outreach campaign. The overall campaign will be conducted using a combination of Board staff, including project staff to be hired exclusively for assisting with the implementation of the Photo ID Law, and outside consultants.

As previously stated, Wisconsin has several existing State contracts for advertising and public relations services. The Board proposes to use one of these contractors to purchase professional services for developing and deploying the outreach campaign. The objectives of the outreach campaign will be to:

- Identify groups of eligible voters needing assistance who may not have an acceptable form of identification.
- Identify organizations that work with these select groups of eligible voters
- Develop educational materials for these organizations to use in training their members/staffs about the new Voter ID Law
- Communicate educational messages on a more personal level; intersect within the lifestyles and communities of the target audiences via grassroots marketing efforts
- Minimize the number of historically disadvantaged voters who arrive at the polls without a Photo ID that meets statutory requirements
- Direct targeted voters and groups to a dedicated website and/or help line
- Complement paid advertising initiatives

Likely targets for the outreach campaign include:

- Elderly voters whose driver licenses or identification cards may have expired
- Both rural and urban populations
- Voters with disabilities
- Minority groups (e.g., African American/Hispanic/Hmong populations)
- College students

The advertising/public relations firm would assist Board staff in producing the following materials. Note that due to their respective areas of expertise, members of the Board staff would develop the text.

- Short video explaining how to obtain/renew statutory identification for voting; video to be distributed online and on CD/DVD
- PowerPoint presentation that can be customized for different target audiences

- Banners to be used at events
- Posters
- Brochures and other printed materials for distribution to community resource centers, senior citizen housing/retirement facilities, colleges, churches, physician offices, grocery stores, restaurants, libraries, government buildings, etc.

C. Training/Education/Technical Assistance
(\$165,200)

Key Statistics about Wisconsin's Electorate:

- Wisconsin 2010 population according to the 2010 Decennial Census, was approximately 5.7 million residents.
- The State's November 2010 estimated voting age population was 4,372,302. Of this number, 3,711,699 voting records were maintained in the Statewide Voter Registration System (SVRS), of which 3.5 million were eligible to vote.
- The State's 1,850 municipalities serve 2,827 polling places that comprise 3,600 reporting units (wards/precincts). 1,673 of the State's cities, towns and villages have a population under 5,000 and are mostly rural.
- The majority of the 1,850 municipal clerks (62 percent) responsible for administering local elections work part-time, and the turnover rate is between 20-25% annually. These facts underscore the need for ongoing training and continuous support to ensure uniform application of the many new requirements for the voting and election administration provisions contained in Act 23.
- Depending on the election (the November Presidential General Election especially), 20,000 to 30,000 poll workers are called upon to work the 2,827 polling places in both regular (13 hours) and split (less than 13 hours) shifts.

Action Plan:

Providing accurate and easy-to-understand information to the State's Local Election Officials (our partners), 3.5 million voters and another one million potential voters who are part of the voting age population about the requirements of the new Voter Photo ID Law is an important and also daunting and challenging task.

Materials will include but not be limited to brochures, pamphlets, informational flyers, and other documents developed for "getting out the word" through training, education, and technical assistance efforts, and related outreach initiatives. These training, educational, technical assistance and outreach initiatives are necessary and important components of the agency's overall strategy in addressing and complying with the Voter ID Law, making sure the electorate is reached, involved and well informed of the new law and its core requirements.

Obviously, a one-size-fits-all approach is not the answer. Given the manner in which people learn, recall, retain and act on information, an array of approaches will be used to make sure all reasonable and practical efforts are made to effectively reach Wisconsin's citizenry, including various targeted groups through a variety of training, education and technical assistance efforts, and related outreach initiatives.

Although the Training/Education/Technical Assistance task is delineated for informational purposes, in actuality, this component, along with the Public Information Multi-Media Campaign and the Public Outreach Campaign, are integrated and therefore complementary. Due to their interconnections, taken and implemented together, these initiatives will provide an effective combined tool for meeting this public policy and public information objective.

In its fiscal estimate for SB-6, the Board projected a budget for training, education and technical assistance to local election officials of approximately \$250,000. While that budget remains unchanged, it also includes the time of new project staff to be hired exclusively for assisting with the implementation of the Photo ID Law.

