

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).

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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
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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

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

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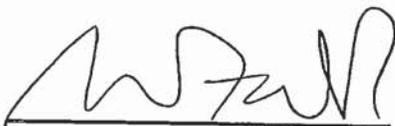
respect to contributions or in-kind contributions received, this proposed rule requires organizations to disclose only donations "made for" political purposes, but not donations received for other purposes.

The Government Accountability Board recommends promulgation of this rule.

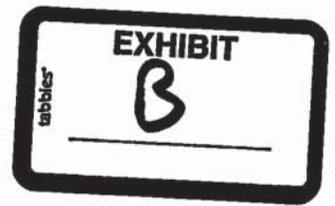
Respectfully submitted,

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

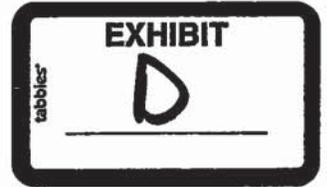
this plain reading of the statutes, the Government Accountability Board has issued an emergency rule to “ensure the proper administration of the campaign finance statutes and properly address the application of *Citizens United v. FEC.*” *Id.* at ¶32. The Attorney General noted that the rule interprets §§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.

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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).