The Budget Summary Line Item for Training/Education/Technical Assistance of \$165,200 contains only funds being spent for Supplies and Services. Funds designated in the budget for new staff who will be working on training, education and technical assistance are included in the Personnel line under Program Support.

Supplies and Services costs for training, education and technical assistance include in-state travel to educational, training, technical assistance, and outreach sessions; production of polling place training aids; and production of training videos for local election officials, targeted groups and software for online training.

2. **Program Support** **(\$698,702)**

Sufficient program support is critical to the success of an effective implementation of the Voter Photo ID Law. Key to this success is a cadre of knowledgeable and skilled staff.

Action Plan:

2011 Wisconsin Act 32, the 2011-2013 biennial budget, authorizes 5.0 two-year GPR project positions to implement the provisions of Act 23. The positions are to be utilized for public outreach and education, modification of the Statewide Voter Registration System, training of election officials, support of the Board's Help Desk, and revision of forms and materials.

A. **Personnel (Staffing Costs)** **(\$599,292)**

Personnel cost details are as follows:

FTE	Classification	Hourly	Annual	Fringe	Total
3	PID* Elections Specialist	\$23.000	\$48,024	\$23,124	**\$213,444
1	PID IS Resource Support Tech-Entry	\$13.899	\$29,021	\$13,974	\$42,995
1	PID Office Operations Associate	\$13.968	\$29,165	\$14,043	\$43,208
5	Totals		\$202,258	\$97,387	***\$299,646

* PID = Photo ID

** The total annual cost for one PID Elections Specialist is \$71,148. The total annual costs for 3 PID Elections Specialist are \$213,444

*** The total annual costs for the 5 PID employees are \$299,646. The total funds allocated for personnel for the two-year time period is \$599,292

All five two-year project positions will devote 100% of their time to the implementation of the Voter Photo Law, and their respective primary tasks will be assigned in the following manner.

- The three (3) Photo ID Elections Specialists will be the Photo ID Program Specialists. These project employees will prepare materials, documents and information for the Public Information Multi-Media Campaign, the Public Outreach Campaign, and for Training/Education/Technical Assistance. In addition, these positions will provide and conduct training, education and technical assistance, as well as conduct public outreach activities. Hourly salary, depending on substance and relevance of the Candidate's training and experience, will not exceed \$23.00.
- The one (1) Information Specialist (IS) Resource Support Tech-Entry position will be assigned to our Help Desk to respond to public inquiries about Photo ID, and provide timely and accurate information about Photo ID.
- The one (1) Office Operations Associate will provide program and administrative support to the Photo ID program and the project Photo ID staff.

Election Administration is rooted in, and based on an array of complex Federal and State laws, rules, regulations and procedures. For an Election Specialist to achieve full performance and competence, experience gained during a four-year election cycle during which both a Gubernatorial and Presidential Election is conducted, is important. Time will not allow the five two-year project positions to go through this normal training cycle. Therefore, existing Government Accountability Board staff who are supported with Federal funds, and who have a demonstrated body of election administration program knowledge and experience, will be utilized as Lead Workers.

These Lead Workers will commence planning and preparation for the implementation of the Photo ID Law while the five two-year Photo ID project staff are being recruited and hired. These Lead Workers will also participate in the hiring, orientation, training, coaching and guiding the new Photo ID project staff. In addition, these Lead Workers will assist in monitoring, overseeing and evaluating the Voter ID project staff's work.

Based on the Government Accountability Board's experience and the need to obtain position numbers from the State Budget Office and work with the Department of Administration, Bureau of Human Resources, to recruit and hire the five two-year Photo ID project staff, it is anticipated that the recruitment, selection and initial training process will take about three months. The savings from personnel budget line item will be used to prorate the salary of Board staff who will be designated as Lead Workers for their respective time spent on planning and preparation for the implementation of the Photo ID Law while the five two-year Photo ID project staff are being recruited, hired and trained.

B. Staff Travel
(\$30,000)

To illustrate the environment in which the Photo ID project staff members have to operate, there are 114,141 miles of roads in Wisconsin. It takes about 7 hours to drive from the most southern part of the state to its northern peak, and about 5 hours to go from across the state from the far west border to the far east border. Wisconsin's population is sparsely scattered over 56,145 square miles.

Action Plan:

Based on the Government Accountability Board's experience in executing its regular and everyday election administration program activities, staff travel for implementing the new Photo ID Law will include numerous in-person interactions with the public and targeted groups, which will require a heavy travel schedule. Before, during and after elections, elections specialists' "in-the-field" travel to service local election partners and customers often increases to comprise 80% of their work hours. The State's Central Fleet vehicles are used for this purpose. Staff always stay at lodging facilities that honor the State lodging rate.

Based on the Government Accountability Board's experience in conducting regular training throughout the State, and given that Photo ID is a major new public policy that fundamentally changes the way Wisconsin's electorate has been voting for decades, we believe the information about the new law will need to be repeated in a variety of ways, including in-person group and classroom style meetings. These factors contribute to the allocation of \$30,000 for travel. In addition to the costs for the State's Central Fleet vehicles and lodging, this allocation also includes reimbursement for meals and related expenses incurred in accordance with established State Travel Guidelines.

Example:

➤ Total personal expenses: \$65 x 3 staff =	\$195.00
➤ 1 State Fleet Van, 2 days =	\$80.00
➤ Hotel, 2 nights for 3 people =	\$420.00
➤ \$695/trip x 43 trips =	\$30,00.00

C. Equipment
(\$10,000)

For purposes of this Plan, equipment is defined as computers for the five two-year project Photo ID employees.

Action Plan:

Procure five computers for the five two-year project Photo ID employees at \$2,000 each.

D. Administrative Expenses
(\$59,410)

Administrative expenses to help support the five two-year project Photo ID positions include: Telephone service, email accounts, office supplies, printing and postage.

Action Plan:

The allocation of \$59,410 for supplies and services will be tracked and monitored along with all other expenditures associated with this Photo ID Budget.

3. Statewide Voter Registration System (SVRS)
Modifications for Implementing Photo ID
(\$515,199)

Action Plan:

The SVRS will be modified in order to track whether an absentee voter has previously submitted photo ID and is therefore, not required to do so with subsequent absentee ballot

submissions. The SVRS will also need to be modified to manage the new provisional ballot scenarios, and training for clerks that use the SVRS will be imperative.

The SVRS will be modified so that the voter list and absentee ballot log print-outs used on Election Day indicate whether the voter has to show a statutory ID (to allow for the exemptions in the Act). This checkbox will be pre-populated based on the voter record so that election inspectors know if any exceptions to the legislatively-authorized ID requirement apply to the individual voter.

The SVRS will be updated to reflect the new Photo ID requirements. The SVRS field currently labeled “ID Required” field must be changed to “Proof of Residence Required” on the voter list, voter application node, and the voter record. A statutory ID field must also be added to the voter record and voter application node so it can be displayed on the voter list.

A number of reports and forms generated by SVRS must be updated. “ID Required” and “Proof of Residence Required” must be displayed on the absentee ballot label, absentee ballot log, absentee ballot log with districts, and absentee certificate envelope which are generated by SVRS. The existing uniform absentee instructions in SVRS will be updated to reflect the new procedures. The Voter Public Access feature on the Board’s website will be modified to display the “Proof of Residence Required” and “Statutory ID required” fields.

Due to the fact that only mail-in absentee ballots exempt the voter from presenting acceptable photo ID at future elections, SVRS will be enhanced to designate the absentee ballot transmission method on all absentee labels, the voter list, and the absentee ballot log. The new types of care facilities eligible to be covered by special voting deputies will also be shown. A new absentee witness name/address verification will be created to cover the different acceptable witness statements available for confined electors, voters in facilities covered by special voting deputies, and voters in facilities not covered by special voting deputies. SVRS will also be modified to remove the corroborating witness as an option in the voter application and voter record.

In order for these highly technical changes and modification to the Statewide Voter Registration System (SVRS) to be effectuated in time for the 2012 Election Cycle, a dedicated team of advanced-skilled IT specialists will be needed. SVRS User Acceptance Testing also will need to be completed.

Modifications will be made to the SVRS’ Voter Public Access (VPA) component in order to allow military and permanent overseas voters to submit requests for absentee ballots online, without the need to present a photo ID, as they are exempted from this requirement under Act 23. This will require modification of SVRS to accept application from the VPA site. This functionality will greatly assist military and overseas voters to receive, mark, return and track their ballot as required by the Federal Military and Overseas Voter Empowerment (MOVE) Act. Significant training of clerks on this additional absentee application process will be required.

It is estimated that about 5,380 hours at a blended rate of \$90 would be required for making the SVRS modifications, and about 755 hours at a blended rate of \$40 would be required for the testing.

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KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For the August 2, 2011, 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 providing information to the Joint Committee on Finance and the Legislative Fiscal Bureau with regard to our four, 13.10 requests, preparing for the second quarter Contract Sunshine certification, preparing for the close-out of FY-11 and preparations for the new fiscal year, creating a budget for the Voter Photo ID implementation, developing the budget section of the Federal Voter Assistance Program (FVAP) grant application, recruiting staff, communicating with agency customers, and developing legislative and media presentations.

Noteworthy Activities

1. Legislative Joint Committee on Finance (JCF) 13.10 Funding Requests

On March 10, 2011, staff submitted four separate Section 13.10 requests to the Legislative Joint Committee on Finance for inclusion at its next 13.10 meeting.

1. That the Joint Committee on Finance place our \$16,515 request for increased expenditure authority on the agenda. We are requesting **\$94,720** for FY-11 in our program revenue appropriation [s.20.511(1)(im)] supplies and services line to enable the agency to complete its current information technology (IT) project to upgrade our lobbying database and website.
2. That the Joint Committee on Finance transfer **\$40,800** from the Committee's supplemental appropriation [s.20.865(4)(a)] to the agency's GPR general operations appropriation to enable the agency to acquire the necessary resources to review, analyze, and determine the sufficiency of up to 16 legislative recall petitions that may be offered for filing between April 25, 2011, and May 31, 2011.
3. Pursuant to §13.101(4), Wis. Stats., the Government Accountability Board requests the Joint Committee on Finance release **\$7,000** to the agency's GPR Election-related cost reimbursement appropriation [§20.511 (1)(b)] to reimburse municipalities for extended

polling hours for the April 5, 2011, and May 3, 2011 elections. We have a shortfall in this appropriation due to across-the-board budget reductions this biennium.

4. That the Joint Committee on Finance transfer GPR expenditure authority totaling **\$67,637** for FY 2010-11 from the agency's GPR general operations [§20.511 (1)(a)] to the GPR election administration transfer account [§20.511 (1)(d)] and then to the SEG election administration fund [§20.511 (1)(t)] in order to qualify for HAVA Section 251 payments, which has a 5% state match requirement. This will enable G.A.B. to secure an additional \$1,285,090 in 2010 federal HAVA requirements payments.

On July 19, 2011, the JCF held their first quarterly meeting to address our 13.10 requests. However, as it was the end of the fiscal year, our needs changed significantly. The Financial staff was able to provide known fund balances, as opposed to the projected balances we first submitted in March.

Ultimately, the committee approved all four of our requests as follows:

1. To provide \$8,700 PR in 2010-11 to the Board's lobbying administration PR appropriation to permit the Board to upgrade its lobbying database and website. (This amount was based on actual need and our revised request).
2. To transfer \$40,800 from the Committee's 2010-11 supplemental appropriation to offset the costs of the recall expenses. (This amount was based on our original request, not the actual costs of the recall efforts, which were \$88,300).
3. To transfer \$5,400 on a one-time basis from the Committee's 2010-11 supplemental appropriation to reimburse municipalities for additional costs incurred to adjust polling hours to begin at 7:00 a.m., at any election held after April 29, 2006. (This amount was based on actual need and our revised request).
4. To transfer GPR expenditure authority totaling \$67,700 GPR for FY-2010-11 from the agency's GPR general operations to the SEG election administration fund in order to qualify for HAVA Section 251 payments, which requires a 5% state match. (This amount was approved based on our original request).

2. Contract Sunshine Program Update

The Government Accountability Board sent out its second quarterly certification for the year on July 1. This certification covered the period beginning April 1, 2011, and ending June 30, 2011. As has been the case with most recent certifications, agency response thus far has been outstanding and compliance remains very high. There are currently only two agencies that have failed to return their certification for this period: the Department of Transportation and the Department of Health Services. These agencies have been contacted multiple times regarding the certification progress by G.A.B. staff. These agencies will be listed on the Contract Sunshine website until such time as we receive their certification. It is our plan to pilot a single-agency audit of Contract Sunshine data in August or September to determine the methodology and resource commitment auditing will take. G.A.B. staff will seek the assistance of Legislative Audit Bureau staff to design audit procedures.

Contract Sunshine continues to receive enhancements to improve usability. G.A.B. staff is working with our vendor to review workflow processes within Contract Sunshine. Workflows that are found to be inefficient or confusing will be streamlined to improve user experience. Minor cosmetic improvements are also being developed. In terms of major changes in functionality, the ability of

agency contacts to make edits to their own agency data has been developed and is currently undergoing testing. This development, which should be available in August, gives agencies greater flexibility and control over the editing of their data for corrections, which formerly required G.A.B. intervention. The process developed by G.A.B. staff includes a step that requires G.A.B. staff to review all edits, which ensures a layer of accountability even as we decentralize this process. This process should remove some pressure in terms of demands upon G.A.B. staff and will also result in quicker turn-around time for edits for users.

3. Procurements

Financial services staff have been quite busy throughout June and July closing-out the previous fiscal year FY-11 (July 1, 2010 – June 30, 2011) accounts and opening the new fiscal year FY-12 (July 1, 2011 – June 30, 2012) accounts. Thirty-seven purchase orders were created last year, of which 34 were closed and three were carried over into this current fiscal year.

For the current fiscal year, thus far, we have created 10 new purchase orders, valued at \$560,921. Combined with the 3 carried-over purchase orders, the total value of purchase orders written for this fiscal year totals \$597,038.

These purchase orders have involved several procurement efforts, which include: hiring a 3-person team for comprehensive IT services (\$443,134); hiring temporary services staff to help with polling place accessibility surveys (\$4,864); hiring temporary services staff to go out onto the road to conduct polling place accessibility surveys (\$4,006); renewing the Contract Sunshine website programmer contract (\$11,300); renewing the lobbying database developer contract (\$89,984); renewing the photocopier maintenance agreements (\$6,445); renewing the Contract Sunshine web hosting services (\$1,188); and, carrying over FY-11 purchase orders for the Eye on Financial Relationships application programmer (\$9,975), Badger State Industries for systems furniture (\$16,545) and the Department of Administration for SWEBIS 1 maintenance (\$9,597).

4. Fiscal Year 11 Close-Out Activities and FY-12 Operating Budget Preparations

The financial services section has been extremely busy the last six weeks preparing numerous financial transactions in preparation for the end of FY-11 and setting up our FY-12 operating budget:

- Auditing and updating all interest earnings allocation calculations to properly account for and allocate \$5,209,999 in interest income to each federal program.
- Calculated and booked true-ups of our payroll expenditures for the last 4-quarters ensuring compliance with federal costing standards, especially employee time diverted to recall efforts.
- Calculated the FY-12 operating budgets.
- Validated fund classifications for the new GASB Statement No. 4 – Fund Balance Reporting and Government Fund Type Definitions to properly report our agency funds on the Comprehensive Annual Fiscal Report (CAFR) balance sheet depending upon state commitments, constraints and intentions. The CAFR is prepared in accordance with Generally Accepted Accounting Principles (GAAP).

- Verified all Section 261 (Accessibility) grants payments in WiSMART to ensure accurate expenditure targets for the federal fiscal year grant ending 9/30/2011.
- Assisted with developing the Voter Photo ID budget calculations and prepared the operating budget of \$1.9M.
- Audited monthly General Service billings for proper allocations to federal and state programs.
- Set up accounts for FY-12 and developed new accounting codes to track recall and Voter Photo ID expenses.

Staff continues to work on the FY-11 close-out process and will conclude this work in mid-August.

5. Other Financial Services Section Activity

- Calculated budget amounts being proposed for the Federal Voting Assistance Program (FVAP) grant application (the Electronic Absentee Systems for Elections (EASE). Our agency is requesting a two-year grant for \$1,919,864.
- Reviewed and approved numerous travel vouchers and invoice payments to ensure timely processing of fiscal year-end payables.
- Assisted in recall petitions and challenges work.
- Paid over 150 invoices (including 60 polling place reimbursements in 2-days).
- Made several deposits which consisted of \$322 for sales of copies, \$32,085 for sales of voter lists, and \$8,900 in campaign finance filing fees.
- Made travel arrangements for 10 staff and 10 temporary services staff to conduct polling place accessibility surveys across Wisconsin.
- Made travel arrangements for 4 agency staff to attend the Heartland conference and 3 agency staff to attend the NASED conference.

6. Staffing

Currently, we are recruiting for an Office Operations Associate position to support the HAVA program staff. On March 25 we hired an employee, but he resigned from his position on May 27.

Additionally, in our 2011-13 biennial budget, five new two-year project FTE (1-Elections Specialist, 2-Training Officers, 1-Help Desk support, 1-Office Associate) were approved for Voter Photo ID implementation. Recruitment efforts will begin once we receive position numbers and the position descriptions are approved. We also will begin recruitment efforts for nine additional staff vacancies.

On June 5, 2011, Ross Hein began his new appointment as an Elections Supervisor.

7. Communications Report

Since the May 17, 2011, Board meeting, the Public Information Officer has engaged in the following communications activities in furtherance of the Board's mission:

- The PIO continued to respond to an unusually high number of media and public inquiries on a variety of subjects, including the recall petition review process and the elections ordered by the Board, the aftermath of the Supreme Court recount, and the implementation of the new Voter Photo ID law. The PIO set up interviews with print and electronic journalists for Mr. Kennedy and also gave interviews when he was not available.
- In addition to media and public inquiries about Voter Photo ID law, the PIO worked with other Board staff to develop a report for the Joint Committee on Finance, which was submitted to the committee on July 1 for 14-day passive review. While the report covered the Board's overall budget and plans for all aspects of implementation of Act 23, it focused on the public information, public outreach and training aspects of the law. On July 15, the Joint Committee on Finance informed the Board that the plan had been approved. The next step is selecting an advertising/public relations agency from existing state contracts to assist the Board staff with the development and placement of a multi-media advertising campaign to educate the public about the need for a photo ID to vote beginning in February 2012. The agency will also assist the staff in development of materials for the public outreach campaign to groups which are likely to need assistance in obtaining a photo ID.
- The PIO created a new photo ID portal page on the website (<http://gab.wi.gov/elections-voting/photo-id>) with information relevant to voters and local election officials about Act 23. The previous portal page, with background about legislative proposals for the new voter photo ID law, is still available on the website.
- The PIO has been responding to a number of public records requests related to the Supreme Court recount.
- In the midst of the Board's many activities during June for the recall petitions and recall candidate challenges, the PIO coordinated preparations for a larger than usual number of presentations by Board staff to groups of international visitors:
 1. June 6 – visitors from Burkina Faso, Cameroon, Chad, Guinea, Guinea-Bissau, Kenya, Madagascar, Mali, Mauritius, Niger, Nigeria, Senegal, Uganda, Zambia, and Zimbabwe, hosted by International Institute of Wisconsin.
 2. June 20 – visitors from Algeria, Egypt, Mauritania, Morocco, Palestinian Territories, Saudi Arabia, Tunisia, and United Arab Emirates, hosted by International Institute of Wisconsin.
 3. June 21 – visitors from the country of Georgia, hosted by the International Institute of Wisconsin.
 4. June 30 – government officials from Kenya, hosted by Center for International Development, State University of New York.

The first three groups were all very interested in learning about the Board's role in the historic political events that occurred during the first half of 2011, including recall elections, the Supreme Court recount, and ethics investigations. The Kenyan delegation, which included members of the parliament who wished to learn about Wisconsin's recall laws because recall is a part of their new constitution. Operations Program Assistant Tiffany

Schwoerer provides invaluable assistance in putting together packets of materials for our guests and providing refreshments.

- The PIO has also worked on a variety of other projects including responding to concerns from Legislators on a variety of topics and communicating with our clerk partners.

8. Meetings and Presentations

During the time since the last Board meeting, Director Kennedy has been participating in a series of meetings and working with agency staff on several projects. The primary focus of the staff meetings has been to address legislative and budget implementation issues, including several internal and external meetings on Voter Photo ID implementation. The Director, staff counsel Mike Haas and recount project leader Ross Hein had several discussions with the Waukesha County Corporation Counsel, Judge Mawdsley and Barbara Hansen related to the statewide recount.

Considerable time has been spent meeting with attorneys from the Department of Justice on the large number of lawsuits to which the agency is a party, as well as the related court hearings. The agency's decisions have been upheld in all 10 cases emanating from the initial set of recall initiatives.

The Director has had several meetings and discussions with legislators and legislative staff members on election reform proposals. This has also included discussion with the Legislative Council staff, Legislative Reference Bureau drafting attorneys and analysts with the Legislative Fiscal Bureau.

One key meeting was with the Department of Administration Secretary Huebsch to discuss agency staffing issues. As a result of the meeting, federal funded Elections Division staff received an additional one-year extension. We are still working to finalize authorization for the final four years of federally-funded staffing.

The Director, along with the Division Administrators and other key staff, participated in several meetings with delegations of public officials, journalists and citizens from other countries. These meetings are described in the preceding section prepared by the agency public information officer.

The media has continued to make a number of inquiries on recall, recount, and legislative initiatives, particularly Voter Photo ID and redistricting, as well as the rules and costs associated with recall and the statewide recount. This has led to extended interviews with print journalists and a number of television and radio appearances. These included a May 27, 2011, appearance on Wisconsin Public Television related to photo identification background and implementation, a June 22, 2011 Wisconsin Eye show related to background and implementation of the new Voter Photo ID law (<http://www.wiseye.com/Programming/VideoArchive/EventDetail.aspx?evhdid=4418>) and two Wisconsin Public Radio call-in shows on June 9, 2011, and July 7, 2011.

On June 2, 2011, the Assembly and Senate elections committees held a joint public hearing on changing the date of the presidential preference primary from the third Tuesday in February to the first Tuesday in April. This initiative is based on changes in the national political party rules for the presidential nominating process. The staff has worked closely with the two state political parties, the legislative committees and the legislative drafter on this issue.

The staff has also been actively involved in the development of the legislation to move the September partisan primary. The legislative proposals will change the date of the partisan primary

from the second Tuesday in September to the second Tuesday in August. This is the same date as Minnesota and Michigan. There is more information on both these proposals in the legislative status report.

Judge Vocke participated in an orientation session with agency staff on June 22, 2011. This has been a recurring staff initiative for new Board members, which provides background information on the scope of the Board's jurisdiction, agency operations and key issues pending before the Board.

On May 12, 2011, the Joint Committee on Finance held an executive session on the agency budget. The Committee took executive action on July 19, 2011 with respect to the agency's emergency funding requests submitted in March of this year. They are more fully described in the administration section of this report.

On June 28, 2011, a team of staff including the Director, Elections Division Administrator Nat Robinson, Ross Hein, Sarah Whitt, and Katie Mueller traveled to Ladysmith to meet with county clerks. The team then proceeded to Birchwood to meet with Districts 1 and 2 of the Wisconsin Municipal Clerks Association. The presentations focused on Voter Photo ID implementation, on-line voter registration, and recall election administration, with an emphasis on new changes effective for 2011.

On June 29, 2011, the Director and Sarah Whitt participated in a teleconference meeting sponsored by the Pew Charitable Trusts Center on the States on voter registration modernization. This project has been ongoing since 2009. The goal is to establish a voter registration data sharing mechanism that will improve state voter registration data quality and facilitate voter registration by eligible citizens.

The Director attended a meeting in Chicago on July 20 and 21, 2011, of the Pew Charitable Trusts Center on the States Performance Index for Election Administration Working Group. The working group is focused on developing objective measures to evaluate the administration of elections. The working group consists of state and local election administrators and an equal number of academic researchers.

Ross Hein, Nat Robinson and Director Kennedy attended the summer meeting of the National Association of State Election Directors (NASSED) in Chicago on July 21 through July 23, 2011. Director Kennedy, along with Indiana Co-Director of Elections Brad King, presented a summary of election and campaign finance related legislation for the organization.

Looking Ahead

The staff will continue to complete its review of the issues identified from the statewide recount of the April 5, 2011, spring election for Supreme Court Justice. The staff will also be engaged in implementing several provisions of the photo identification legislation including provisions effective for the August recall and other 2011 elections. Staff will also turn its attention to a number of matters that have been postponed due to the recall and recount issues including proposed legislative changes.

Action Items

None identified by staff.

The Board's next meeting is scheduled for Monday September 12, 2011, beginning at 9:30 a.m.